Five Year Statutory Review of the *Thoroughbred Racing Act 1996*

and

Three Year Statutory Review of the *Australian Jockey and Sydney Turf Clubs Merger Act 2010*

[Incorporating a Report on the Powers of Racing NSW over Unlicensed Persons]

8 April, 2014

The Hon George Souris MP
Minister for Tourism, Major Event, Hospitality and Racing
Minister for the Arts and Minister for the Hunter
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Minister Souris

In accordance with your request, I submit the attached report on the Five-year Statutory Review of the Thoroughbred Racing Act, 1996 and the Australian Jockey and Sydney Turf Clubs Merger Act, 2010 for your consideration.

I would like to thank the community, racing industry associations, racing clubs, The Greens and Racing New South Wales for taking the time to submit their views to the Review. These views have been taken into consideration in making recommendations as to how the legislation might be amended to reflect better outcomes for the racing industry and the community.

I would also like to thank the NSW Office of Liquor, Gaming and Racing for its assistance.

Yours sincerely

Michael Foggo

Michael Foggo

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1 Executive Summary

The 2008 amendments to the *Thoroughbred Racing Act 1996* contained a statutory five year review provision to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives[1].

A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years - that is by 1 July 2014.

Similar provisions are contained in the *Australian Jockey and Sydney Turf Club Merger Act 2010.* However, that review is subject to a three year deadline and the review is to be tabled by 16 November 2014[2].

As such, the Hon George Souris MP, Minister for Tourism, Major Events, Hospitality and Racing, Minster for the Arts, and Minister for the Hunter requested both Acts be reviewed concurrently.

Accordingly, this report is provided to the Minister to enable the statutory requirement under each Act to be fulfilled.

The review was assisted by submissions from industry associations, race clubs, the controlling body and the community.

Legislation surrounding the regulating and control of thoroughbred racing has been the subject of a number of reviews and changes since the nineteen forties.

In summary, these changes include:

- The prohibition of proprietary racing in 1943 and the requirement that racing clubs must be non-proprietary bodies with the purpose of promoting the sport of racing:
- The 1963 Kinsella Royal Commission which recommended the formation of the TAB as the funding model for the racing industry and strengthening the prohibitions on illegal SP betting;
- The establishment of the NSW TAB in 1964 as a Government Authority;
- The privatisation of the NSW TAB in 1998;
- The 1995 Ian Temby QC review which found that there was a perceived conflict of interest in the Australian Jockey Club exercising the dual role of controlling body and a race club;
- The Temby Review resulted in the current arrangements by which Racing NSW is the controlling body for thoroughbred racing in NSW.
- The 2006 introduction of race fields legislation to broaden the revenue base of the NSW racing industry and to ensure that all wagering operators pay a fee for the use of race fields as a wagering platform. The constitutional challenge to the legislation by wagering operators failed with the High Court ultimately deciding in 2012 in favour of the racing industry and the State;
- Also in 2006 Mr Ken Brown AM undertook an independent review of the Act and in 2008 Mr Malcolm Scott, Barrister-at-law undertook an independent review of the regulatory oversight of the New South Wales racing industry as a whole.

[1] Section 53 of the *Thoroughbred Racing Act 1996*
[2] Section 49 of the *Australian Jockey and Sydney Turf Clubs Merger Act 2010*

The *Thoroughbred Racing Act* has been amended 27 times since its assent in June 1996. Some of these amendments have been consequential, but others have seen significant changes - for example the introduction of an independent board to the controlling body, *Racing New South Wales*, and many integrity and probity enhancements designed to increase the public trust and confidence in the conduct of thoroughbred racing.

An important thread running through the legislative framework is that Racing NSW is independent of Government[3] in the day to day control and regulation of the strategic and integrity management of the NSW thoroughbred racing industry.

The Minister and the Government are nevertheless important stakeholders in that they strive to ensure that the legislative framework is contemporary, and meets best practice and community expectations.

The racing environment is subject to continuous changes which include globalisation and technology in the competition for entertainment and wagering revenues, the need to keep up to date with drug testing for new drugs and the simple axiom that where there is ready cash it is necessary to guard against the infiltration of criminal elements and the manipulation of race outcomes.

Nevertheless, it is somewhat unexpected that in the context of these significant changes, that only 13 submissions were received by the Review. This may mean that many of those changes have been accepted by the racing industry, or that there has been a "review overload". Given the matters raised by the submissions, the Review believes that the former is the case.

The Review believes that its recommendations, if adopted, will further assist the industry in resolving the many challenges that face the thoroughbred racing industry.

[3] Section 5 of the *Thoroughbred Racing Act 1996*

2 Summary of Recommendations

2.1 The Thoroughbred Racing Act 1996

Recommendation 1

The Review recommends that formal objects be inserted into the Act at the next available opportunity to assist with clarifying the statutory role of Racing NSW. The objects may be drawn from sections 11, 13 and 14 of the Act with emphasis on the following provisions:

- *Duty to act in the public and industry interest.*
- *Control, supervise and regulate thoroughbred racing in NSW.*
- *Initiate, develop and implement policies conducive to the promotion, strategic development and welfare – and the protection of the public interest – as it relates to thoroughbred horse racing in NSW.*

The Review also recommends that a drafting omission be corrected in that the word 'representative' be deleted from the long title of the Act.

(Chapter 5.3)

Recommendation 2

The Review supports the continuation of the current provisions for the appointment of members of Racing NSW. However, consideration should be given in the future to aligning the appointment processes of Racing NSW, HRNSW and GRNSW.

The Review notes that the provisions in the Act that deal with conflicts of interest at the time of appointment (and arising after appointment) of members of Racing NSW were strengthened in 2011. The Review recommends that it would, as a matter of principle of good governance, be appropriate for similar strengthening of the conflict of interest provisions in relation to the Acts that establish Greyhound Racing NSW and Harness Racing NSW.

(Chapter 5.4)

Recommendation 3

The Review recommends no changes be made to the current structure to incorporate a further independent oversight of the thoroughbred racing industry.

(Chapter 5.5.1)

Recommendation 4

The Review recommends that the functions and powers of Racing NSW be reviewed to make certain that they are explicit and cover the necessary areas to ensure that Racing NSW can undertake its broader responsibilities (note: Recommendations 5, 6, 7 and 8 that follow). That review should be undertaken in consultation with all industry representatives, including Racing NSW, race clubs, and industry associations.

(Chapter 5.5.1)

Recommendation 5

The Review supports the recommendations in the advice of Mr Armati in regard to the provision of powers to Racing NSW to take appropriate action against unlicensed persons.

(Chapter 5.5.1)

Recommendation 6

The Review notes that the recommendation from the 2006 Brown Review to distinguish between 'industry' assets and 'club' assets has not been undertaken.

The Review recommends that the task be undertaken as a matter of priority and preferably by an independent person with knowledge of the operation of the racing industry. Such a formal consultative review with industry stakeholders would assist with clarifying the role of Racing NSW to meet its statutory responsibility to initiate, develop and implement strategic policies consistent with Recommendation 4 above.

(Chapter 5.5.2)

Recommendation 7

The Review recommends that the provisions of the Thoroughbred Racing Act be reviewed to overcome the current deficiencies in the appointment of an administrator over a race club and clarify the powers of Racing NSW and the administrator.

(Chapter 5.5.2)

Recommendation 8

The powers of Racing NSW in relation to placing conditions on a race club's registration; imposing directions and penalties for failure to comply; and the costs of complying with minimum standards should be reviewed as part of a general review of the powers and functions of Racing NSW to ensure greater clarity.

The general review should also take account of the recent Supreme Court decision in the matter of Dr Ross Gregory Pedrana v Racing NSW (2014) to assess if there any implications which require legislative action.

(Chapter 5.5.2)

Recommendation 9

The Review notes that section 14B (Consultation and Planning) was a recent amendment to the Act to facilitate formal consultation between Racing NSW and stakeholders. The Review notes that submission makers continue to express concerns in this area.

The Review does not recommend that the Act be amended again but that Racing NSW review its consultation policies, particularly in relation to the development of the industry strategic plan to ensure that appropriate consultation is made with all stakeholders within the thoroughbred racing industry.

(Chapter 5.5.3)

Recommendation 10

The Review recommends that consideration be given to the NSW Bookmakers Co-operative Limited being appointed an eligible industry body for the purposes of the Racing Industry Consultation Group.

(Chapter 5.5.3)

Recommendation 11

The Review recommends that matters concerning the distribution of funds through private industry agreements (ie the Racing Distribution Agreement and the Inter-code Agreement) should not be overridden by legislation but remain issues for the racing industry to resolve in accordance with the terms of those agreements.

Further, the Review notes the race fields scheme is established under the Racing Administration Act 1998 and that it is outside the scope of this Review.

(Chapter 5.5.4)

Recommendation 12

The Review notes that the NSW Parliament has enacted the Prevention of Cruelty to Animals Act 1979 as the statute that covers the field for the prevention of cruelty to all types of animals.

The 1979 Act is the responsibility of another Minister and subject to its own statutory review processes and the issues are therefore not within the scope of this Review.

(Chapter 5.6)

Recommendation 13

Similarly, the Review does not support legislation requiring the collection and collation of data or the imposition of fees on the industry to support a thoroughbred rehabilitation scheme.

(Chapter 5.6)

Recommendation 14

The Review does not recommend, at this time, the easing of the 'eligible company' provisions in the Act for the following reasons:

- *The statutory scheme for the licensing and regulation of bookmakers is spread over several Acts - the three racing controlling body Acts, the Unlawful Gambling Act 1998 (in particular section 11 which prohibits secret financial interests and section 11A prohibiting remote access to betting) and Parts 3 and 3A of the Racing Administration Act 1998 which regulate the scope of betting activities by licensed bookmakers.*

- *The Review considers that the statutory framework is largely outside the terms of reference of the review of the Act and that it would be prudent to defer to a review of the whole scheme to avoid unintended consequences.*

- *A change to this policy is a matter for Government that should follow an appropriate consideration involving expert advice from the Office of Liquor Gaming and Racing, the Attorney General's Department (noting that the*

Unlawful Gambling Act 1998 is the principal criminal statute in relation to gambling matters), the racing controlling bodies and that group should consult with interested parties.

Separately, in relation to the proposal for the consolidation of the licensing of bookmakers under the auspices of Racing NSW, the Review notes that the sharing of licensing arrangements may be achieved by way of section 18(4) of the Thoroughbred Racing Act 1996 (and corresponding provisions of the Greyhound Racing Act 2009 and Harness Racing Act 2009).

Section 18(4) currently provides that the three NSW racing controlling bodies may enter into arrangements to share the administration of licensing and registration functions. The consent of the Minister is a pre-requisite to such an arrangement.

The Review recommends that the three NSW racing controlling bodies consider the consolidation of bookmaker licensing under the relevant corresponding sections in their respective Acts and inform the Minister of any proposal, or otherwise.

(Chapter 5.7)

2.2 The Australian Jockey and Sydney Turf Clubs Merger Act 2010

Recommendation 15

The Review does not recommend any changes to the objects of the Merger Act.

(Chapter 6.3.1)

Recommendation 16

The Review recommends that there be no change to the numbers of elected and independent directors to the Australian Turf Club Board, nor the current selection panel or its process.

(Chapter 6.3.2)

Recommendation 17

The Review notes that for the foundation Board it was a necessity to have a full complement of directors given the workload and merger change management needs ahead. The Review also notes that the Merger Act provides, after the four year term of the foundation Board, for the terms of Independent Directors to be staggered at the discretion of the selection panel to do so as necessary.

The Review recommends that the ATC obtain legal advice in relation to the amendment of its constitution for this purpose having regard to the Corporations Law and section 9 of the Act.

The review notes that it may be possible to give effect to staggered terms without amending the Act.

(Chapter 6.3.2)

Recommendation 18

The Review recommends that the Government response to the possible amendment of Section 23 of the Merger Act be deferred until such time as the ATC and Racing NSW engage in a formal consultation with industry stakeholders and that there is a consensus view to lifting the restriction based on detailed consideration of ensuring that Sydney racecourse infrastructure and its utilisation are maximising wagering turnover for the present and the future in accordance with strategic development and public interest goals.

(Chapter 6.3.3)

3 Glossary of Terms and Acronyms

AJC	Australian Jockey Club
Appeal Panel	A body of suitably qualified persons appointed by Racing NSW under Part 4 of the *Thoroughbred Racing Act* to hear appeals against certain decisions of the stewards of Racing NSW, the stewards of a committee of a registered race club or a racing association
ARBL	Australian Racing Board Limited
ARR	Australian Rules of Racing
ATC	Australian Turf Club
Controlling body	A body responsible for the control and regulation of a code of racing, ie Racing NSW, Harness Racing NSW and Greyhound Racing NSW
GRICG	Greyhound Racing Industry Consultation Group
GRNSW	Greyhound Racing NSW
HRICG	Harness Racing Industry Consultation Group
HRNSW	Harness Racing NSW
Integrity Assurance Committee	A committee established by Racing NSW under section 23 of the Act to have primary oversight of those aspects of the functions of Racing NSW that relate to race stewards, drug testing and control, licensing, handicapping and horse racing appeals.
IntraCode Agreement	The commercial agreement between Racing NSW, the ATC, the Provincial Racing Association of NSW and Racing NSW Country which provides for the obligations of race clubs and for the distribution of monies to race clubs
OLGR	Office of Liquor, Gaming and Racing
PRA	Principal Racing Authority, ie a principal club or controlling body
Racing Appeals Tribunal	Independent appeals tribunal appointed by the Minister for Racing on the recommendation of the Attorney General to hear appeals against certain decisions of racing authorities
Racing Distribution Agreement	The commercial Agreement between the TAB and the racing industry for the provision of racing and the distribution of revenue
Race Fields Scheme	Provisions under the Racing Administration Act 1998 which prohibit wagering operators from publishing NSW race field information without prior approval from the respective controlling body and allowed the controlling bodies to impose a fee for the use of that race field information.
RICG	Racing Industry Consultation Group
STC	Sydney Turf Club
TAB Limited	A wholly owned subsidiary of Tabcorp Holdings Pty Limited which holds a 99 year licence to conduct totalizator and other wagering activities in NSW

4 The Review Process

Section 53 of the *Thoroughbred Racing Act* provides that the legislation is to be reviewed 5 years after the assent to the 2008 amendments (the *Thoroughbred Racing Further Amendment Act 2008*) to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

Section 53 Review of Act

> *(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.*
>
> *(2) A review under this section is to be undertaken as soon as possible after the period of 5 years from the date of assent to the Thoroughbred Racing Amendment Act 2008.*
>
> *(3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.*

A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of five years from the date of assent (ie 1 July 2014).

An identically worded review provision (but with a three year deadline) is contained in section 49 of the *Australian Jockey and Sydney Turf Clubs Merger Act 2010 (the Merger Act)*. However the report of the review of this Act is to be tabled in each House of Parliament within 12 months after the end of the period of three years from the date of assent (ie 16 November 2014).

On the basis that both Acts relate to the conduct of thoroughbred racing in New South Wales, the Minister approved of the two statutory reviews being undertaken concurrently. Mr Michael Foggo accepted the Minister's invitation to undertake the reviews.

Advertisements were placed in the Daily Telegraph and Sydney Morning Herald newspapers of Saturday 2 November 2013 inviting submissions to the statutory reviews during the period 18 November 2013 to 13 December 2013 from any interested person or organisation. A similar advertisement was published in the Government Gazette of 25 October 2013.

Consultation

On 29 October 2013 the Office of Liquor, Gaming and Racing (OLGR) wrote to the following key stakeholders inviting submissions to the statutory reviews:

- Racing NSW
- Australian Turf Club
- Provincial Racing Association of NSW
- Racing NSW Country
- Thoroughbred Breeders NSW
- NSW Racehorse Owners Association
- NSW Trainers' Association
- Australian Jockeys Association (NSW Branch)
- NSW Bookmakers Co-operative Limited

In its correspondence to Racing NSW, the OLGR sought that all race clubs be advised of the reviews and that the advertisement inviting submissions be published on the Racing NSW website. The advertisement was also published on the OLGR website.

Submissions were received from:

1. Racing NSW Country
2. Mr Peter Mair
3. NSW Trainers' Association Ltd
4. Racing Industry Consultation Group (RICG)
5. NSW Racehorse Owners' Association
6. Thoroughbred Breeders NSW
7. NSW Bookmakers' Co-operative Limited

7a. NSW Bookmakers' Co-operative Limited

8. RNSW - re *Thoroughbred Racing Act 1996*
9. RNSW - re *Australian Jockey and Sydney Turf Clubs Merger Act 2010*
10. Confidential
11. Confidential
12. The Greens NSW
13. Australian Turf Club (part confidential)

These submissions were published on the OLGR website unless it was considered appropriate for a submission (or part of a submission) to be treated as confidential.

As well, the Review met with the following stakeholders:

- Australian Turf Club
- NSW Bookmakers' Co-operative Limited
- Racing NSW
- Racing Industry Consultation Group

The Review also had a telephone conversation with Racing NSW Country.

The Review will deal with each Act in turn.

5 Review of the Thoroughbred Racing Act 1996

5.1 Background to the Administration of Racing in NSW

In May 1840 a group of prominent citizens formed the Australian Race Committee to conduct a number of organised race meetings at a site in Homebush.

In January 1841 a permanent not for profit body called the Australian Jockey Club (AJC) was established and regular race meetings were conducted at Homebush until 1859 when the Club moved its activities to a grant of land at Randwick. By that time many race meetings were also regularly conducted in country areas.

In 1851 the AJC declared local Rules of Racing and most groups that conducted race meetings in the Colony adopted those Rules and sought the assistance of the AJC's Committee in settling disputes.

In 1882 the principal race clubs of the Colony - the AJC, the Victorian Race Club and the South Australian Jockey Club agreed to a uniform set of Rules (with minor local variations) which are known as the Australian Rules of Racing.

In 1883 the AJC opened a register of all racing clubs that adopted its Rules. Race meetings organised by other than permanent race clubs could also be registered.

By 1885 there were 201 registered race clubs along with 210 registered race meetings. Horses running at any unregistered race meeting were disqualified from registered race meetings. In 1889 a requirement was introduced for trainers and jockeys to be registered and registered jockeys were prohibited from riding at unregistered race meetings.

Despite these control measures, unregistered pony racing and proprietary racing with betting continued to be conducted at privately owned racetracks.

The incursion of the unregistered race clubs and the spread of both on-course and off-course betting led to the introduction of the *Gaming and Betting Act 1906*. This Act permitted betting on racecourses, introduced new controls aimed at street betting and betting shops, and limited the number of race meetings held in the Sydney metropolitan area.

The Act also established a licensing system for racecourses and a Racing Advisory Board responsible for allocating unregistered race dates, while the AJC remained in control of allocating registered race dates.

In 1932 under threat from the Government of the day all of the former pony clubs sought registration with the AJC and by January 1933 unregistered racing in Sydney ceased, however proprietary racing continued.

There were a number of efforts to abolish proprietary racing but it was not until after the establishment of the Sydney Turf Club (STC) by the *Sydney Turf Club Act 1943* that proprietary racing ceased in November 1945.

In 1995 following the referral of tapes of telephone conversations intercepted by the Australian Federal Police, the NSW Crime Commission commenced an investigation into what the media termed the "Jockey Tapes" scandal.

As a result of the Crime Commission Report, in June 1995 the then Government engaged Ian Temby QC (who had been assisting the Crime Commission in its hearings) to review the rules governing the conduct of thoroughbred racing and the mechanism for ensuring compliance with these rules. In addition, Mr Temby was to report his findings and recommendations for changes considered necessary to:

- prevent unfair competition in the conduct of thoroughbred racing, prevent fraud and corruption in thoroughbred racing and associated betting activities, and
- maintain public trust and confidence in the conduct of thoroughbred racing.

Following the recommendations of the Temby Review, the *AJC Principal Club Act 1996* (later changed to *Thoroughbred Racing Board Act 1996*) was passed which:

(i) created the Thoroughbred Racing Board (which underwent a name change to Racing NSW in 2004), and
(ii) transferred the control and regulation of thoroughbred racing from the AJC to Racing NSW.

Racing NSW was created as a representative body, with members nominated by the AJC, the STC, the Provincial Association of NSW, the NSW Country Racing Council and the new Racing Industry Participants Advisory Committee.

In 2004 the legislation was amended to implement recommendations of the 2001 statutory review of the Act which included:

- strengthening of Racing NSW's registration and licensing functions so that it could expressly take into consideration a person's non-spent criminal convictions,
- improvements to certain procedural and administrative aspects about the manner in which the Racing Industry Participants' Advisory Committee operated,
- providing Racing NSW with a right of appeal to the Appeal Panel and also the Racing Appeals Tribunal against the adequacy of penalties imposed by the Stewards or the Appeal Panel,
- clarification that a hearing before the Appeal Panel or Racing Appeals Tribunal is in the nature of a new hearing; that fresh evidence may be given at the appeal; and that the body hearing the appeal may vary the decision appealed against by substituting any decision that could have been made by the body that made the original decision, and
- providing that a third person may be appointed as the Racing Appeals Tribunal.

In 2006 a further independent review of the Act was conducted by Mr Ken Brown AM who was requested to review the legislation to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

Based upon recommendations of the Brown review the Act was amended in 2008 to:

- provide for an 'independent' Board of Racing NSW,
- clarify the powers of Racing NSW, and
- strengthen industry consultation mechanisms.

The new 'independent' model provided for 'selection on merit' in accordance with 'skills based criteria' by an Appointments Panel consisting of industry representatives. The fundamental issue with the previous 'nominee' structure was the tendency towards the expectation by the nominating body that their nominee would promote the narrower factional interest.

The legislation was further amended in November 2008 to require the five appointed members of Racing NSW to be persons recommended for appointment by a Selection Panel established by the Minister (instead of being appointed on the nomination of the Appointments Panel provided for by the earlier amending Act).

The amending legislation also required that the legislation is to be reviewed 5 years after its commencement to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

One of the recommendations of the Brown review was for the OLGR to coordinate the implementation of an appropriate review into the powers and procedures of controlling bodies in respect of the regulatory oversight of the racing industry across the three codes.

Mr Malcolm Scott, a Barrister at law, was requested by the then Minister for Gaming and Racing to conduct an independent review to examine across the three codes of racing the role and operating environment of racing stewards, and the appeal process and structure in relation to disciplinary decisions made in relation to breaches of the Rules of Racing by licensed persons. The Scott review also proposed a response to the behaviour of unlicensed persons that contributed to a breach of the Rules of Racing and in circumstances where it may constitute criminal behaviour.

While the Scott review recommended no changes to the structure of Racing NSW, it recommended an independent board model for Greyhound Racing NSW and Harness Racing NSW. This later recommendation, supported by a similar recommendation in a 5 year review of the *Greyhound Racing Act 2002* and the *Harness Racing Act 2002*, was implemented by Government in July 2009.

The outcome is that each of the three controlling bodies – Racing NSW, Harness Racing NSW and Greyhound Racing NSW now have independent boards.

Concerns later emerged that the eligibility arrangements for membership of Racing NSW were not suited to ensuring that its members are able to comply with the duty to act in the public interest and in the interests of the horse racing industry as a whole in New South Wales.

There were also concerns that the Racing NSW membership of five was insufficient to manage the workload – in terms of size and range of skills – to undertake the many reforms necessary to ensure the future viability and sustainable economic development of the thoroughbred racing industry.

This led to legislation being introduced in 2011 which:

- increased the membership of appointed members of Racing NSW from five to seven members,
- strengthened the eligibility requirements so that a person is not eligible for appointment if they have been an employee or member of the committee of a race club or like in the 12 months preceding appointment,
- strengthened the eligibility requirements to expressly prohibit membership of Racing NSW if the independent Selection Panel forms the view that an applicant has a direct or indirect pecuniary interest that is considered to be a conflict of interest which is incompatible with membership of Racing NSW,
- amended the Act so that the independent Selection Panel may submit to the Minister a list of eligible candidates for membership of Racing NSW and that the Minister may make a final selection from that list,
- strengthened the conflict of interest provisions in the Act requiring the disclosure of a direct or indirect interest in a matter under consideration by Racing NSW,
- amended the Act in relation to the appointment of the Chair and Deputy Chair of Racing NSW so that the Minister makes those appointments, and that the Minister may seek the advice of appointed members for that purpose, and
- terminated the appointments of existing members of Racing NSW.

In 2013 the Act was further amended to provide Racing NSW with the power to impose a wider range of sanctions on race clubs for failing to comply with a condition of registration and to achieve consistency with Racing NSW's existing powers in respect of a race club's failure to comply with directions in relation to minimum standards of operation.

This last reform provided Racing NSW with additional tools to effectively manage the conduct of race clubs and ensure the continued viability and development of the industry.

Outcomes

With a range of Reviews and legislative change particularly over the past 20 years, the critical question is whether the industry is better placed today than it has been in the past. One way to test that is to look at the decisions and outcomes to, in some way, measure its advancement.

There is no doubt that the industry has been required to meet significant challenges during this period, including:

- The erosion of wagering turnover following the advent of internet bookmakers.
- The impact of the equine influenza on wagering turnover and foaling levels.
- Falling race day patron numbers.
- The impact of the global economic crisis.

The following outline of achievements comes from a document provided to the Review by Racing NSW. While the Review has not sought to verify all the statements made, it nevertheless provides a view as to the success or otherwise of the present framework under the *Thoroughbred Racing Act.*

Race Fields Legislation

With turnover on thoroughbred racing leaking to interstate corporate wagering operators, and thus eroding revenues paid to the industry, Racing NSW lobbied the NSW Government to enact a legislative solution through the *Racing Administration Act 1998* (Race Fields Legislation).

This Act prohibited wagering operators from publishing NSW race field information without prior approval from the respective controlling authority and allowed the controlling authorities to impose a fee for the use of that race field information.

Ultimately, Racing NSW imposed a uniform fee of 1.5% of turnover subject to a exempt fee threshold of $5 million. The scheme came into effect on 1 September 2008 following the promulgation of a regulation under the *Racing Administration Act.*

Despite legal challenges, the High Court upheld the validity of the race fields scheme implemented by Racing NSW and allowed Racing NSW to release $102m accrued as race field fees and ensured certainty with regard to the collection of recurrent fees of more than $60m per annum.

Racing NSW advises the recurrent revenue will be applied to prize money, the accrued revenue is currently being applied to a major infrastructure program for the race clubs' racecourses.

Expanding the Industry's Revenue Base

Racing NSW assumed a pivotal role in renegotiation of the industry's commercial arrangements during the takeover of TAB Ltd by Tabcorp. This generated an additional $12m per annum in product fees for the industry.

In addition Racing NSW has been able to facilitate:

- new agreements with Sky Channel for the provincial and country clubs resulting in increased revenue of $2.4m per annum,
- a further round of negotiations with the State's off-course wagering operator, Tabcorp, which resulted in an additional $15m being injected into the NSW racing industry,
- the extension of TAB's on-course advertising exclusivity to a value of $5 million indexed annually, the settlement of an agreement with TAB for the payment of fees in respect of its off-shore operations which has generated annual revenue of $6.41m, and
- the introduction of legislation by the Government to remove a statutory 16% cap on totalizator commission deductions. The industry's revenues were increased by $9.2m per annum as a result of this initiative.

AJC/STC Merger

Racing NSW played an integral role in the 2011 merger of the AJC and the STC and the formation of the Australian Turf Club (ATC).

As part of the process Racing NSW was instrumental in encouraging the Government to approve the conduct of the computerised racing game "Trackside" by TAB. This then allowed Racing NSW to sell its future revenues from this game to TAB for $150 million which was then applied towards the construction of a new world class grandstand and associated spectator facilities at Royal Randwick Racecourse.

In addition, during the merger Racing NSW was able to negotiate a $24m grant from the Government to be applied towards capital improvements at the Rosehill Gardens Racecourse.

Racing NSW also negotiated from TAB an extension of the product fees on fixed odds racing to all races on which TAB offers fixed odds markets. This has added an additional $5 million in revenue to the racing industry.

Equine Influenza Outbreak

In 2007/2008 Racing NSW was able to procure a $235m rescue package from the Federal Government after it devised a scheme whereby owners were encouraged to keep their horses being trained while racing was stopped due to the outbreak of Equine Influenza. In effect owners were able to have their horses trained with the Federal Government indirectly paying the majority of training fees.

Further, as soon as racing was able to recommence after four months of being shutdown, horses were available to compete as they continued to be trained during this closure period.

Relevant NSW Ministers were lobbied for the provision of further financial assistance which resulted in the provision of a $7.5m grants scheme for the industry's participants and race clubs and the establishment of a Special Mortgage Deferment Scheme for racing industry participants, and a further one off grant to help promote the industry following the resumption of normal racing activities.

World Youth Day Negotiations

Racing NSW coordinated planning for the use of Royal Randwick Racecourse for the conduct of World Youth Day activities in 2008. This included dealing with the NSW Government and the Catholic Church, and Racing NSW was able to negotiate a $40 million compensation package for the racing industry.

Substantial Improvements in Efficiency and Cost Control

Racing NSW carried out a total review of its internal operations and undertook a major restructure of its operating procedures, staffing requirements and reporting processes. In addition a restructure was implemented of the administration of country racing. These initiatives resulted in total cost savings of $6.5m (35% of the organisation's operating budget). Under Racing NSW the costs of administering the NSW thoroughbred industry are approximately $30 million per annum less than those of Racing Victoria Ltd in administering the smaller Victorian industry.

Racing NSW has also restructured the administration of country racing which resulted in further savings of $3m per annum; and undertook a complete review of the industry's insurance requirements and renegotiated all existing policies at favourable terms and conditions. This initiative resulted in total savings to the racing industry of $3m per annum.

Welfare and Safety of Industry Participants

Racing NSW has initiated a number of major programs to promote the welfare and safety of industry participants and horses, including:

- coordinating a comprehensive review of jockeys' safety in this country which resulted in a number of ground-breaking recommendations which will provide long term benefits to the health and welfare of Australia's jockeys;
- creating a Jockeys' Career Fund to assist jockeys to adjust to their new circumstances following their retirements by way of retraining, relocation or by granting general financial assistance;
- promoting superannuation arrangements for jockeys;
- initiating a complete overhaul of the industry's training programs and establishing an industry wide training scheme to fulfil the needs of the industry and its participants;
- organising a partnership arrangement with TAFE for the provision of further training for industry participants; and
- entering into a joint venture with Corrective Services NSW for the rehabilitation and re-training of retired racehorses.

5.2 Overview of Submissions – Thoroughbred Racing Act 1996

A total of 13 submissions were received in response to the advertisements and written invitations.

All 13 submissions deal with issues related to the *Thoroughbred Racing Act*, with three of these dealing with issues concerning the *Merger Act.* A list of persons/entities that made a submission is provided in Chapter 4.

It is interesting to note that apart from the ATC, no race club made a submission.

Also of interest is the limited range of issues that have been raised as part of the Review. The submissions concentrated on issues surrounding Racing NSW, animal welfare and some other matters.

The significant provisions of the *Thoroughbred Racing Act* involve, amongst others, the integrity of the thoroughbred racing industry, including:

- Registration and licensing functions of Racing NSW.
- Establishment and role of the Integrity Assurance Committee.
- Race broadcasting arrangements.
- Appeals to the Racing Appeals Tribunal or NSW Civil and Administrative Tribunal.
- Establishment and role of the RICG.
- Establishment and role of the Appeal Panel.

None of these provisions were the subject of submissions (or were only touched on as part of a complaint about outcomes of these processes). The Review, therefore does not intend to comment on these provisions on the assumption that the industry generally is supportive of the current arrangements.

Racing NSW stated in its submission that it was of the view that "*the Act's framework remains current, sound and achieves the objectives of Government.*"

Key themes in the submissions

Many of the submissions from industry groups focused on the make-up of the board of Racing NSW, and its roles and responsibilities. Three submissions were received from the public. Two submissions raised the issue of animal welfare.

As previously stated, the submissions themselves can be found on the OLGR website at *http://www.olgr.nsw.gov.au/racing_home.asp*

Accordingly, the Review has placed the issues raised by those lodging submissions under five headings:

There were a range of issues raised under the *Roles and Responsibilities of Racing NSW* heading, and the Review has grouped these into four areas for discussion purposes.

Under each heading, the Review makes some background comments, outlines the submissions and the persons/entities that raised them, followed by a policy discussion and recommendations, if any.

Each of these headings will be dealt with in turn in the following pages.

5.3 Policy Objectives of the Act

Background

Unlike the *Merger Act*, the *Thoroughbred Racing Act* contains no formal objects. This was in line with the legislative drafting protocols of its time.

The "long title" of the Act states:

> *"An Act to make provision for the establishment, management and functions of Racing New South Wales as the representative body to control thoroughbred horse racing in the State; and for other purposes".*

When introducing the *Thoroughbred Racing Amendment Bill 2008* into the NSW Legislative Assembly, the Hon Graham West, MP stated:

> *"The main purposes of the bill before the House are to reform and update the statutory arrangements that underpin the governance arrangements for Racing NSW; to clarify the powers and functions of Racing NSW for its controlling body responsibilities in relation to the thoroughbred racing industry in New South Wales; and to provide for necessary savings and transitional arrangements. The opportunity to make these reforms is essential, timely and significant. The objectives of the reforms are to promote the future viability of the thoroughbred racing industry, to give certainty to the many thousands of participants that depend on it for a living, to give appropriate acknowledgement to the custom and tradition of our racing heritage, and to ensure that the many participants and members of the public that enjoy the spectacle of racing continue to do so."*[1]

Submissions

- The objectives of the Act remain valid - ATC
- The policy objects of the Act now lag behind the development of community attitudes to animal welfare - The Greens
- The Act achieves the objectives of Government – Racing NSW

With no formal objectives written into the Act, it is possibly not surprising that there was little discussion on the topic.

The ATC submitted that the objectives of both Acts *"have ongoing validity and relevance"*.

The issues raised by The Greens in support of animal welfare provisions to be included in the Act are discussed under the Animal Welfare theme (Chapter 5.6).

Racing NSW stated that it was *"of the view that the Act's framework remains current, sound and achieves the objectives of Government."*

Policy Discussion

An objects clause is a provision that outlines the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity.

[1] Hansard 19 June 2008 – Legislative Assembly

Some objects provisions give a general understanding of the purpose of the legislation while others set out general aims or principles that help the reader to interpret the detailed provisions of the legislation.

Objects clauses may assist the courts and others in the interpretation of legislation.

Section 33 of the NSW *Interpretation Act 1987* states the following:

> *"In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object."*

It is now usual for objects to be inserted into new Acts but they are not usually inserted into existing legislation when they are amended.

The *Thoroughbred Racing Act* deals with significant issues including ensuring the integrity of all persons involved with racing and maintaining public confidence. There is also a range of persons and entities that are required to make determinations under its provisions.

The Review believes that formal objects in the Act would assist the public and decision makers in the understanding and interpretation of the legislation.

Later in the Review (Chapter 5.5) the Review notes that the definition of the functions and powers of Racing NSW is far from clear. The provision of objects into the Act would assist in better interpretation of those functions and powers.

The Review also notes that there is a drafting omission in that the word 'representative' is retained in the long title of the Act which reads as:

> *"An Act to make provision for the establishment, management and functions of Racing NSW as the representative body to control thoroughbred horse racing in this State; and for other purposes.*

Racing NSW has been an independent Board since amendments made in 2008.

Recommendation 1

The Review recommends that formal objects be inserted into the Act at the next available opportunity to assist with clarifying the statutory role of Racing NSW. The objects may be drawn from sections 11, 13 and 14 of the Act with emphasis on the following provisions:

- *Duty to act in the public and industry interest.*
- *Control, supervise and regulate thoroughbred racing in NSW.*
- *Initiate, develop and implement policies conducive to the promotion, strategic development and welfare – and the protection of the public interest – as it relates to thoroughbred horse racing in NSW.*

The Review also recommends that a drafting omission be corrected in that the word 'representative' be deleted from the long title of the Act.

5.4 Membership of Racing NSW

General Discussion

Section 6 of the *Thoroughbred Racing Act* states:

Membership

(1) Racing NSW is to consist of the Chief Executive and 7 other members appointed by the Minister from time to time.

(1A) The Minister is to appoint members as follows:

(a) except as provided by paragraph (b)—each person appointed must be selected from a recommended members list that is provided to the Minister by the Selection Panel under section 7 in relation to the vacancy or vacancies concerned,

(b) in the case of any casual vacancy (a vacancy in the office of an appointed member occurring other than by reason of the completion of the member's term of office)—each person appointed must be selected from a list of persons recommended for appointment to fill the vacancy or vacancies concerned that is provided to the Minister by Racing NSW.

(1B) The number of persons listed in a list of persons recommended for appointment to fill any casual vacancy or vacancies must be more than the number of persons required to fill the vacancy or vacancies concerned.

Note. See section 7 (2) (c) for a comparable requirement in relation to lists provided by the Selection Panel.

(2) A person is not eligible to be an appointed member of Racing NSW if the person:

(a) is currently, or during the previous 12 months has been, an employee of a race club, racing association or eligible industry body, or

(b) is currently, or during the previous 12 months has been, a member of the governing body of a race club, racing association or eligible industry body, or

(c) holds a licence issued by Racing NSW or by a racing association, or

(d) is registered by or with GRNSW under the or HRNSW under the Harness Racing Act 2009, or

(e) is currently, or during the previous 10 years has been, warned off, disqualified or named on the Forfeits List under the Australian Rules of Racing, or

(f) during the previous 10 years has been convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more, or convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or

(g) is an undischarged bankrupt or is taking advantage of the laws in force for the time being relating to bankruptcy, or

(h) is a mentally incapacitated person.

(3) A person is not eligible to be appointed as a member of Racing NSW if the person is a member of the Selection Panel at the time the Selection Panel makes its recommendation for the appointment concerned.

(4) A person is not eligible to hold office as an appointed member of Racing NSW for more than 8 years in total (whether or not involving consecutive terms of office).

(5) The Chief Executive does not have a vote at meetings of Racing NSW.

(6) While a person is an appointed member of Racing NSW, any entitlement of the person to vote as a member of a race club or of an eligible industry body is suspended.

Section 7 of the Act outlines the establishment and role of the Section Panel:

Selection Panel

(1) The Minister is to establish a Selection Panel:

(a) to prepare and provide to the Minister a list of persons recommended for appointment as members of Racing NSW when any vacancies arise (a recommended members list), and

(b) to prepare and provide to the Minister a list of persons recommended for appointment as the Chairperson or Deputy Chairperson of Racing NSW when any vacancies arise, and

(c) to recommend the terms of office for persons included in any such list.

(2) A list provided to the Minister under this section:

(a) must list the persons recommended for appointment and recommend terms of office for the persons listed, and

(b) may list persons as being recommended for appointment both as members of Racing NSW and as the Chairperson or Deputy Chairperson of Racing NSW, and

(c) must list more persons than the number of persons required to fill the vacancy or vacancies concerned.

(3) The Selection Panel must not include a person in a recommended members list unless the Panel is satisfied that the person has experience in a senior administrative role or experience at a senior level in one or more of the fields of business, finance, law, marketing, technology, commerce, regulatory administration or regulatory enforcement.

(4) Before including a person in a recommended members list, the Selection Panel must conduct a probity check of the person (with the level of scrutiny as determined by the Minister). The Minister is to appoint a Probity Adviser to assist the Selection Panel to conduct probity checks.

(5) The Selection Panel is to choose between candidates for inclusion in a list to be provided under this section on the basis of merit, with merit to be determined on the basis of a candidate's abilities, qualifications, experience and personal qualities that are relevant to the performance of the duties of membership of Racing NSW or the duties of the Chairperson or Deputy Chairperson (as the case requires)

(6) The Selection Panel must not include a person in a recommended members list if the Panel is satisfied that the person has a direct or indirect pecuniary interest in any matter that gives rise (or is likely to give rise) to a conflict of interest of a nature that is incompatible with membership of Racing NSW.

(7) The term of office for which the Minister may appoint a person selected from a list provided under this section may (but need not) be the term of office recommended by the Selection Panel.

The provisions outlined above are quite straightforward and appear well understood by those that made submissions on the topic of membership of the board of Racing NSW.

The history of the introduction of an independent board for Racing NSW and the role of the Selection Panel has been outlined previously under the heading *Background to the Administration of Racing in NSW* (Chapter 5.1). In its initial stages, its membership was nominated by various industry associations, but following recommendations by the Brown Review in 2006, legislation was passed in 2008 to establish an independent board.

The current provisions were passed by Parliament in 2011.

Submissions

Generally speaking most of the industry associations supported a move to a mix of "experienced industry representatives" and independent directors on the board of Racing NSW. The submissions promoted either one or three directors appointed by RICG with the remainder of the board being made up of independent directors.

The major reasons cited were that industry representatives have a close association with their respective industry areas (breeders, trainers, owners, etc) and therefore a better understanding of issues that affect those areas. They would also bring an "industry perspective" to the board.

- A mix of experienced industry representatives and independent Directors on the Board of RNSW would lead to better outcomes - RICG; NSW Trainers' Association; Thoroughbred Breeders NSW Limited; NSW Racehorse Owners Association; ATC
- An industry representative should be elected to the Board of Racing NSW from stakeholders represented on the RICG – Racing NSW Country; RICG; NSW Racehorse Owners Association
- The Board of Racing NSW is accountable to the Minister rather than the racing industry - RICG; NSW Trainers' Association; Thoroughbred Breeders NSW Limited; NSW Racehorse Owners Association
- The Chairperson and Deputy Chairperson should be elected by the Board of Racing NSW not the Minister - RICG; NSW Trainers' Association; NSW Racehorse Owners Association
- A member of RICG should be on the Selection Panel for the Board of Racing NSW appointing non-industry members - RICG; NSW Trainers' Association; Thoroughbred Breeders NSW Limited; NSW Racehorse Owners Association; ATC
- The eligibility rules under the Act should be removed to enable persons serving on governing bodies of race clubs or eligible industry bodies who have the required qualifications to be appointed to the Board of Racing NSW - NSW Racehorse Owners Association

Policy Discussion

The suggestion for "industry representation" appears to come from the desire of representative bodies to have a greater voice in decision making at the Racing NSW board level. That suggestion, together with the view that board members are accountable to the Minister rather than the racing industry, strongly implies that the board of Racing NSW should be beholden to the racing industry.

The Review considers that these views are not consistent with the objectives of the *Thoroughbred Racing Act* or the roles and responsibilities of Racing NSW for a number of reasons.

First, Racing NSW has a broader range of responsibilities than simply looking after sectional interests within the racing industry. Although these interests may be very important for the well-being of the thoroughbred industry, one of Racing NSW's primary roles is to:

> *"initiate, develop and implement policies considered conducive to the promotion, strategic development and welfare of the horse racing industry in the State and the protection of the public interest as it relates to the horse racing industry"*[1]

Second, Racing NSW is under a statutory duty:

> *"It is the duty of each appointed member of Racing NSW to act in the public interest and in the interests of the horse racing industry as a whole in NSW."*[2]

In undertaking these responsibilities, it may mean that on occasions the interests of sections of the racing industry must play a subservient role to the best interests of the overall industry and the public interest. The Review believes that an independent board is better equipped to deal with these types of responsibilities in an objective manner.

Third, Racing NSW's role as racing industry regulator means there must be clear delineation between the regulator and the industry which it regulates. Not only can it not be beholden to the industry that it is required to regulate, it cannot *appear* to be beholden to it.

Under its powers, Racing NSW can register or licence, or refuse to register or licence, or cancel or suspend the registration or licence of, a race club, or an owner, trainer, jockey, stablehand, bookmaker, bookmaker's clerk or another person associated with racing.

Given these powers, appointing a person to represent the interests of these areas to Racing NSW's board is problematic - even though it may be only one of the seven members.

While the Review concedes that industry knowledge would assist decision making for the board, on balance it is of the view that maintaining independence is a more important policy criteria. It is the Review's position that direct industry representation on Racing NSW could jeopardise the current and required independence of a regulatory body.

[1] Section 13(1)(c) of the *Thoroughbred Racing Act 1996*
[2] Section 11 of the *Thoroughbred Racing Act 1996*

The reasons why Racing NSW was established as an independent entity with the roles and responsibilities of the Principal Club was to remove the previous conflicts that saw a race club not only conducting its own racing activities, but regulating its own conduct as well as the conduct of other competing race clubs.

The view that Racing NSW is responsible to the Minister - and not the industry - is an interesting proposition. Expressed in other terms, it implies that the regulator must be responsible to the industry that it regulates.

Some of the submissions go further and would have the industry appointing its own regulator as well. Best regulatory practice would not support these views.

Section 5 of the Act states that Racing NSW "*does not represent the Crown and is not subject to direction or control by or on behalf of the Government.*" The Act also provides specific functions and responsibilities for Racing NSW. These provisions do not support the proposition that members or Racing NSW itself is responsible to the Minister.

The legislation surrounding the independent membership of Racing NSW closely follows the legislation for the boards of Harness Racing NSW (HRNSW) and Greyhound Racing NSW (GRNSW). However, there are a number of small, but important, differences.

First, under the harness and greyhound legislation, the Selection Panel must recommend to the Minister only the number of names for which there are vacancies. That is, the Minister has no ability to appoint a lesser number (or choose from a greater number as is the case with Racing NSW).

Second, the Minister appoints the Chairman and Deputy Chairman of Racing NSW - which is not the case with HRNSW or GRNSW. In those cases the boards appoint their Chairperson and Deputy Chairperson from among themselves.

Third, the harness and greyhound legislation does not impose a 12 month moratorium on appointments of persons who are members of race clubs, industry associations, etc. However, prior to appointment to HRNSW or GRNSW, the recommended applicant must resign their position/s.

These three differences have only been recently introduced (2011) with limited numbers of appointments made under the new process. Given the views of the industry, perhaps these three issues should be reviewed in the future with a view to aligning the appointment processes in a manner which overcomes industry concerns.

While the Review acknowledges that there are people who are presently ineligible to be appointed to the board that possess the necessary aptitudes to be appointed, the independent member framework has a successful record since its commencement in 2008. The ATC's submissions states in this regard:

> *"Over the past few years, RNSW has fulfilled many of its assigned regulatory and integrity roles with distinction:*
>
> - *RNSW's successful defence of the Race Fields Fee Scheme through the "race fields legislation" resulted in an equitable, largely platform agnostic framework for wagering distributions to the industry.*

- *NSW's racing industry integrity policies and stewardship are best practice internationally.*
- *RNSW supported the orderly merger of AJC and STC, and was effective in securing and administering the provision of funding for the redevelopment of Randwick Racecourse and Rosehill Gardens Racecourse.*
- *RNSW supported the aggregation of these state's racing coverage media rights within a single industry owned media asset."*

For these reasons, the Review does not support a change from the present independent membership of the board.

As far as the makeup of the Selection Panel, there is nothing in the Act that would preclude a member, or an appointee of RICG from being appointed to the Panel. That is a matter for the Minister's discretion under section 7 of the Act and the Review does not support the introduction of specific legislative provision in that regard.

The Review supports the current arrangements.

Recommendation 2

The Review supports the continuation of the current provisions for the appointment of members of Racing NSW. However, consideration should be given in the future to aligning the appointment processes of Racing NSW, HRNSW and GRNSW.

The Review notes that the provisions in the Act that deal with conflicts of interest at the time of appointment (and arising after appointment) of members of Racing NSW were strengthened in 2011. The Review recommends that it would, as a matter of principle of good governance, be appropriate for similar strengthening of the conflict of interest provisions in relation to the Acts that establish Greyhound Racing NSW and Harness Racing NSW.

5.5 Roles and Responsibilities of Racing NSW

There were a large number of issues raised under this general heading. For ease of discussion, the Review has listed them under four themes:

1. *Roles, responsibilities and powers* (see 5.5.1)
2. *Definition of "industry assets"* (see 5.5.2)
3. *Consultation* (see 5.5.3)
4. *Revenue distribution* (see 5.5.4)

5.5.1 Roles, responsibilities and powers

Background

Section 13 spells out the functions of RNSW, section 14 its powers and section 29A its power to set minimum standards for race clubs.

Functions of Racing NSW

(1) Racing NSW has the following functions:

(a) all the functions of the principal club for New South Wales and committee of the principal club for New South Wales under the Australian Rules of Racing,

(b) to control, supervise and regulate horse racing in the State,

(b1) such functions in relation to the business, economic development and strategic development of the horse racing industry in the State as are conferred or imposed by this Act,

(c) to initiate, develop and implement policies considered conducive to the promotion, strategic development and welfare of the horse racing industry in the State and the protection of the public interest as it relates to the horse racing industry,

(d) functions with respect to the insuring of participants in the horse racing industry, being functions of the kind exercised by the AJC on the commencement of this section, and such other functions with respect to insurance in the horse racing industry as may be prescribed by the regulations,

(e) such functions as may be conferred or imposed on Racing NSW by or under the Australian Rules of Racing or any other Act,

(f) such functions with respect to horse racing in New South Wales as may be prescribed by the regulations.

(2) The functions of Racing NSW are not limited by the Australian Rules of Racing and are to be exercised independently of the Australian Racing Board.

(3) The AJC ceases to have the functions that are solely the functions of the principal club for New South Wales or committee of the principal club for New South Wales under the Australian Rules of Racing.

Powers of Racing NSW

(1) Racing NSW has power to do all things that may be necessary or convenient to be done for or in connection with the exercise of its functions.

(2) Without limiting subsection (1), Racing NSW has power to do the following:

(a) investigate and report on proposals for the construction of new racecourses, and inspect new racecourses or alterations or renovations to existing racecourses

(b) register or licence, or refuse to register or licence, or cancel or suspend the registration or licence of, a race club, or an owner, trainer, jockey, stablehand, bookmaker, bookmaker's clerk or another person associated with racing, or disqualify or suspend any of those persons permanently or for a specified period,

(c) supervise the activities of race clubs, persons licensed by Racing NSW and all other persons engaged in or associated with racing,

(d) inquire into and deal with any matter relating to racing and to refer any such matter to stewards or others for investigation and report and, without limiting the generality of this power, to inquire at any time into the running of any horse on any course or courses, whether or not a report concerning the matter has been made or decision arrived at by any stewards,

(e) allocate to registered race clubs the dates on which they may conduct race meetings,

(f) direct and supervise the dissolution of a race club that ceases to be registered by Racing NSW,

(g) appoint an administrator to conduct the affairs of a race club,

(h) register and identify galloping horses,

(i) disqualify a horse from participating in a race,

(j) exclude from participating in a race a horse not registered under the Rules of Racing,

(k) prohibit a person from attending at or taking part in a race meeting,

(l) impose a penalty on a person licensed by it or on an owner of a horse for a contravention of the Rules of Racing,

(m) impose fees for registration of a person or horse,

(n) require registered race clubs to pay to it such fees and charges (including fees for registration of a race club) as are required for the proper performance of its functions, calculated on the basis of criteria notified to race clubs by Racing NSW,

(o) consult, join, affiliate and maintain liaison with other associations or bodies, whether in the State or elsewhere, concerned with the breeding or racing of galloping horses,

(p) enter into contracts,

(q) acquire, hold, take or lease and dispose of real and personal property

(r) borrow money,

(s) order an audit of the books and accounts of a race club by an auditor who is a registered company auditor nominated by Racing NSW,

(t) scrutinise the constitutions of race clubs to ensure they conform to any applicable Act and the Rules of Racing and that they clearly and concisely express the needs and desires of the clubs concerned and of racing generally,

(u) publish material, including periodical publications, to inform and keep informed the public concerning matters relating to racing, whether in the State or elsewhere,
(v) undertake research and investigation into all aspects of the breeding of horses and of racing generally,
(w) take such steps and do such acts and things as are incidental or conducive to the exercise of its powers and the performance of its functions.

As can be seen in section 13, the *Thoroughbred Racing Act* defines the functions of Racing NSW to include the functions of the *"principal club for New South Wales"* as set out in the Australian Rules of Racing (ARR). The Australian Racing Board Limited (ARBL) makes the ARR.

The ARBL is a *"not-for-profit organisation with objectives that are concentrated on developing, encouraging and promoting the sport of thoroughbred racing throughout Australia. Its members are the Principal Racing Authorities (PRAs) that supervise and control thoroughbred racing in each State and Territory. Under its Constitution ARBL is established to make, change and administer the Australian Rules of Racing and to otherwise do all things whatsoever that the Board considers to be conducive to developing, encouraging, promoting or managing the Australian thoroughbred racing industry"* - ARBL website.

The ARR defines a PRA, *"as a body, statutory or otherwise, that has the control and general supervision of racing within a State or Territory (provided any Member thereof is not a direct Government appointee), and means in the State of New South Wales, the NSW Thoroughbred Racing Board"*. Rule AR7 of the ARR defines the powers of the PRA.

Submissions

A major issue that needs to be addressed is the definition of the role, responsibilities, functions and powers of Racing NSW. A number of submissions were made in this regard and are outlined below:

Independent oversight

- The establishment of a mechanism to ensure independent oversight of the thoroughbred racing industry [is recommended] - The Greens

Functions and responsibilities

- The Act should explicitly define the roles and responsibilities of Racing NSW and race clubs - ATC

Policy Discussion

Independent oversight

The Greens recommend that there should be a mechanism to ensure independent oversight of the thoroughbred racing industry. Their submission suggests that it could be achieved by the creation of an independent Racing Integrity Commissioner. This would overcome The Greens' view that there is a current conflict of interest in Racing NSW acting as both the regulator and promoter of thoroughbred racing in New South Wales.

The Review does not support the introduction of an over sighting regulator for Racing NSW. This would add a deal of complexity in a range of areas. As outlined above and below, it is difficult enough to quickly understand the present functions and powers of Racing NSW, without giving another body the power to oversight and call into question the role and determinations of Racing NSW.

Racing NSW is not the sole promoter of thoroughbred racing in NSW. All race clubs, trainers, bookmakers, the TAB, etc share in this role. Section 13(1)(c) provides that Racing NSW has the power to initiate, develop and implement policies considered conducive to the promotion, strategic development and welfare of the horse racing industry in the State and the protection of the public interest as it relates to the horse racing industry.

Many Acts require regulatory bodies to exercise their functions in the context of the broader public interest. This requires regulators, in exercising their powers, to balance the outcome and impact of their regulatory decisions on the appropriate development of the industry that they are regulating. As such, the Review does not see that there is a direct conflict of interest in Racing NSW's roles in respect of the regulation and the promotion of the racing.

At one point, the regulatory and commercial functions of the harness and greyhound authorities were separated - one regulatory body covering both codes and a commercial body for each code. The separation was far from successful, and has now reverted to a regulatory/commercial body for each code.

Given the current structures surrounding the ARBL at a national level, it would be difficult to impose a further level of regulation over Racing NSW without a major change to those structures.

The Review sees little benefit being achieved by adopting the suggested approach - rather substantial costs could be imposed on the racing industry to fund its operations. The question then becomes, if there is a Commissioner for thoroughbreds, what about harness racing and greyhound racing?

Recommendation 3

The Review recommends no changes be made to the current structure to incorporate a further independent oversight of the thoroughbred racing industry.

Functions and responsibilities

The functions and powers of Racing NSW are somewhat less clear than they could be. The submissions to the Review on this important topic appear more as a request for clarification of what constitutes the functions and powers of Racing NSW - rather than a total re-definition of those powers.

Courts generally have found that the powers and functions of bodies set up by legislation are limited to the explicit powers and functions set out in their establishing legislation (or in other legislation that explicitly provides that power or function for the statutory body). Particularly where decisions of statutory bodies affect the rights and liabilities of others, courts will look to the legislative framework to ensure there is express and clear provision for the body to exercise those powers. Where those provisions do not exist or are not explicitly stated, courts will find those determinations are *ultra vires*.

Generally speaking, Racing NSW's functions and powers are found in the *Thoroughbred Racing Act* in sections 13, 14 (set out above) as well as 29A, 29B, 29C and 29E.

While section 13 empowers Racing NSW with all the functions of the principal club for NSW and committee of the principal club for NSW under the ARR, it also states that the functions of Racing NSW are not limited by the ARR and are to be exercised independently of the ARBL.

Many of the powers that are contained in the ARR are also listed throughout the *Thoroughbred Racing Act* (particularly section 14). The Review understands that this is necessary because were the ARBL to cease to continue, Racing NSW would still require those powers to continue to undertake their important role in the regulation of the NSW racing industry.

The 2006 Independent Review of the NSW Thoroughbred Act conducted by Mr Ken Brown AM (the Brown Report) recommended *"that the Act be amended so as to clearly provide that a function of Racing NSW is to manage and co-ordinate the conduct and operations of the thoroughbred racing industry in New South Wales".*

The Review supports this recommendation and believes that clarity in this regard - particularly following a consultative process - would ultimately lead to enhanced relationships, better consultation and better outcomes.

Throughout the industry, there continues to be a lack of understanding and certainty of the functions and powers of Racing NSW and this needs to be addressed. Some of the areas of uncertainty are further discussed at Chapter 5.5.2 below.

Recommendation 4

The Review recommends that the functions and powers of Racing NSW be reviewed to make certain that they are explicit and cover the necessary areas to ensure that Racing NSW can undertake its broader responsibilities (note recommendations 5,6,7 and 8 that follow). That review should be undertaken in consultation with all industry representatives, including Racing NSW, race clubs, and industry associations.

Unlicensed persons

Background

The issue surrounding the powers of Racing NSW to deal with unlicensed persons has been raised previously as part of the Brown Review and the Malcolm Scott Review. The area is complex, involving amongst other issues the legal rights of individuals, particularly where criminal behaviour may be concerned.

Submissions

- The Act should empower Racing NSW to take action against non-licensed persons – Racing NSW

Policy Discussion

Earlier in 2013, the Minister engaged Mr David Armati to provide advice on a proposal by Racing NSW in relation to:

- Empowering Racing NSW to compel unlicensed persons to:
  (i) produce documents, however created, and information to Racing NSW or other designated bodies,
  (ii) attend hearings by stewards, the Appeal Panel or the Racing Appeals Tribunal, and
  (iii) answer questions at such hearings.
- Empowering appropriate bodies to impose penalties for non-compliance.
- Establishing procedural mechanics to effect these powers.
- Providing appropriate protection against self-incrimination or liability in criminal or civil proceedings or any other proceedings arising from such actions.

Mr Armati has provided advice to the Minister, which is now attached as a separate annexure to this Review. The Review supports the recommendations in Mr Armati's advice.

Recommendation 5

The Review supports the recommendations in the advice of Mr Armati in regard to the provision of powers to Racing NSW to take appropriate action against unlicensed persons.

5.5.2 Definition of "industry assets"

Background

The considerable doubt and concern within the thoroughbred racing industry and Racing NSW itself as to the definition of the functions and powers of Racing NSW leads to a wide range of issues including:-

- Control over "industry assets"
- Appointment of administrators
- Action against non-licensed persons
- Imposition of minimum standards on racing clubs
- Imposition of conditions on race clubs
- Issuing directions to race clubs

These issues are discussed in turn.

Control over "industry assets"

Submissions

- The Act should provide a power for Racing NSW to intervene in relation to industry assets to ensure that their use, or proposed use, does not adversely impact on other sections of the industry – Racing NSW
- With industry consultation, those activities and assets that attract Racing NSW's powers and functions need to be identified, the extent of those powers and functions defined and the requirement for compensation where the retention of assets or activities increases a race club's costs – ATC

- The Act should provide a requirement that race clubs obtain approval from Racing NSW for the disposal of race club assets – Racing NSW

Policy Discussion

The notion of "industry assets" has particular relevance to the racing industry. The majority of funding for the operations of race clubs and their infrastructure comes from revenues distributed through the Racing Distribution Agreement and the Intracode Agreement - and not from their own operations.

This means that no one single race club would be self sustaining without the operations and revenues generated by other clubs and distributed through various funding agreements. This interdependence demands a coordinating authority with the power to ensure that each of the parts act in accordance with the interests of the whole.

Similar views were expressed in the Brown Report. Mr Brown AM made several recommendations concerning the powers and functions of Racing NSW. While some of these recommendations have resulted in amendments to the Act, the recommendations for a review of Racing NSW's powers, including the power over "industry assets" remain unfulfilled. In that regard, Mr Brown stated:

> *"The proposition that certain "club assets" may also be "industry assets" and in turn should come under the purview of the controlling body, is I feel a fair and reasonable one."*[1]

He went on:

> *"The critical issues are:-*
>
> - *the definition of an industry asset;*
> - *in what circumstances should RNSW have the power to intervene in the use or application of an industry asset; and*
> - *the nature of that power ie whether in the form of a binding direction with conditions, or a simple right of veto over the proposed use of the asset. It should certainly not extend to a power to direct the expropriation of a club's real property."*[2]

The Brown Report also recommended that the *Thoroughbred Racing Act* be amended to include an express power (in accordance with regulations under the Act) for Racing NSW to intervene in relation to industry assets and the formulation of those regulations be proceeded by extensive industry consultation to determine what is an industry asset, the circumstances which would justify intervention and the form of that intervention.

This Review supports those recommendations. The outcome would be to provide Racing NSW and the industry far greater certainty over future decision making.

The Board of a race club is not limited to ensuring that pies are hot and that the beer is cold on a race day. The club has a duty to promote racing generally, create its own character and to create revenues so that the club may operate to ensure its ongoing and future viability.

[1] Page 20 of the Brown Report
[2] Page 21 of the Brown Report

Nevertheless, Racing NSW has a statutory duty to take a strategic view to ensure that racing infrastructure is properly matched to maximising wagering revenues for the whole industry. This is achieved largely through the allocation of race dates, TAB and race fields payments (prize money and infrastructure).

A special point should be made about the long standing practice of advancing funds to race clubs by way of Interest Free Interminable Loans (IFIL) for infrastructure needs. The principle is that the disposal of an IFIL funded asset triggers the repayment of the loan to the racing controlling body. The industry funds are then available for reallocation for industry purpose.

Some factors which might guide the definition of an industry asset would include whether: the asset is an IFIL funded asset; it is above an identified financial threshold; its disposal would adversely affect the racing industry (particularly in terms of the need to maintain necessary racing infrastructure or the amenity of members) and the proposed disposal is value for money (ie not an inappropriate fire sale or a transaction which benefits a third party at the expense of club members or the racing industry).

The Review notes that it may be appropriate for the controlling body and clubs to engage in an asset register review to assist with such a process so that an overall view of assets may be assessed.

Recommendation 6

The Review notes that the recommendation from the 2006 Brown Review to distinguish between 'industry' assets and 'club' assets has not been undertaken.

The Review recommends that the task be undertaken as a matter of priority and preferably by an independent person with knowledge of the operation of the racing industry. Such a formal consultative review with industry stakeholders would assist with clarifying the role of Racing NSW to meet its statutory responsibility to initiate, develop and implement strategic policies consistent with Recommendation 4 above.

Appointment of administrators

Background

A number of respondents raised the issue of the appointment of administrators by Racing NSW either in writing or at a meeting with the Review. All raised the fact that the existing provisions were inadequate.

Submissions

- The power to appoint administrators to race clubs by Racing NSW should be more strictly defined or repealed - Confidential submissions

Policy Discussion

It is the Review's opinion that given the functions and responsibilities imposed on Racing NSW, it is necessary for it to have the ability to appoint an administrator over a race club. If, for example, a race club becomes bankrupt, the sale of its assets may mean their loss to the broader racing industry.

The current legislation is deficient in a number of areas. For example, it provides no processes or requirements in relation to:

- The circumstances in which Racing NSW can appoint an administrator.
- Whether there is a requirement for Racing NSW to provide the race club with a natural justice process prior to the appointment.
- Who bears the costs of appointment?
- What is the timeframe for the duration of the administration?
- What are the powers of the administrator?
- What are the liabilities of the administrator?
- How the administration is terminated and a new race club board appointed.
- Whether an administrator can be appointed in lieu of or as part of a sanction.

The current provisions do not provide for circumstances where, for example administrators are appointed under other legislation eg Companies Code.

Recommendation 7

The Review recommends that the provisions of the Thoroughbred Racing Act be reviewed to overcome the current deficiencies in the appointment of an administrator over a race club and clarify the powers of Racing NSW and the administrator.

Other specific powers

Background

A number of submissions suggested a range of clarifications should be made to Racing NSW's powers.

Submissions

- The Act should be amended to define the conditions that Racing NSW is permitted to impose on race clubs' registration - Confidential submission.
- The Act should define "racecourse" so as to exclude those areas not directly used for race meetings - Confidential submission
- The Act should empower Racing NSW to issue directions to race clubs on any matter relating to licensed persons and impose a range of penalties if the race club fails to comply – Racing NSW
- Racing NSW needs power to direct racing clubs to ensure OH&S and safe and well maintained training tracks - NSW Trainers' Association
- The cost of compliance to Racing NSW minimum standards be recognised and compensated through an appropriate funding mechanism - ATC

Policy Discussion

Each of these matters is important for individual race clubs and their operations. These issues should be dealt with as part of a broader review of the powers and functions of Racing NSW as recommended above, and resolved in a consultative manner. The Review supports greater clarity in these areas, but makes the following comments.

Occupational Health and Safety (now known as "WHS" – Workplace Health and Safety) issues are the responsibility of individual race clubs and not the responsibility of Racing NSW.

The WHS legislation imposes specific responsibilities on employers, etc to ensure a safe workplace and Racing NSW should not be placed in a position to second guess WorkCover NSW.

The minimum standards published by Racing NSW are broadly defined. Given the vast differences between various race clubs and racecourses, a pragmatic approach needs to be adopted. Issues involving disputes between Racing NSW and race clubs as to the specific details should be left to those bodies to negotiate, particularly given the financial impact that could be imposed on race clubs.

Separately, the Review notes on the issue of intervention in clubs non-racing activities that such a process must acknowledge the rights of clubs to do so to broaden and diversify their revenue base and also, in particular, the statutory powers of supervision of Randwick Racecourse for that purpose by the Trustees on behalf of the Minister.

The Review notes that race clubs are non-proprietary bodies and that their charter is essentially to conduct and promote racing. The Review also notes that clubs raise revenues from non-racing activities for racing purposes as funding is scarce. In some circumstances such non-racing activities may adversely impact on preparations for race days. The Review has already identified that this issue be considered as part of the Industry/Club asset review (Recommendation 6 above).

Finally, the recent Supreme Court decision in the matter of *Dr Ross Gregory Pedrana v Racing NSW (2014)* was made after the Review had a chance to assess if there any implications which require legislative action.

Recommendation 8

The powers of Racing NSW in relation to placing conditions on a race club's registration; imposing directions and penalties for failure to comply; and the costs of complying with minimum standards should be reviewed as part of a general review of the powers and functions of Racing NSW to ensure greater clarity.

The general review should also take account of the recent Supreme Court decision in the matter of Dr Ross Gregory Pedrana v Racing NSW (2014) to assess if there any implications which require legislative action.

5.5.3 Consultation

Submissions

There was a concern expressed with the consultative processes between the industry and Racing NSW. This was expressed in two ways. The first requested industry representation on the Racing NSW Board, the second requested a better consultative process.

- The industry needs greater input to the decision making by Racing NSW. The present Act allows Racing NSW to pay lip service to recommendations and

consultation with RICG - RICG; NSW Trainers Association; Thoroughbred Breeders NSW Limited; NSW Racehorse Owners Association; ATC

- Racing NSW should consult more with the industry over industry issues, including the Racing NSW Strategic Plan – ATC
- The NSW Bookmakers Co-operative should be added to the list of nominated representative organisations on the (thoroughbred industry) RICG - NSW Bookmakers' Co-operative

Policy Discussion

As stated above there was general complaint about the lack of, and difficulties with an appropriate level of consultation between the industry and Racing NSW.

The *Thoroughbred Racing Act:*

- establishes the RICG
- defines its membership
- defines its functions (consultation with Racing NSW)
- requires RICG to meet with Racing NSW at least 12 times a year.

RICG has the function of consulting with and making recommendations to RNSW on matters concerning horse racing in the State. The recommendations are to be made in writing and tabled at the next meeting of RNSW or may be presented in person at that meeting by the Chairperson of RICG (section 34(2) of the Act).

Racing NSW is to respond to RICG in writing in relation to any such recommendations within a reasonable time after they are received. If Racing NSW does not support a recommendation made by RICG the response by Racing NSW is to include its reasons for not supporting the recommendation (section 34(3) of the Act).

The Act also requires that Racing NSW is to undertake formal consultation on a regular basis with RICG and other horse racing industry stakeholders in connection with the initiation, development and implementation of policies for the promotion, strategic development and welfare of the horse racing industry (section 14B(2) of the Act).

Racing NSW is also required to prepare a strategic plan for the horse racing industry every 3 years. Each strategic plan must be prepared in consultation with RICG and other horse racing industry stakeholders (section 14B(3) of the Act).

A progress report on implementation of the business plan of Racing NSW and the strategic plan is required to be outlined in its annual report (section 14B(4) of the Act).

It is the Review's opinion that these provisions are appropriate and should provide a structured process for the industry to present their views and recommendations to Racing NSW.

However, even with these requirements, RICG's view is that the industry needs greater input into decision making by Racing NSW, with Racing NSW required to have *"an acceptable level of accountability to the industry".*

RICG's view is that there should be a board member of Racing NSW elected/nominated by RICG and that this direct representation would have the benefit of *"real time input from the grass roots during Board Meetings".*

The Review has previously dealt with the membership of the board of Racing NSW (see Chapter 5.3) and does not support a change to the present membership requirements.

The statements regarding the development of the Racing NSW strategic plan are somewhat concerning. However, given the issues that have surrounded the industry in recent time - race fields legislation, merger of the AJC and STC, the development of The Championships racing program etc, it is not surprising that Racing NSW's focus may have been elsewhere.

The Review did not test these complaints to any depth.

But leaving the regulatory functions of Racing NSW aside, there is a fundamental requirement for it to consult widely with the broader racing industry on its commercial responsibilities. As stated in the Brown Report when similar criticism about the lack of consultation was raised - "*Sound and proper consultation is the very essence of good governance."* – Page 27 of the Report.

Recommendation 9

The Review notes that section 14B (Consultation and Planning) was a recent amendment to the Act to facilitate formal consultation between Racing NSW and stakeholders. The Review notes that submission makers continue to express concerns in this area.

The Review does not recommend that the Act be amended again but that Racing NSW review its consultation policies, particularly in relation to the development of the industry strategic plan to ensure that appropriate consultation is made with all stakeholders within the thoroughbred racing industry.

Membership of RICG

The provisions under the *Thoroughbred Racing Act* in relation to the establishment of the RICG do not provide for the opportunity to appoint a representative of the NSW Bookmakers Co-operative to the Group.
Under the *Greyhound Racing Act 2009* the NSW Bookmakers Co-operative is an "eligible industry body" appointed by the Minister and may nominate a representative to the Greyhound Racing Industry Consultative Group (GRICG). The Review understands that the Co-operative also had representation on the Harness Racing Industry Consultative Group (HRICG) at certain times.

The Review is of the opinion that consideration should be given to the possibility of the Co-operative being appointed to the various consultative groups. This should be undertaken in consultation with RICG and HRICG representatives.

Recommendation 10

The Review recommends that consideration be given to the NSW Bookmakers Co-operative Limited being appointed an eligible industry body for the purposes of Racing Industry Consultation Group.

5.5.4. Revenue distribution

Submissions

This area is a perennial issue raised by the various racing codes and sections within those codes. At present, the NSW Legislative Council has established a Select Committee to inquire into Greyhound Racing in NSW, which has included a reference to racing industry funding.

- Racing NSW should be required to distribute all Race Fields Fee Scheme revenue using a performance based formula to allocate proportionate distributions to race clubs in a timely manner - ATC
- Racing NSW should be required to establish a process to provide visability of industry revenue collected by Racing NSW under various agreements - ATC
- The Act should be amended to require Racing NSW to distribute funds received from racing revenue which are to be allocated to race clubs immediately on receipt of such funds, and payment of all TAB distributions be restructured to allow monthly payments to race clubs - Confidential submission.

Policy Discussion

Racing NSW is a signatory to a series of agreements which deal with issues related to wagering and racing revenue and the requirement for the provision of race meetings. The Racing Distribution Agreement, Inter-Code Agreement and Intra-Code Agreement are complex, multi-partied, interlocking agreements that require unanimous agreement by all parties to be changed.

These arrangements exist external to the *Thoroughbred Racing Act* and appear to derive from the exercise of powers under the *Totalizator Act 1997.*

The *Thoroughbred Racing Act* is silent on wagering other than a reference to Racing NSW's power to licence bookmakers and bookmaker's clerks.

Unlike the provisions in the *Harness Racing Act* and the *Greyhound Racing Act*, Racing NSW has no legislative authority to distribute royalties received other than in accordance with the Intra-Code Agreement.

Similar concerns were raised in the Brown Report which recommended that Racing NSW be granted the same right to distribute these funds without the obstruction of any agreement. The then Government chose not to follow that recommendation.

Governments generally are loath to use legislation to interfere with existing commercial arrangements.

The various agreements enable the parties to change these agreements, albeit with unanimous agreement.

The Race Fields revenues appear to fall outside the ambit of these agreements, and according to Racing NSW those funds are being applied to increasing prize money and infrastructure.

Essentially it is the Review's opinion that the distribution of revenues received from wagering turnover is an issue for the industry to resolve.

However, the Review supports the following statements in the Brown Report:

> *"The formulation of a scheme of distribution should not be hindered or impeded by sectional industry interests. It should be devised in close consultation with stakeholders, particularly racing clubs and should have regard for the needs and relevant importance of each of the metropolitan, provincial and country sectors. I agree with RNSW's view that it should not be based on a simple market share distribution formula.*
>
> *A sound scheme of distribution should also have account of the need for clubs to budget and forward plan with confidence and certainty. It should have reasonable tenure and contain details of the processes for its periodic review."*[1]

The Review does not consider it appropriate for Government to interfere in these areas - particularly when the provisions of the *Thoroughbred Racing Act* state that Racing NSW does not represent the Crown and is not subject to direction or control by or on behalf of the Government.

Recommendation 11

The Review recommends that matters concerning the distribution of funds through private industry agreements (ie the Racing Distribution Agreement and the Inter-code Agreement) should not be overridden by legislation but remain issues for the racing industry to resolve in accordance with the terms of those of agreements.

Further, the Review notes the race fields scheme is established under the Racing Administration Act 1998 and that it is outside the scope of this Review.

[1] Page 25 of the Brown Report

5.6 Animal welfare

Background

A number of submissions were received in regard to animal welfare, particularly as it relates to thoroughbred horses.

Submissions

- The treatment of horses is not adequately addressed in the Act - The Greens
- The treatment of horses is not properly regulated by those in charge – Confidential submission
- The Act should require Racing NSW to collect, collate and publicise data on horses born, injured and killed in the racing industry each year - The Greens
- The legislation should require that the thoroughbred racing industry collect a small levy on betting turnover to fund re-homing and rehabilitation programs for retired thoroughbred horses - The Greens; Confidential submission

Policy Discussion

The *Prevention of Cruelty to Animals Act 1979* provides a range of powers for Police, RSPCA officers, and appointed government inspectors to investigate cases of animal cruelty and to enforce animal welfare law. In the course of investigating animal cruelty offences, officers and inspectors are empowered to:

- enter property
- seize animals
- seize evidence of animal cruelty offences
- issue animal welfare directions/notices
- issue on-the-spot fines, and
- initiate prosecutions under animal welfare legislation.

Persons found guilty of cruelty to an animal are subject to fines of up to $27,500 and imprisonment for 6 months, while conviction of aggregated violence to animals attracts four times these penalties.

Thoroughbred racing and its associated activities are conducted under the ARR which contain provisions relating to horse welfare. Racing NSW advises it also publishes on its website the "Welfare Guidelines for Australian Thoroughbred Racing" which were adapted from the "International Group of Specialist Racing Veterinarians Welfare Guidelines for Horse Racing".

Racing NSW advises that it also operates a comprehensive Thoroughbred Rehabilitation Program which is directed at the treatment of thoroughbred horses at the completion of their racing career.

The Thoroughbred Rehabilitation Program is a joint venture with NSW Corrective Services and TAFE which aims to:

- re-house thoroughbred horses when they retire from racing,

- re-educate and re-train thoroughbred horses for deployment in a new equine career such as equestrian competition - for example dressage and eventing or for mounted police and security work - and for recreation and leisure purposes, and
- provide inmates with skills training and prospective employment opportunities in the thoroughbred and other equine industries through the completion of relevant TAFE qualifications offered through the program.

The Program is a not-for-profit venture with any proceeds of the sale of re-trained horses being put back into the ongoing administration and development of the Program. Racing NSW provides funding and administrative support to the Program.

These animal welfare initiatives are identified in Racing NSW's Strategic Plan for the future of the thoroughbred racing industry in this State and are aimed at ensuring the future welfare of racehorses once they are no longer required to compete.

The Greens submission recommends that the *Thoroughbred Racing Act* incorporate provisions relating specifically to the treatment of horses in order to reflect changing community expectations on the prioritisation of animal welfare in the racing industry. The Greens argue that this would ensure that breaches of animal welfare are punishable, criminal offences, rather than being dealt with "in-house" by Racing NSW as part of its self-regulatory process.

The Review agrees that animal welfare is an important issue for all the racing codes. However, it does not support the racing legislation providing its own scheme of offences and procedures in dealing with this issue. This would possibly result in individual schemes for thoroughbreds, harness and greyhounds, as well as the existing scheme under the *Prevention of Cruelty to Animals Act.* This would be somewhat confusing for those charged with enforcing the legislation.

Notwithstanding that Racing NSW may deal with an individual who breaches racing rules as part of its responsibilities, it does not preclude police or others from taking criminal proceedings against that person for animal cruelty.

A confidential submission raised a large number of issues concerning the treatment of horses. Due to its confidentiality, it was difficult for the Review to take some of these issues further. The overwhelming majority of people within the racing industry have the welfare of horse deep at heart. However, the Review supports better education of the racing industry on animal welfare and research into issues that continually affect the heath of horses.

The Review is of the opinion that the provisions of the *Prevention of Cruelty to Animals Act,* the ARR and RNSW guidelines on animal welfare provide a regulatory framework that protects the welfare of horses. Regulators need to be vigilant to ensure that this framework is effectively enforced.

Provision of data

In terms of the other issues raised under this heading, the Review fails to see that a requirement to provide data in relation to the destination of thoroughbreds once they have left the industry will necessarily enhance their wellbeing.

Given that there are around 7,000 foals each year with an average life expectancy of over 20 years, a significant administrative burden would be placed on the industry, and presumably Racing NSW to maintain this data.

The issue at heart is the well being of the horse itself - whether it be a thoroughbred, harness, stock or any other variety. There are significant powers under the *Prevention of Cruelty Act* to deal with these issues.

Other rehabilitation funding

As detailed above, Racing NSW is undertaking a Thoroughbred Rehabilitation Program, and the Review is not supportive of a similar program being funded and incorporated into the *Thoroughbred Racing Act.*

Recommendation 12

The Review notes that the NSW Parliament has enacted the Prevention of Cruelty to Animals Act 1979 as the statute that covers the field for the prevention of cruelty to all types of animals.

The 1979 Act is the responsibility of another Minister and subject to its own statutory review processes and the issues are therefore not within the scope of this Review.

Recommendation 13

Similarly, the Review does not support legislation requiring the collection and collation of data or the imposition of fees on the industry to support a thoroughbred rehabilitation scheme.

5.7 Other issues

Submissions

There were a number of submissions that did not fall under the general themes outlined above. These included:

- "Taxes and levies" should first be paid to Government and any distribution to 'racing' or any other expenditure separately accounted for – Mr Peter Mair
- The definition of "eligible company" in section 14A should be amended to enable a more flexible approach (as in Victoria) - NSW Bookmakers Co-operative Limited
- Some form of simple and cost free reciprocal licensing capability be introduced to allow Thoroughbred-licensed bookmakers to field at Harness and Greyhound race meetings in NSW - NSW Bookmakers Co-operative Limited

Policy Discussion

Mr Peter Mair raised a range of issues - many of which do not come within the terms of reference for this Review which relates to the objects and provisions of the *Thoroughbred Racing Act.*

Mr Mair is of the view that *"all money collected as government endorsed 'taxes and levies' should first be paid into the public purse and any distribution of 'racing' or any other expenditure separately accounted for'".*

Mr Mair is critical of the current funding regime that represents owners as participants deserving to recover expenses - as distinct from being classified with punters.

The Review does not endorse these views.

Bookmaking issues

The NSW Bookmakers Co-operative Ltd raised two issues for the Review's consideration. The first relates to the limitations placed on an "eligible company" as defined in the Act.

Section 14A of the *Thoroughbred Racing Act* enables bookmaking licences to be held by either an individual or a proprietary company - which must be an "eligible company". In defining "eligible company" the Act imposes restrictions on the directors and shareholders of that company.

NSW has a longstanding policy that a licensed bookmaker should be a natural person that is over 18 years of age and meets the appropriate polity and financial capacity tests. The eligible company provisions were introduced relatively recently and provide for directors of that company to be close family members and each to be licensed as a bookmaker in the usual way.

The current provisions were introduced in 2002 as part of the NSW Government's response to the National Competition Policy.

The NSW Bookmakers Co-operative points out that many of the limitations imposed under the NSW legislation in respect of 'companies' are not evident under the Victorian model. According to the Victorian Bookmakers Association this absence of unnecessary restrictions has had no discernible detrimental impact on Victorian bookmakers, whether they be new entrants or pre-existing license holders, nor on the wider racing and wagering industry in that State.

The number of bookmakers has been declining over the years, but it is widely accepted in all racing codes that their presence on the race track brings a level of "colour" to the race day. If as stated in the submission, that the changes in Victoria have resulted in additional numbers of bookmakers, then the Review supports the request by the NSW Bookmakers Co-operative for change.

However, it is not clear whether these changes would result in a greater presence of on-course bookmakers. It may be that an unintended consequence would be a desire for corporate bookmakers to move their operations to online and office premises away from the racecourse.

While the Review has been told that Racing NSW supports the proposition, similar provisions apply under the *Greyhound Racing Act* and the *Harness Racing Act*. Both GRNSW and HRNSW should be consulted to ascertain their views.

Further, the Review notes that the statutory scheme for the licensing and regulation of bookmakers is spread over several Acts - the three racing controlling body Acts, the *Unlawful Gambling Act 1998* (in particular section 11 which prohibits secret financial interests and section 11A prohibiting remote access to betting) and Parts 3 and 3A of the *Racing Administration Act 1998* which regulate the scope of betting activities by licensed bookmakers.

A change to this policy is a matter for Government that should follow an appropriate consideration involving expert advice from the Office of Liquor Gaming and Racing, the Attorney Generals Department (noting that the *Unlawful Gambling Act 1998* is the principal criminal statute in relation to gambling matters) the racing controlling bodies and that group should consult with interested parties.

The second matter raised by the NSW Bookmakers Co-operative seeks to enable bookmakers who are licensed by Racing NSW to also field at greyhound and harness race meetings. In effect this would be similar to the existing provisions relating to telephone and internet betting, where the Minister can authorise a NSW licensed bookmaker to field telephone and electronic betting on any of the racing codes under the *Racing Administration Act.*

The Bookmakers Co-operative submission stated:

> *"Currently the minor codes are having difficulty attracting bookmakers to their race meetings, with the additional licensing related costs and administrative effort required by our members being a key disincentive. Again we have discussed this recommendation with the RNSW Chief Executive, who has indicated he is supportive of the concept on a "one way" basis (i.e. that there would be no automatic right for Harness and Greyhound bookmakers to field at thoroughbred meetings under their existing 'minor code' issued licenses)."*

The Review would also support a fundamental review of this area in consultation with Racing NSW, HRNSW and GRNSW with a view to consolidating these provisions under the responsibility of Racing NSW.

Recommendation 14

The Review does not recommend, at this time, the easing of the 'eligible company' provisions in the Act for the following reasons:

- *The statutory scheme for the licensing and regulation of bookmakers is spread over several Acts - the three racing controlling body Acts, the Unlawful Gambling Act 1998 (in particular section 11 which prohibits secret financial interests and section 11A prohibiting remote access to betting) and Parts 3 and 3A of the Racing Administration Act 1998 which regulate the scope of betting activities by licensed bookmakers.*

- *The Review considers that the statutory framework is largely outside the terms of reference of the review of the Act and that it would be prudent to defer to a review of the whole scheme to avoid unintended consequences.*

- *A change to this policy is a matter for Government to that should follow an appropriate consideration involving expert advice from the Office of Liquor*

Gaming and Racing, the Attorney Generals Department (noting that the Unlawful Gambling Act 1998 is the principal criminal statute in relation to gambling matters), the racing controlling bodies and that group should consult with interested parties.

Separately, in relation to the proposal for the consolidation of the licensing of bookmakers under the auspices of Racing NSW, the Review notes that the sharing of licensing arrangements may be achieved by way of section 18(4) of the Thoroughbred Racing Act 1996 (and corresponding provisions of the Greyhound Racing Act 2009 and Harness Racing Act 2009).

Section 18(4) currently provides that the three NSW racing controlling bodies may enter into arrangements to share the administration of licensing and registration functions. The consent of the Minister is a pre-requisite to such an arrangement.

The Review recommends that the three NSW racing controlling bodies consider the consolidation of the bookmaker licensing under the relevant corresponding sections in their respective Acts and inform the Minister of any proposal, or otherwise.

6 Review of the Australian Jockey and Sydney Turf Clubs Merger Act 2010

6.1 Background to the Merger Act

The Australian Jockey Club was formerly the 'principal club' for horse racing in New South Wales, having been founded in 1841. The Club conducted racing at the Randwick and Warwick Farm Racecourses.

The Sydney Turf Club, the State's second metropolitan race club, was established in 1943 and ultimately conducted its racing activities at the Rosehill Gardens and Canterbury Park Racecourses.

From time to time since the transfer of the Australian Jockey Club's responsibility for the control and regulation of thoroughbred racing to Racing NSW, the future viability of the two metropolitan race clubs continuing to conduct racing in opposition was raised.

A 2009 a report by Ernst & Young, followed by reports by L.E.K. and a Merger Benefits Team established by the Government all concluded that the merger of the Australian Jockey Club and Sydney Turf Club was of benefit to the racing industry and the economy of New South Wales.

In 2010 legislation was introduced to give effect to the proposed merger of the two clubs. The objects of the *Australian Jockey and Sydney Turf Clubs Merger Act 2010* are:

(a) to facilitate the merger of Australian Jockey Club Limited (the AJC) and the Sydney Turf Club (the STC) into a new racing club (the merged racing club) incorporated under the *Corporations Act 2001* of the Commonwealth (the *Corporations Act*) for that purpose (including by making provision for the transfer of certain assets, rights and liabilities and employees to the merged racing club),

(b) to make provision in relation to the corporate governance of the merged racing club,

(c) to provide for the functions of the merged racing club in relation to Randwick Racecourse and certain other racecourses,

(d) to provide for the granting of further leases over Randwick Racecourse,

(e) to provide for the repeal of the *Australian Jockey Club Act 2008* and the *Sydney Turf Club Act 1943*, and Australian Jockey and Sydney Turf Clubs Merger Bill 2010,

(f) to make provision for matters of a savings or transitional nature, and

(g) to make consequential amendments to certain other Acts and statutory instruments.

The following year the legislation was amended to replace the life term tenure provisions for Randwick Racecourse Trustees and provide the Randwick Racecourse Trust with a modern governance structure.

The legislation:

- provided for the tenure and appointment of the Randwick Racecourse Trust in accordance with modern practice, including replacing life tenure of Trustees with fixed term tenure,
- dissolved the existing three member Trust and replaced it with a new three member honorary Trust that has a Chairperson and two members,
- provided for a maximum term of 8 years overall, with terms of up to 5 years for the Chairperson and up to 4 years for a member,
- provided that the Minister responsible for racing may terminate a trustee's appointment at the discretion of the Minister,
- required that the Trust must seek the approval of the Minister before consenting to additional activities, including subleases, at the Racecourse, and
- generally prohibited the sale or disposal of any land or buildings at the Racecourse by the Trust without Ministerial approval.

The current 99 year lease of Randwick Racecourse to the ATC for the purpose of conducting racing and associated activities was not affected by the amendments to the arrangements for the Trust.

6.2 The Review Process

As previously stated it is proposed to undertake the review of the *Australian Jockey and Sydney Turf Clubs Merger Act* concurrent to the review of the *Thoroughbred Racing Act.*

Section 49 of the *Merger Act* provides that three years after Assent (16 November 2010) a review is to be undertaken to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 3 years.

The review report is to be tabled in Parliament by 16 November 2014.

The three year review deadline was identified so as to be conducted a year before the end of the four year term of the foundation ATC Board.

The Review Process is set out in Chapter 4 above.

6.3 Overview of Submissions - Australian Jockey and Sydney Turf Clubs Merger Act 2010

Of the 13 submissions received in response to the Review, only three dealt with issues surrounding the *Australian Jockey and Sydney Turf Clubs Merger Act.* These issues are listed below:

6.3.1 Validity of the Merger Act's objectives

Section 3 states the objects of the *Merger Act* are as follows:

(a) to facilitate the merger of the AJC and the STC into a new racing club incorporated under the Corporations Act (including by making provision for the transfer of certain assets, rights and liabilities and employees to the merged racing club),

(b) to make provision in relation to the corporate governance of the merged racing club,

(c) to provide for the functions of the merged racing club in relation to Randwick Racecourse and certain other racecourses,

(d) to provide for the granting of further leases over Randwick Racecourse,

(e) to provide for the repeal of the Australian Jockey Club Act 2008 and the Sydney Turf Club Act 1943,

(f) to make provision for matters of a savings or transitional nature,

(g) to make consequential amendments to certain other Acts and statutory instruments.

Submissions

Two submissions were received in regard to the objects of the *Merger Act.*

- The objectives of the *Merger Act* have been mostly achieved and the objectives 3 (b), (c) and (d) are of ongoing validity and relevance - ATC
- The objects of the Act remain valid – Racing NSW

Policy Discussion

There was little comment on the objects of the *Merger Act.* The merger has been successfully completed.

The Review sees no requirement to make recommendations for change.

Recommendation 15

The Review does not recommend any changes to the objects of the Merger Act.

6.3.2 Membership of the board of the ATC

Submissions

Again only the ATC and Racing NSW made submissions on the topic of membership of the board of the ATC.

- The ATC Board should comprise 3 members elected at a general meeting of the Club and the remaining 4 be nominated for appointment by the Selection Panel – Racing NSW
- The Selection Appointment Panel should comprise a person nominated by the Chairperson of Racing NSW, a director of the ATC nominated by the ATC Board and an independent person nominated jointly by the unanimous agreement of the Chairperson of Racing NSW and the ACT Board – Racing NSW
- ATC Board appointments should be made by the Chairperson of Racing NSW rather than the Minister – Racing NSW
- No change should be made to the number of ATC Directors, but their terms should be staggered to ensure retention and transfer of knowledge - ATC

Policy Discussion

The *Merger Act* (sections 6 and 10, and Schedule 1) outlines certain mandatory corporate governance provisions and provides the framework for the constitution of the ATC's board and the appointments process.

The Review understands that the preferred position advanced by the Merger Benefits Team was an independent Board structure with appointments on merit assessed against skills based criteria.

This was a sensitive issue in terms of the proud heritage of each club and the perception that members would be excluded from serving as directors.

In the event, the view was that a review down the track might find that those concerns had settled.

Following the appointment of the first board (9 members during the first 12 months), the current board consists of 7 members, each of whom are appointed for 4 years.

The Board must comprise 4 directors (Elected Directors) elected by resolution passed at a general meeting of the ATC, and 3 directors (Independent Directors) appointed by the Minister on recommendation of an appointments selection panel in accordance with section 10 of the *Merger Act.*

The appointments selection panel who is to recommend to the Minister the Independent Directors is constituted by the following persons:

- a person nominated by the Chairperson of Racing NSW,
- a director of the merged racing club nominated by the board of directors of the club who is an independent director, and
- a director of the merged racing club nominated by the board of directors of the club who is not an independent director.

The Racing NSW position is that in view of the large investment in new facilities at the ATC's racecourses (Racing NSW $150m and the NSW Government $24m) there should be a greater level of independence on the board.

Racing NSW suggests that there should be 4 Independent Directors, and 3 Elected Directors, and that the appointments selection panel should be comprised of:

- a person nominated by the Chairperson of Racing NSW
- a director of the ATC nominated by the ATC Board; and
- an independent person nominated jointly by the unanimous agreement of the Chairperson of Racing NSW and the ATC Board.

The ATC submits that no change should be made to the number of ATC directors or the basis of their appointments.

The Review notes that an amendment to the ATC Constitution requires a 75% majority to give effect to change in the structure of the Board.

The Review is of the opinion that at this point in time there should be no change to the number of the Elected and Independent Directors appointed to the Board or to the selection process. This view is based on the fact that the ATC board arrangements have only been in place for just 3 years, and during that time it has been reduced from 9 members to 7, undertaken a significant merger of the two largest race clubs in New South Wales, as well as a capital works program involving over $174m.

Over the recent past, a new Chair and Vice Chair have taken office and two directors have resigned. There is a general meeting of the ATC in November 2014 that will elect directors for those two positions and in the meantime the board has appointed two members to act in these positions. In addition the recent resignation of an independent director requires that an appointments selection panel will be established to recommend to the Minister a replacement appointee for the unexpired period of that director's term of office.

Given this changing environment, there is little scope to determine if change is required. The Review suggests that these matters could be reviewed at a later date, if the ATC and Racing NSW make consensus submissions to Government for change.

Recommendation 16

The Review recommends that there be no change to the numbers of elected or independent directors to the Australian Turf Club board, nor the current appointments selection panel or its process.

The further matter raised by the ATC is of some concern. That issue relates to the staggering of the appointment dates for directors. As arrangements currently stand, it is possible that all board members could retire at the same time, leaving little corporate memory and knowledge transfer at the board level.

The Review understands that the foundation Board appointments were made for 4 years in the context of significant workload and merger change management needs.[1]

In the case of Independent Directors, appointments after the foundation board may be made for such period as the panel considers appropriate not exceeding four years and the maximum term of 8 years.[2]

The Review notes that under the legislation and the ATC Constitution, an Elected Director may be removed from office by resolution passed in general meeting.[3]

Accordingly, the Review understands that there are present means by which staggered terms may be achieved after the foundation Board arrangements.

The ATC should take further advice on amending its Constitution on this point noting the 75% majority rule and the Ministerial consent required under section 9 of the Act. As the ATC submission points out, the ATC Constitution would require amendment to give effect to the new appointment periods.

Recommendation 17

The Review notes that for the foundation Board it was a necessity to have a full complement of directors given the workload and merger change management needs ahead. The Review also notes that the Merger Act provides, after the four year term of foundation Board, for the terms of Independent Directors to be staggered at the discretion of the selection panel to do so as necessary.

The Review recommends that the ATC obtain legal advice in relation to the amendment of its constitution for this purpose having regard to the Corporations Law and section 9 of the Act.

The review notes that it may be possible to give effect to staggered terms without amending the Act.

[1] Section 10(8)(a) of the *Australian Jockey and Sydney Turf Clubs Merger Act 2010*
[2] Section 10(8)(c) and clause 4(5) of Schedule 1 of the *Australian Jockey and Sydney Turf Clubs Merger Act 2010* respectively
[3] Clause 7 of Schedule 1 of the *Australian Jockey and Sydney Turf Clubs Merger Act 2010*

6.3.3 Ten year moratorium on the sale or disposal of racing infrastructure

Submissions

Two submissions were received on this issue - one in support of retaining the moratorium (Thoroughbred Breeders NSW); and the other in support of relaxing the restriction if there is industry and member support (ATC).

Policy Discussion

The Review notes that there is frequent speculation by racing media commentators about the possible sale of Canterbury Park Racecourse and there are a range of strong views within the thoroughbred racing industry about the merits of doing so.

Section 23 of the Merger Act places a ten year moratorium of the sale of certain assets of the ATC.

The second reading speech for the Merger Act in 2010 gives guidance as to the policy rationale for section 23. It states:

> *"Clause 23 of the Bill provides for a ten year moratorium on the sale of certain racecourse land that becomes vested in in the merged club. The clause has been expressed in terms of other than Randwick Racecourse and Warwick Farm. This is because the former is Crown land and simply cannot be sold by*

the merged club and the latter is excluded in recognition of a pre-existing arrangement relating to the establishment of the Inglis complex at Warwick Farm. This is a safeguard that has been included at the explicit request of the AJC, STC and Racing NSW to demonstrate that there is no intention to resort to a fire sale of land."

As a matter of principle, the Review is open to the proposition that the owner of an asset should be able to deal with that asset in an appropriate manner.

Given the consultation that occurred through the Merger Working Party (AJC, STC, Racing NSW and Government) following the Ernst & Young and LEK Consulting Reports and prior to the introduction of the merger legislation, it is considered appropriate that formal consultation be conducted jointly by the ATC and Racing NSW with the racing community.

The Review is not expert in these matters but acknowledges that the issue is complex and that there are strong views in the racing community about the sale of a metropolitan racecourse. Accordingly, the proposal should be properly tested and that such evidence should inform the industry position before it is put to Government for an amendment that must be considered by Parliament.

The Review notes the following matters, which are not intended to be an exhaustive list, for consideration:

- The optimal allocation of race dates, trials and training facilities etc across Sydney Metropolitan racecourses should be reviewed for example against 'wear and tear' from possible over-racing, and the patterns of weather which might require transfer of a race meeting or trials between racecourses. The fundamental principle is to ensure that utilisation of Sydney racecourse infrastructure is maximising wagering turnover for the present and the future in accordance with strategic development and public interest goals.
- Canterbury Park Racecourse is currently the home of night racing in Sydney and is often programmed with a Moonee Valley race day to maximise wagering turnover. Should it be sold, what are the future plans?
- Are there any obligations under the Racing Distribution Agreement (RDA) that require consideration?
- There has been a long standing practice since before the privatisation of the TAB to provide infrastructure to race clubs by what are termed Interest Free Interminable Loans (IFIL). The rationale for this funding mechanism is that the loan is repayable if a race club sells its assets and ceases to conduct racing. In that event the industry funds revert to the relevant racing controlling body (ie Racing NSW) to allocated for industry purposes. The Review is not aware of the extent of such obligations or of how such funds might be re-allocated.
- The strong inference from the above is that a racecourse is an 'industry asset' and that a Metropolitan racecourse is a significant element which influences wagering turnover and therefore can affect the overall size of TAB distribution and race fields revenues that might be available to all sectors of the thoroughbred racing industry.

Also racecourses must be licensed and cancelled by the Minister pursuant to the *Racing Administration Act 1998*[1]

- The Minister would be responsible for proposing an amendment to Section 23 to Cabinet and managing its consideration through Parliament. The industry formal consultation process should be informed by an evidence based cost benefit analysis that demonstrates a benefit to the racing industry and the State. Any proposal to the Minister should have the full support of the racing industry to enable the Minister to manage the Executive and Parliamentary arms of Government.

Recommendation 18

The Review recommends that the Government response to the possible amendment of Section 23 of the Merger Act be deferred until such time as the ATC and Racing NSW engage in a formal consultation with industry stakeholders and that there is a consensus view to lifting the restriction based on detailed consideration of ensuring that Sydney racecourse infrastructure and its utilisation are maximising wagering turnover for the present and the future in accordance with strategic development and public interest goals.

6.3.4 Other issues

Submissions

One other issue was raised for consideration.

- Any changes to the *Merger Act* should not increase the powers of Racing NSW over any race club - Thoroughbred Breeders NSW

Policy Discussion

There was no recommendation to the Review that put forward a case for the powers of Racing NSW to be increased under the provisions of the *Merger Act.* The *Merger Act* only has reference to the ATC, not other race clubs. Discussion on the functions and powers of Racing NSW is outlined further at Chapter 5.5.

[1] Sections 7 and 9 of the *Racing Administration Act 1998*

Report on the Powers of Racing NSW over Unlicensed Persons

David Armati

21 December 2013

The Hon G Souris
Minister for Tourism, Major Events, Hospitality and Racing,
Minister for the Arts, Minister for the Hunter,
Level 30
Governor Macquarie Tower,
1 Farrer Place,
Sydney 2000

Dear Minister,

I have pleasure in delivering to you my report on the powers of Racing NSW to compel unlicensed persons to produce documents or things, attend inquiries and answer questions.

My report was prepared in accordance with your request to me of 23 July 2013.

On 21 December 2013 I emailed to your officers a copy of the report. I have made some typographical corrections in this copy and made one change. That change is in recommendation 7 in the executive Summary and on page 27 of the report. It comprises the addition of the words "where a person attends or produces documents or things after a Supreme Court order". This change was made to make it clear the recommendation was limited to those circumstances.

I regret the delay in providing the report occasioned by the time taken by the Department of Attorney General and Justice to consider the issues after a conference with them on 7 August 2013. I understand the recent court cases referred to in the report necessitated a detailed and understandable consideration.

As referred to in the report there are presently two matters that may necessitate a delay in implementing any of the recommendations, if they are to be accepted.

They are the current review by Mr Foggo of the Thoroughbred Racing Act and ongoing court cases.

I remain available to discuss the report with you and your officers.

Thank you for entrusting me with this most complex and interesting issue.

Yours sincerely,

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15 January 2014

UNLICENSED PERSONS

REPORT TO THE HON G SOURIS, MINISTER FOR TOURISM, MAJOR EVENTS, HOSPITALITY AND RACING ON THE POWERS OF RACING NSW

REPORT BY DB ARMATI LLB

21 December 2013

EXECUTIVE SUMMARY

On 23 July 2013 you asked me to inquire into and report to you on the powers of Racing NSW to compel unlicensed persons to produce documents and things and to attend inquiries and answer questions.

As requested I have consulted Racing NSW and The Department of Attorney General and Justice.

My report recommends legislative amendment to the Thoroughbred Racing Act 1996 to remove uncertainty as to whether Racing NSW has the necessary powers, to specifically vest Racing NSW with the necessary powers, to express the necessary powers and the safeguards required if they are to be exercised.

My recommendations are:

1. I recommend that there be legislative change to require persons not licensed by Racing NSW to be compelled to attend an inquiry, answer questions and/or produce documents or things.

2. I recommend that appropriate powers with appropriate derivative protections be given to Racing NSW by amendment to the Thoroughbred Racing Act.

3. I recommend that the Thoroughbred Racing Act be amended to empower Racing NSW to compel unlicensed persons to:

(i) produce documents, however created, and information to Racing NSW or other designated bodies,

(ii) attend hearings by stewards or the Appeal Panel and,

(iii) answer questions at such hearings;

4. I recommend that the Government consider using the model contained in the Australian Sports Anti-Doping Authority Act 2006 or, adopt such other model from existing legislation that the Government considers appropriate.

5. I recommend that the legislative amendment contain derivative provisions.

6. I recommend that there be judicial oversight of Racing NSW of the type set out in this report.

7. I recommend that Racing NSW and the stewards, in conducting an inquiry where a person attends or produces documents or things after a Supreme Court order, be required to have the presence of a legally qualified person.

8. I recommend that the legislative amendments include criminal sanctions for non-compliance and that those sanctions provide for a monetary penalty and a term of imprisonment.

9. I recommend that ,if criminal sanctions of a monetary nature are included, that consideration be given to including a continuing daily monetary penalty until the order is complied with.

10. I recommend that, if the Government is not to act urgently on these recommendations, that they be referred to the statutory review of the Thoroughbred Racing Act.

11. I recommend that the Government have regard to any pending cases that might impact upon the recommendations in this report.

12. I recommend that the Minister write to Racing NSW suggesting that it should liaise with the Police to establish protocols for the notification by Racing NSW to the Police of any activity coming to the notice of Racing NSW which might involve criminal activity.

UNLICENSED PERSONS

REPORT TO THE HON G SOURIS, MINISTER FOR TOURISM, MAJOR EVENTS, HOSPITALITY AND RACING ON THE POWERS OF RACING NSW

REPORT BY DB ARMATI LLB

21 December 2013

BACKGROUND

The terms of reference

By letter dated 23 July 2013 to me from Ms Elisabeth Tydd, then executive director, Department of Trade and Investment, Office of Liquor Gaming and Racing, I was appointed by the Minister to:

"Inquire into and report on the attached legislative proposal of Racing NSW to the Minister dated 13 June 2013 to:

1. Empower Racing NSW to compel unlicensed persons to:
   (i) produce documents, however created, and information to Racing NSW or other designated bodies,
   (ii) attend hearings by stewards, the Appeal Panel or the Racing Appeals Tribunal, and,
   (iii) answer questions at such hearings;
2. Empower appropriate bodies to impose penalties for non-compliance;
3. Establish procedural mechanics to effect these powers;
4. Provide appropriate protection against self-incrimination or liability in criminal or civil proceedings or any other proceedings arising from such actions."

Attachment 1 to this report is the letter of Racing NSW of 13 June 2013.

As the original request from Racing NSW of 13 June 2013 did not include a request for a power to compel the production of documents and other things, Racing NSW, after a meeting with me on 15 July 2013, formally requested that that power be considered and it is noted that on 5 August 2013 the Minister authorised me to consider that additional power.

Attachment 2 to this report is a letter of Racing NSW to the Minister of 5 August 2013 and his endorsed agreement.

Nature of the Inquiry

By the letter of appointment I was required to report as soon as reasonably practicable and empowered to conduct such interviews and attend upon such persons or entities as I saw fit. I was required to consult with officers of the NSW Department of Attorney General and Justice.

My consideration of this issue was limited by the initial request for a prompt report and advice from your officers that it was not necessary for me, at the present time, to consult a number of agencies such as the Law Society of NSW, Bar Association of NSW, entities involved with civil liberties, journalists and national racing bodies.

Accordingly I limited my attendances to Racing NSW and the NSW Department Attorney General and Justice. A number of legislative provisions and legislative proposals together with numerous court decisions, submissions and reports have been considered and are referred to in the body of the report.

Delay in the Provision Of This Report

In accordance with my duties I consulted with officers of the NSW Department of Attorney General and Justice on the first available mutually convenient date of 7 August 2013. Comment was not received from those officers until 5 December 2013. Delay was occasioned by the need for those officers to consider very recent and highly relevant court decisions. I note that I have kept the Minister and his officers advised of the reasons for the delay in the provision of this report. Those reasons include a necessity for input from those officers to ensure the proposal will have appropriate ministerial approvals and address the necessary issues.

THE ISSUES REPHRASED

1. Does Racing NSW have power to compel unlicensed persons to produce documents and things and give evidence. If the answer is yes then no other matters need be considered.

2. If the answer is no then should Racing NSW have those powers.

3. If those powers are necessary what should they be.

4. How should those powers be exercised.

5. What safeguards should be put in place if those powers are to be exercised.

THE LEGISLATIVE SCHEME AT PRESENT

The relevant act is the Thoroughbred Racing Act 1996 ("the Act").

This is an act to:

"An Act to make provision for the establishment, management and functions of racing New South Wales as a representative body to control thoroughbred horse racing in the State; and for other purposes."

Section 4 establishes Racing NSW as follows:

"(1) There is established by this Act a body corporate with the corporate name of Racing New South Wales.
(2) Racing New South Wales may, in the exercise of its functions, use the name "Racing NSW."

Section 5 makes Racing NSW independent of government as follows:

"Racing NSW does not represent the Crown and is not subject to direction or control by or on behalf of the Government."

Sections 6 to 12 provide for the membership, selection of, terms of, remuneration of, duties of, requirement to comply with a code of conduct and exculpation of personal liability of the members of Racing NSW. Importantly the duties include that in section 11 which is as follows:

"11. It is the duty of each appointed member of Racing NSW to act in the public interest and the interests of the horse racing industry as a whole in New South Wales."

Section 13 sets out functions of Racing NSW, relevantly, as follows:

"(1) Racing NSW has the following functions:
(a) all the functions of the principal club for New South Wales and committee of the principal clubs in New South Wales under the Australian Rules of Racing,
(b) the control, supervise and regulate horse racing in the State,
(bi) such functions in relation to.... strategic development of the horse racing industry in the State...
(c) to initiate, develop and implement policies considered conducive to the..... welfare of the horse racing industry in the State and the protection of the public interest as it relates to the horse racing industry,
(d)... insurance..,
(e) such functions as may be conferred or imposed on Racing NSW by or under the Australian Rules of Racing or any other Act,
(f) such functions with respect to horse racing in New South Wales as may be prescribed by the regulations.
(2) The functions of Racing NSW are not limited by the Australian Rules of Racing and are to be exercised independently of the Australian Racing Board,
(3 & 4) not relevant"

Section 14 sets out the powers of Racing NSW, relevantly, as follows:

> "(1) Racing NSW has power to do all things that may be necessary or convenient to be done for or in connection with the exercise of its functions.
> (2) without limiting subsection (1), Racing NSW has power to do the following:
> (a) not relevant
> (b) register or licence, or refuse to register or licence, or cancel or suspend the registration or licence of, a race club, or an owner, trainer, jockey, stable hand, bookmaker, bookmakers clerk or another person associated with racing, or disqualify or suspend any of those persons permanently or for a specified period,
> (c) supervise the activities of race clubs, persons licensed by Racing NSW and all other persons engaged in or associated with racing,
> (d) inquire into and deal with any matter relating to racing and to refer any such matter to stewards or others for investigation and report and, without limiting the generality of this power, to inquire at any time into the running of any horse on any course or courses, whether or not a report concerning the matter has been made or decision arrived at by any stewards,
> (e - j) not relevant
> (k) prohibit a person from attending at or taking part in a race meeting,
> (l) impose a penalty on a person licensed by it or on an owner of a horse for a contravention of the Rules of Racing,
> (m-v) not relevant
> (w) take such steps and do such acts and things as are incidental or conducive to the exercise of its powers and the performance of its functions."

Sections 14AA to 18A cover registration and licensing of people and bookmakers, consultation and planning, terms of office of various members and staff. The only section of relevance is 14AA which mandates fitness and propriety of persons to be registered or licensed.

Section 19 provides some relevant procedural matters as follows:

> "19 (1) Racing NSW may regulate its proceedings as it considers appropriate, subject to this section.
> (1A) P roceedings in respect of an inquiry conducted by Racing NSW may be conducted in public or in private, or partly in public and partly in private, as Racing NSW may decide.
> (1B) In conducting an inquiry, Racing NSW may examine any witness on oath or affirmation, or by use of a statutory declaration.

It is interesting to note powers vested in the Integrity Assurance Committee, created by Racing NSW under section 23, as they are set out in section 23A. Those powers extend to compelling a racing official who is under investigation to provide information and records and for examination et cetera of those records and provide consents for committees to obtain information from other persons. Those other persons do not incur a liability to another person if they comply. Criminal sanctions are provided for non-compliance.

Section 29 requires Racing NSW to provide an Annual Report to the Minister for tabling in Parliament.

The remaining provisions of the Act need not be considered on the issues.

It might be noted that Part 4 provides for the Appeal Panel which would of course be relevant to do with any appeal from the stewards or Racing NSW from any person aggrieved by a decision. If the power to deal with unlicensed persons exists then those appeal rights would not be disturbed.

It might also be noted that there is no Regulation made under the provisions of the Act.

Of interest is the provision in the Racing Appeals Tribunal Act which empowers the tribunal to compel persons to attend hearings or produce documents as follows:

"16A (1) The Tribunal may, by written notice served upon any person, require the person to attend at a time, date and place specified in the notice for the purpose of:

(a) giving evidence relating to an appeal being heard or to be heard by the Tribunal, or

(b) producing any document, relating to such an appeal, specified in the notice that is in the person' s possession or under the person' s control.

(2) a person who is served with a notice under this section must not, without reasonable excuse, fail or refuse to comply with the requirements of the notice. Maximum penalty: 5 penalty units."

Subsection 16A(3) provides for conduct money.

RULES OF RACING OF RACING NSW

In accordance with section 13 (1)(e) of the Act Racing NSW has functions conferred from The Australian Rules of Racing ("AR") and has also adopted Local Rules ("LR").

The relevant parts of the rules of racing are as set out below.

AR1 is the definition section and says:

a "participant in racing" includes a trainer, a person employed by a trainer, a nominator, a rider, a riders agent and any person who provides a service or services connected with the keeping, training or racing of a horse.

a "person" includes any syndicate, company, combination of persons, firm, or stud owning or racing a horse or horses."

AR2 provides:

"Any person who takes part in any matter coming within these Rules thereby agrees with the Australian Racing Board and each and every Principal Racing Authority to be bound by them."

AR7 sets out powers of a Principal Racing Authority (which I note includes Racing NSW) relevantly and paraphrased as follows:

"(ii) have the control and general supervision of racing within its territory.

(iii) (b) to license jockeys, trainers and others on such terms and conditions as it shall think fit, and at any time to suspend, vary or revoke any such licence without giving any reason therefore.

(c) to inquire into and deal with any matter relating to racing... the running of any horse upon any course

(d) to penalise:

(i) any person contravening the Rules or disobeying any proper direction of any official, or

(ii) any licence person or official misconduct or negligence in the performance of his duties as led, or could have led to a breach of the Rules.

AR8 provides for the powers of the stewards relevantly and paraphrased as follows:

"(b) to require and obtain production and take possession of any mobile phones, computers, electronic devices, books, documents and records, including any telephone or financial records relating to any meeting or enquiry.

(e) to penalise any person committing a breach of the rules.

(y) To exercise any other powers and duties laid down for them by the Principal Racing Authority concerned.

(z)... where a person has been charged with a breach of these Rules (or a local rule...) or a person has been charged with the commission of an indictable criminal offence, the stewards... of the opinion that the continued participation of that person in racing might pose an unacceptable risk to, prejudice or undermine the image, interest or integrity of racing, may:

(a) suspend any licence, registration, right, or privilege granted under these Rules to that person;

(d) make any other direction or order related to that person which is in the interests of racing,"

AR69 and following deal with syndicates and thereby catch any person involved in a syndicate.

AR175 sets out offences and the powers of a committee or steward and relevantly and paraphrased as follows:

"(a) Any person, who, in their opinion, has been guilty of any dishonest, corrupt, fraudulent, improper or dishonourable action or practice in connection with racing.

(aa) any person, who in their opinion, engages in conduct that corrupts the outcome of the race or is intended to corrupt the outcome of a race.....

(b) any person who corruptly gives or offers any money, share in a bet, or other benefit to any person having official duties in relation to racing, or to any owner, nominator, trainer, rider, or person having charge of or access to a racecourse.

(f) Any owner, nominator, lessee, member of a syndicate, trainer, jockey, rider, apprentice, stable hand, bookmaker, bookmaker' s clerk, person having official duties in relation to racing, person attendant on or connected with the horse, or any other person who refuses or fails to attend or give such evidence as directed at any inquiry or appeal when requested by the Principal Racing Authority or Stewards to do so.

(g) any person who gives at any inquiry or appeal any evidence which in their opinion is false or misleading in any particular.

(gg) any person who makes any false or misleading statement or declaration in respect of any matter in connection with the administration or control of racing.

(k) any person who has committed any breach of the Rules, or whose conduct or negligence has led or could have led to a breach of the Rules.
(l) any person who attempts to commit, or conspires with any other person to commit, or any person who connives at or as a party to another committing any breach of the Rules.
(p) Any person who fails or refuses to comply with any order, direction or requirement of the Stewards or any official.
(q) any person who in their opinion is guilty of any misconduct, improper conduct or unseemly behaviour."

AR175A states:

"Any person bound by these Rules who either within a racecourse or elsewhere in the opinion of the Committee of any Club or the Stewards has been guilty of conduct prejudicial to the image of, or interest, or welfare of racing may be penalised."

AR 192 states:

"Any person found by the Principal Racing Authority or by the Stewards to be a defaulter in bets or any person posted as a defaulter in bets by any Club recognised by a Principal Racing Authority for the purposes of this Rule, may be disqualified until his default is cleared or his posting removed."

AR197 states:

"No person shall be entitled to make any claim for damages by reason or in consequence of the imposition, annulment, removal, mitigation, or omission of any penalty imposed or purporting to be imposed under the Rules."

AR199B is the rule that provides that any person attending or required to attend an inquiry or hearing is not entitled to be legally represented.

The Local Rules apply.

LR3 states:

"Any person who takes part in any matter coming within the Rules of Racing, or to which the said rules apply, thereby agrees to be bound by them."

LR6 states:

"The Board has power to warn off any or all racecourses within its control any person whose presence there on in the opinion of the Board is not desirable."

The powers of the stewards, which need not be set out, are expressed in LR12 to 17A.

Powers and procedural requirements for the appeal process are set out in LR104 to 107.

BYLAWS

The Racecourse (General) By Law 1990, clause 14, provides a general power to refuse admission to racecourses.

DOES RACING NSW HAVE THE POWER TO COMPEL UNLICENSED PERSONS?

The problem for Racing NSW is set out in the letter to you of 13 June 2013 in the following terms on page 1:

> "Licensed persons are expressly bound by the Rules of Racing and subject to the procedures and findings of the stewards and associated Appeals Panel and Racing Appeals Tribunal. In some circumstances, certain unlicensed persons may be held by implication to have subjected themselves to the same regime. However, the issue is not well defined and clarification would be important, for example, in relation to the behaviour of racecourse attendees or the behaviour of unlicensed persons in relation to the "conduct prejudicial" provisions."

It is trite to say that the Act and the Rules of Racing apply to licensed persons..

A reading of the Act and Rules of Racing taking into consideration the powers and functions of Racing NSW could lead to a finding that those provisions extend to unlicensed persons.

However, there are reasons why a contrary conclusion is arguable Those reasons are to be found in case law, from actions taken in other States to remove doubt and reinforced by recent inquiries.

Caselaw

A number of cases have provided decisions reading down powers relating to racing and others making decisions in other fields which provide by implication a similar reading down of the powers relating to racing. They are encapsulated in Clements.

Racing cases

-Roberts

The New South Wales Thoroughbred Racing Board Appeals Panel in the Matter of the Appeals of Dr Tim Roberts determined on 22 April 1988 the powers of the then Thoroughbred Racing Board to discipline a Victorian vet. That vet was not licensed in NSW but treated a race horse in NSW. Various breaches of the Australian Rules of Racing were dealt with. Challenge was taken to the powers of the board to deal with him on the basis the rules did not apply to him.

In paragraphs 16 to 27 the Panel set out the reasons. These paragraphs are attached as they have been downloaded from a PDF.
See attachment 3 - Roberts case

Essentially the Panel was dealing with rules of racing which are the same as now and similar statutory provisions as those that now apply.

Firstly, reliance is placed on the decision of the Privy Council in Stephen v Naylor and the terms of the act.

As referred to in Clements below that Privy Council decision is no longer binding. Its ratio is that you can put yourself within the rules if your actions related to racing and were within the purview of the rules.

Secondly, the then legislative scheme which is now mirrored in section 13 of the Act, contains a statutory recognition of the Rules of Racing and authorizes and empowers the board and its stewards to give effect to those Rules. That happens because the scheme of the act, through functions and powers, gives effect to the Australian Rules of Racing.

-Clements

The most recent direct case was determined in the Victorian Civil and Administrative Tribunal on 30 July 2010 in a matter of Clements v Racing Victoria Ltd (Occupational and Business Regulation) [2010] VCAT 1144 ("Clements"). This decision is not binding on the relevant authorities in New South Wales but it was presided over by a Supreme Court judge and it would be necessary to find reasons to distinguish the findings as they deal with the Australian Rules of Racing. It is highly persuasive. It is undoubtedly correct in its legal conclusions.

It dealt with the application of AR8 to an unlicensed person. AR8 deals with the power of stewards to obtain production and take possession of phones, computers, documents et cetera and is set out above. Mr Clements, a professional punter frequently attended race meetings and had discussions with jockeys and placed bets with Betfair. He was not a licensed person. He was required to produce records but did not and was warned off. It was an agreed fact that at no time had he agreed to be bound by the Rules. He did not submit to the jurisdiction of the stewards or the relevant board.

The judgment analysed a number of Australian and English cases. Its key findings are:

1. A number of Local Rules were said to bring him within the jurisdiction but at 38 it was said:
   "But the mere assertion of jurisdiction does not confer it."

2. The decision did not follow Stephen v Naylor (1937) 37 SR (NSW) 127 where the Privy Council said at 15:
   "the respondent was disqualified because he impeded by lying during the course of a necessary and proper enquiry and he has to suffer not because he consented to be bound by the rules, but because he permitted himself so to act as to bring his actions within their purview."

At 42 and following he rejected a premise of the Privy Council.
   "The Privy Council effectively treated the Rules as if they had statutory force such that they apply to anybody who came within the terms."

3. At 45 and following he determined that racing type decisions were those of domestic tribunals and that their authority is derived solely from contract, that is, from the agreement of the parties concerned. At 48 and following he said:

> "48 The general proposition espoused in Lain's case has also been applied to racing in Australia. In Harper v Racing Penalties Appeal Tribunal of Western Australia the Supreme Court of Western Australia (per Malcolm CJ, Kennedy, Franklyn, Anderson and Owen JJ) determined that the Rules of Trotting were intended to have consensual or contractual force and did not form part of the statute law of that state. The legislative position in WA has altered since these cases were decided.
> 49 For completeness we note that in a case sometime after Stephen v Naylor the Privy Council made reference to the fact that the disciplinary powers of racing bodies rest on consensus. In Calvin v Carr an owner challenged a disciplinary ruling by the Australian Jockey Club. After referring to the relevant rules and provisions of the Australian Jockey Club Act 1873 their Lordships said:
>
> > "Although these rules and statutory provisions contain a good deal of repetition and circularity it is clear that they provide a comprehensive scheme or code for the administration of racing and for the exercise of discipline through domestic bodies whose jurisdiction, though reinforced by statute, is founded on consensual acceptance by those engaged in the various activities connected with horse racing."
>
> 50. A necessary corollary to the contractual source of the Stewards' powers is that those powers do not extend to individuals who do not agree (either expressly or by implication) to be bound by the Rules. This was succinctly stated by Denning LJ (as he then was) put it in Lee v The Showmen's Guild of Great Britain:
>
> > "The jurisdiction of a domestic tribunal ...must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authori[z]es it or the parties agree to it."
>
> 51. This general proposition has also been held to apply to racing tribunals. As Sir Thomas Bingham MR observed in R v Disciplinary Committee of the Jockey Club, Ex parte Aga Khan:
>
> > "The Jockey Club cannot, of course, impose contractual conditions on those who do not seek any licence or permit from it and therefore do not enter into any contract with it. This is a class which includes members of the general public ..."
>
> 54. As Lawton LJ said in Law v National Greyhound Racing Club Limited:
>
> > "A stewards' inquiry under the defendants' Rules of Racing concerned only those who voluntarily submitted themselves to the stewards' jurisdiction. There was no public element in the jurisdiction itself. Its exercise, however, could have consequences from which the public benefited, as, for example by the stamping out of malpractices, and from which individuals might have their rights restricted by, for example, being prevented from employing a trainer whose licence had been suspended. Consequences affecting the public generally can flow from the decisions of many domestic tribunals ... the courts have always refused to use the orders of certiorari to review the decisions of domestic tribunals."

55. Similarly, in D'Souza v Royal Australian and New Zealand College of Psychiatrists and ors Ashley J (as he then was) held that a decision of the College to deny the plaintiff fellowship was not amenable to judicial review despite the public consequences of such a decision.
56. It seems to us that the 'gap' identified by Dr Pannam can be remedied by legislative amendment to give the Rules statutory force."

4. At 65 and following he dealt with common-law statutory construction:

"65. The standard or usual approach to statutory construction is informed by the common law presumption that fundamental rights and freedoms cannot be abrogated without 'a clear expression of an unmistakable and unambiguous intention'. This involves favouring an interpretation which produces the least infringement on common law rights. In R v Secretary of State for the Home Department; Ex parte Pierson, Lord Steyn described this approach as 'the principle of legality'.
66. The right to privacy and to protection from trespass are protected by this common law doctrine. In Coco v R the High Court held that the Invasion of Privacy Act 1971 (Qld), which authorised the use of listening devices in certain circumstances, did not confer a right on a judge to authorise entry onto premises for the purpose of installing and maintaining a listening device, where to do so would otherwise constitute a trespass."

5. At 67 and following he dealt with the principle of legality and its application to the rules of racing:

"67. In Electrolux Home Products Pty Ltd v Australian Workers' Union Gleeson CJ explained the rationale for the principle in these terms:

> "The joint judgment in Coco went on to identify as the rationale for the presumption against modification or abrogation of fundamental rights an assumption that it is highly improbable that Parliament would "overthrow fundamental principles, infringe rights, or depart from the general system of law" without expressing its intention with "irresistible clearness". In R v Home Secretary; Ex parte Pierson, Lord Steyn described the presumption as an aspect of the principle of legality which governs the relations between Parliament, the executive and the courts. The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

68. AR8 is a broad, invasive power. It empowers the Stewards to require a person to hand over any 'mobile phones, computers, electronic devices, books, documents and records ... relating to any meeting or inquiry'. Courts have been slow to imply the existence of such an invasive power. Nor is it to the point that rules such as AR8 are for the public benefit, to keep the sport of racing untarnished. As Fraser J observed in Demerara Turf Club and Others v Phang:

> "Such absolute power when attributed to institutions which are popular may also have to be accorded to the institutions which are disliked and the implications might encourage grave forebodings in the minds of those who

cherish individual freedom and are wedded to the idea that no man ought to be made to suffer loss or damage by an arbitrary assumption of jurisdiction ..."

69. It seems to us that the principle of legality applies with equal force to the interpretation of rules of domestic tribunals. Just as domestic tribunals are subject to the rules of natural justice – an aspect of the rule of law – so too should their rules be construed by reference to the principle of legality. Any doubt in interpretation should be resolved in favour of the person said to be subject to the rules.

70. Such an approach applies to both the language of the relevant rule and to the class of persons it purports to cover.

71. The application of the principle of legality in the context of this case supports a conclusion that the powers in AR8 do not extend to persons who have not agreed to be bound by the Rules. It would be contrary to this principle to extend the application of the Rules to persons who have not agreed to be bound by the Rules but have, by their actions, brought themselves 'within the purview of the Rules'. Such a test is simply too vague and imprecise to provide a proper basis for the conferral of coercive power."

6. His conclusions are found in paragraphs 72-75

"72. In conclusion, and contrary to the decision of the Board, we have decided that Mr Clements was not subject to AR8. The source of the Stewards' powers under that rule is contractual and those powers do not extend to persons who have not agreed (either expressly or by implication) to be bound by the Rules. The contractual nature of the powers of a domestic tribunal (such as the Stewards and the Board) is clearly supported by authority in both England and Australia and our conclusion is also consistent with the principle of legality.

73. To the extent that Stephen v Naylor stands for a broader proposition – that rules such as AR8 apply to persons who, by their actions, bring themselves within the purview of the Rules – we respectfully decline to follow that decision.

74. We acknowledge the public importance of the disciplinary functions exercised by the Stewards and the Board in protecting the integrity of racing. But such a public benefit does not alter the contractual source of their powers. To the extent that our decision creates a regulatory gap, it can be addressed by the legislature.

75. As Mr Clements was not subject to AR8 it necessarily follows that the Board had no jurisdiction to record a finding that he breached AR175(p) and nor did the Board have jurisdiction to impose a penalty. We will order that the finding and penalty be set aside."

Pedrana v Racing NSW (veterinary case)-19 December 2013

I have not seen the pleadings or draft decision in this matter. I understand an injunction was refused by the Supreme Court of NSW. That injunction was sought by a number of vets seeking to restrain Racing NSW from implementing LR82C on 15 January 2014 so as to require vets to be licensed if they are to provide services to thoroughbred horses in training or competition. As I understand the case is expected to be heard on 4 February 2014 and will provide a parallel consideration of the issues addressed in this paper, that is, statutory powers vested in Racing NSW.

Non-racing cases

The use of compulsory question and compulsory production of document powers have been constrained by recent cases. The interrelationship of the criminal law and the activities likely to be investigated mean that the courts will read down laws that attempt to impose those powers. This will apply even if the prohibition on use of those answers or documents in other proceedings (commonly now called "derivative powers") is in place.

X 7

X7 v Australian Crime Commission [2013] HCA 29 dealt with the power of an examiner under the Australian Crime Commission Act 2002 to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence charged. The High Court found that the act did not authorise the examiner to require the person to answer the questions.

The necessity for clear legislative words was emphasised at 24, 125 and 158:

> "French J and Crennan J 24. The rule of construction mentioned above, that statutory provisions are not to be construed as abrogating important common law rights and immunities in the absence of clear words or necessary implication to that effect, applies to the examination provisions, involving as they do an abrogation of the privilege against self-incrimination. The rule is based, in part, on "a working assumption about the legislature's respect for the law", which in this case is evidenced in provisions protecting from prejudice the fair trial of an examined person who has been charged with an offence.
>
> Hayne J and Bell J125. As has been explained, if an alteration of that kind is to be made to the criminal justice system by statute, it must be made clearly by express words or by necessary intendment. If the relevant statute does not provide clearly for an alteration of that kind, compelling answers to questions about the subject matter of the pending charge would be a contempt.
>
> Kiefel J158.The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness. That is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so.

This case is further examined in respect of later issues in this paper.

Lee

Lee v NSW Crime Commission [2013] HCA 39 dealt with the NSW Criminal Assets Recovery Act 1990 which contains a power to examine persons in aid of confiscation order applications even though they had been charged with serious criminal offences. That case examined the presumption of innocence, the privilege against self-incrimination and the right to silence and a number of rules of statutory construction. It noted recent legislative interventions against those protections with appropriate derivative use limitations. The High Court found that the legislation permitted a compulsory examination in those circumstances.

In parts of the judgement the court reiterated the necessity for clear legislative words, for example, at 3 ,171 and 216:

> "French CJ 3.In some cases, a person under statutory examination may already be facing criminal charges and find himself or herself being asked questions touching matters the subject of those charges. Whether a statute authorises a compulsory interrogation of an accused person in those circumstances is a question of statutory interpretation. The courts do not interpret a statute to permit such questioning unless it is expressly authorised or permitted as a matter of necessary implication. When the text, context and purpose of a statute permit a choice to be made, the courts will choose that interpretation which avoids or minimises the adverse impact of the statute upon common law rights and freedoms. However, subject to constitutional limits, where a parliament has decided to enact a law which abrogates such a right or freedom, its decision must be respected.
>
> Bell J 171 As Gleeson CJ observed in Al-Kateb v Godwin, the principle of legality is not new. In 1908, O'Connor J, in Potter v Minahan, referred to a passage from the fourth edition of Maxwell on Statuteswhich stated that "[i]t is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness". Absent that clarity of expression, the courts will not construe a statute as having such an operation. In Electrolux Home Products Pty Ltd v Australian Workers' Union, Gleeson CJ said "[t]he presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law." The principle has been cited and applied on many occasionsas a rule of statutory construction. The principle was applied in X7
>
> 216. In these statements, Gibbs CJ and Brennan J may be taken to have had in mind the principle of legality. Gibbs CJ spoke of the need for clarity of expression if the privilege is to be overridden; Brennan J spoke of the presumption of the law that the legislature does not intend to deny or restrict a fundamental principle which is essential to the criminal justice system. It will be recalled that their Honours were referring to legislation which, on its face, appeared to deny the privilege, but was not explicitly made applicable to accused persons. As was explained earlier in these reasons[, by reference to Potter v

Minahan, a statutory provision will be taken to have intended such an effect only if that intention is unambiguously clear. This is not a low standard."

Baff

Baff v Commissioner of Police [2013] NSWSC 1205, Adamson J found as a matter of construction that the words of the Police Act 1990 and the Police Regulation 2008 were not such as to curtail or abrogate the privilege against self-incrimination. The case dealt with a refusal by a police officer to answer questions by the Commissioner of Police on the basis of self-incrimination in relation to his apparent use of a firearm which discharged and injured a person. He said at 112:

"112. I discern neither in the Act nor the Regulation any indication that Parliament has directed its attention to the privilege against self-incrimination, much less consciously decided on its curtailment or abrogation."

Interstate legislative changes

Victoria

It is informative to note that, possibly post Clements, that a bill has been introduced into the Victorian Parliament to expressly amend the Racing Act 1958 to:

1. Provide the Racing Integrity Commissioner with the power to compel witnesses to appear before inquiries and hand over evidence;
2. Make it clear that Racing Victoria has power to apply the Rules of Racing to non-licensed persons; and
3. Require that the Rules of Racing Victoria includes specific provisions to ensure that persons appearing before the Racing Victoria Racing Appeals and Disciplinary Board are afforded procedural fairness.

In his media release, the Premier, Mr Naphtine, said that the legislative changes were designed to remove any doubt that Racing Victoria has the power to apply the rules of racing to non-licensed persons similar to the powers exercised by other Victorian racing controlling bodies.

See attachment 4- media release.

Queensland

On 1 May 2013 amendments to the Racing Act 2002 commenced and were made to invest the Integrity Commissioner with power when conducting an audit or investigation to give a written notice requiring a person to attend before the Commissioner to answer questions or to produce documents or things. Offence provisions for non-compliance are provided.

See Attachment 5 -Part 3 sections 113AT to 113AY

Recent Inquiries

Brown

In a 2005 review entitled "Review of NSW Thoroughbred Racing Act, 1996", Mr Ken Brown AM, from pages 23 dealt with "Integrity Issues". He said at page 24:

> "Unlicensed Persons
> Licensed persons are expressly bound by the Rules of Racing and subject to the procedures and findings of the stewards and associated Appeals Panel and Tribunals. In some circumstances, certain unlicensed persons may be held by implication to have subjected themselves to the same regime. However, the issue is not well defined and clarification would be important, for example, in relation to the behaviour of racecourse attendees or the behaviour of unlicensed persons in relation to the "conduct prejudicial" provisions."

He noted at page 25 under the title "Operational Issues":

> "a number of international jurisdictions provide stewards with greater operational flexibility in methods used for surveillance and gathering evidence. Whether there should be an expansion of stewards' powers in this area is an important matter for external determination."

Racing Regulatory Oversight Review-Scott report June 2008

In its submissions to this review Racing NSW said on 8 April 2008 on page 2:

> "While substantive changes are not required, legislation could assist implementation of the integrity functions for thoroughbred racing in NSW by:
> . Clarifying the status of the Rules of Racing to remove potential uncertainty as to whether certain categories of people who do not hold licences issued by Racing NSW are subject to the rules and the enforceability of sanctions imposed on such people under the Rules; and
> . Aligning the mechanisms for requiring the provision of evidence across the various stages of the disciplinary and appeals processes."

At page 11 the uncertainty of the present powers was repeated and accordingly the legislation should be amended.

The Scott report did not make specific recommendations on this request. Various structural changes were recommended which effectively involved absorbing the stewards and other Racing NSW inquiry powers in a Registrar and the Racing Appeals Tribunal. The effect of those recommended changes would have meant the power contained in s16A of the Racing Appeals Tribunal Act, set out above, continued to operate. That would have achieved the result of incorporating the powers of compulsion in the inquiry body. Those recommendations were not adopted by Government.

Wood

The NSW Law Reform Commission conducted an inquiry into activities that might constitute cheating at gambling.

Racing NSW made a submission on 16th February 2011 and invited clarification on the issue whether the stewards are able to exercise the powers in the Rules of Racing against non-licensed persons to the extent that they are participating in thoroughbred racing.
It did so noting the tension between Clements and Roberts cases. It is submitted powers of a coercive nature should be given to both Racing NSW and the Police.

The report is Cheating at Gambling, report 130, of the New South Wales Law Reform Commission of August 2011. At paragraphs 4.14 to 4.17 the report said:

> "Jurisdiction over non-participants
> 4.14 One particular problem with the disciplinary powers of sports controlling bodies is that they can only apply to those who have agreed to be bound by the codes of conduct or contractual terms and, therefore, cannot adequately deal with the involvement of people who do not fall within their jurisdiction.
> 4.15 In this regard, we draw attention to a proposal of Racing NSW that the law, presumably the Thoroughbred Racing Act 1996 (NSW), should be amended to clarify that Racing NSW, and its stewards, are permitted to exercise their powers under the Rules of Racing against "non-licensed" people, in particular, to compel their participation in inquiries.20
> 4.16 In substance, Racing NSW's concern was that it, and the Police, require additional coercive powers because of the serious risk that illicit conduct poses to the integrity of racing. It argued that the warning-off power is not sufficient to deal with non licensed people who may be involved, individually or in association with licensed people, in such conduct. Racing NSW also recommended that a specific offence should be created for a person who does not comply with a direction given by Racing NSW, or by Stewards, to participate in any inquiry conducted under the Act or the Rules of Racing.
> 4.17 There was not, however, unanimity in this respect and, in the time available, we have not had the opportunity to consult with the Australian racing and wagering community as to the necessity for, or the ramifications of, any such amendment. "

Conclusion on This Issue

For some time there has been uncertainty on the issue. On one hand there are expressed views that a reading of the functions and powers of Racing NSW in the Act in conjunction with the Rules of Racing are wide enough to empower the stewards to exercise the desired powers. On the other hand there are powerful arguments to the contrary.

In reporting to you I do not believe it is necessary for me to come to a concluded view on whether the power exists. The more prudent recommendation, consistent with the reasons set out as to why the power should exist, is that it is appropriate to remove uncertainty.

I have not had the benefit of arguments in support of or against either proposition. My report is based upon my own research and the submissions and materials provided to me.

I believe that the recent case law striking down legislative provisions because of the principle of legality and the rights against self-incrimination et cetera and the applicable statutory interpretation rules requiring express words are such that the Act probably cannot be read in a fashion which can bind non-licensed persons on the issues. I prefer to consider more recent case law because of the broader public policy issues identified.

I am inclined to the view that the function powers in section 13 (1) (a) and (e) of the Act cannot be read so as to confer statutory force on the Rules of Racing. The Act does not appear do it in those provisions or elsewhere in an express fashion. I do not believe it is open to be implied.

I believe that recent case law requires a more robust examination of the express words used to see if they in fact do create the functions and powers in question. As said in Roberts case there might be a statutory recognition. It would have to be found in the words in 13(1)(a) "has the .. functions... of the principal club under the Australian Rules of Racing" or (e)..functions ...on Racing NSW by or under the Australian Rules of Racing...". I am troubled by the suggestion that this is so express that it is intended that unlicensed persons, who would fall within various terms such as "any person" as against other expressions such as "licensed person", are caught by the rules. There is some argument that there is an implication. It is such an impost upon the principle of legality and avoidance of self-incrimination et cetera that it is difficult to see that Parliament intended those words, and therefore those rules, to extend to unlicensed persons.

I note the expressed recognition in Clements of the difference in Victorian legislation from that applying in New South Wales, particularly at the time of Roberts, but in the same wording today. It appears in recognition of that difference the Victorian government has introduced amending legislation.

I reiterate that it may be possible to resolve the tension between Clements and Roberts and their apparent conflict because of the necessary application of a more strict reading of the Act under recent case law, and the fact that we are no longer bound by decisions of the Privy Council.

If I am correct that would mean that an unlicensed person could only come within the Rules under the Clement principle, that is, by agreeing to be bound by the Rules. That is the contractual power would have to be applied.

Recommendation

I recommend that there be legislative change to require persons not licensed by Racing NSW to be compelled to attend an inquiry, answer questions and/or produce documents or things.

SHOULD THESE POWERS BE GIVEN TO RACING NSW?

There are two competing policy issues. The first is the public versus private nature of Racing NSW and the second is the public interest in the vesting the power.

Is Racing NSW A Public or Private Entity?

The relevance of this question goes to the issue whether it is appropriate for Parliament to vest the powers sought in Racing NSW.

It is the opinion of the Department of Attorney General and Justice expressed to the Minister in respect of a request to comment on the proposal on 5 December 2013 that:

> "Racing NSW is effectively a private organisation, responsible for the regulation of thoroughbred horse racing in NSW, itself a private industry."

And later:

> "It would therefore be unusual for an organisation established to regulate private industry to be given legislative powers to compel persons not directly connected with the industry to either produce documents to an inquiry, or attend an inquiry and give evidence."

Accordingly Racing NSW is distinguished from public entities such as ICAC, PIC and the New South Wales Crime Commission each of which have significant powers of the type sought. It is said to be distinguished from the bodies exercising powers under the Protection of the Environment Operations Act 1997 because that body exercises public interest objects including the reduction of risk to human health and the protection of the environment which go far beyond the purpose of the Act.

The Act makes Racing NSW a representative body to control thoroughbred racing in NSW and does so by establishing a body corporate by statute (s4). That body corporate is independent of government and does not represent the Crown and is not subject to direction or control by or on behalf of the government (s5). There is a duty to act in the public interest and interests of the horse racing industry as a whole (s11). It is required to give an annual report to Parliament (s29).

A body corporate established by statute does not become, without more, a public body. There are many examples such as schools and university colleges created by statute. These are all independent of government and do not represent the Crown and are not subject to direction or control of the government. The sole distinguishing facts are the duty to act in the public interest and interests of the horse racing industry and the making of an annual report to Parliament.

I raise this issue as it is an important one to be considered by the Government. I do not have to resolve the issue in making this recommendation. If it is felt that there are other reasons for vesting the power in Racing NSW then the fact that Racing NSW may be a private body will not matter.

Reasons for Supporting the Power

Racing NSW submit a number of reasons why it is essential for that body to have the powers of compulsion sought.

In their letter to the Minister of 13 June 2013 they refer to integrity of the industry as a critical component of the board's obligations and the fundamental need for that power in a competitive and increasingly complex wagering and gaming environment. Emphasis is given on the change from the former era when the majority of wagering activity occurred on the racecourse to the present era when at least 90% of all wagering is conducted off course. Accordingly it is increasingly difficult for stewards to monitor the activities of persons involved in betting transactions.

In the submission of April 2008 to the Racing Regulatory Oversight Review, page 7, Racing NSW said:

> "the integrity of racing is critical to the overall welfare of the racing industry including maintaining public confidence in racing, supporting or wagering on racing and accordingly the economics of the industry which are dependent on that wagering."

And later at page 11 said:

> "However the operations and integrity of racing, and therefore the interests of the industry and its participants, can be affected by the conduct of people who are not licensed by Racing NSW, including people who may not have any direct relationship with Racing NSW.

Such categories of people might include, for example:

> . Owners of racehorses and directors/officers of the body corporate registered under the Rules as a "syndicate" the purpose of racehorse ownership;
> . People placing a bet with a bookmaker licensed by Racing NSW
> . People attending a racecourse...
> . Other people who may engage in conduct prejudicial to the integrity of racing."

In their submission to the "Wood report" of 16 February 2011 Racing NSW referred to the fact that racing is a form of recreation and entertainment and is a major activity on which people wager. For the year 2009/10 it stated that $4 billion was invested on thoroughbred racing through the totaliser and bookmaking systems and other amounts invested by NSW residents in other states and territories. It emphasised that the major source of income to the thoroughbred racing industry comes from those wagering activities. It emphasised the need for integrity. It emphasised the need for control of drugs in racing but was concerned by the lack of power over unlicensed people. It referred to the advent of sports betting and concerns that such sporting events may not be conducted free from manipulation. Accordingly legislation to prevent cheating in sport was supported.

The report of Access Economics Pty Ltd of 8 February 2005 on Financial Implications of Betting Exchanges carried out at the request of the Australian Racing Board analysed financial implications of Betting Exchanges. That report set out numerous facts and figures which clearly demonstrate the size of the wagering market for thoroughbred racing, its importance to the state through taxation and flow through benefits to the industry and the public from wagering activities.

There is no doubt that thoroughbred racing is a major activity in NSW. I understand some 50,000 people are employed and numerous others are affected by its existence. Many people enjoy membership of racing clubs or attend or participate in racing without being members. A very great number of people wager on the races both frequently and infrequently. Everyone so affected is entitled to have the best protections possible to ensure that the sport is conducted with the highest integrity.

Should the industry lose integrity, or it diminish to an unacceptable level, then the devastating flow on effects throughout the community and to Government will be substantial.

It is proper therefore that every proper step be taken to ensure that the highest standards of integrity prevail and that those charged with the regulation of the industry, Racing NSW, have the necessary powers to ensure those high standards of integrity exist.

Cheating at gambling and the associated criminality is of substantial public prominence at the moment. The cheating at gambling provisions introduced into the Crimes Act reflect Parliament' s concerns. It is a rare day in the media if issues relating to cheating, other improper conduct or the like to do with sport and racing are not reported. The ease with which such cheating can be effected is frightening. Its implications are widespread. Such activity undermines integrity in many fields.

The racing industry is not immune from these public concerns. Indeed the racing codes have been the subject of actual and alleged wrongdoing for a very long period of time. The detailed rules of racing in each of the codes and in each of the states and territories reflect the endeavours of regulators to stamp out such matters. Those efforts are ongoing.

The racing industry has attracted "colourful characters" or "prominent racing identities" for a long-time. Every endeavour must be made to remove them from the industry where wrong conduct is involved.

Those not "associated" with the racing industry but who are directly or indirectly involved with those who are must also be embraced. That is, those who engage in conduct that is related to cheating at gambling or the like but who are not directly involved should be subject to the requirement that they assist an inquiry. Many examples could be given. Obscurely, for example, it could be a taxi driver who drove a punter to the races. It could be a person who was involved in a conversation or overheard a conversation and that conversation related to matters the subject of an inquiry.

Because of the difficulties of identifying wrong conduct the issue is whether the powers of the racing regulator should be extended in the fashion sought in the sure knowledge that such powers may override, or limit, civil liberties and long-standing legal principles.

It is a matter for Government to make that decision.

Recommendation

I recommend that appropriate powers with appropriate derivative protections be given to Racing NSW by amendment to the Thoroughbred Racing Act.

WHAT POWERS ARE REQUIRED?

The letter of appointment to me of 23 July 2013, paragraph 1, asked me to consider legislative reform to:

> "1. Empower Racing NSW to compel unlicensed persons to:
> (i) produce documents, however created, and information to Racing NSW or other designated bodies,

(ii) attend hearings by stewards, the Appeal Panel or the Racing Appeals Tribunal, and,
(iii) answer questions at such hearings;"

I recommend that the Act be amended to provide such power.

The Racing Appeals Tribunal already has these powers and they are found in section 16A.

I understand it is not my function to recommend the wording of any proposed and necessary legislative amendment and that will be a matter for the Office of Liquor Gaming and Racing, the Minister and Government.

I recommend that consideration be given to incorporating the type of powers provided for in the Australian Sports Anti-Doping Authority Act 2006 ("ASADA"). Other protections will be needed and they are referred to later.

In summary that act empowers the CEO to compel a person to attend an interview and answer questions, give information of the kind specified, and produce documents or things specified in a written notice (s13A). The CEO has to certify in writing a reasonable belief. Sanctions apply for non-compliance with a civil penalty up to $3300 (s13C) . Protections exist for a person who does not have the information, documents or things (s13C). Protections against self-incrimination or exposure to a civil penalty are provided. Documents however must still be produced with certain protections (s13D).

It is to be noted that there is a National Anti-Doping Scheme ("NAD") provided for in the ASADA package and that requires an Anti-Doping Rule Violation Panel to be established and the members of the panel have to agree in writing that the CEO' s believe is reasonable. Specific qualifications are required to be on that Panel. This package is designed to ensure safeguards to prevent the misuse of the compulsion powers.

As identified by the officers of the Department of Attorney General and Justice in their submission to the Minister it is appropriate that this be subject at least to judicial oversight. This is discussed later.
See attachment 6 - ASADA legislation

Other legislative schemes could be considered as they have similar provisions requiring attendance and answering questions and producing documents or things and have derivative protections. For example, Protection of the Environment Operations Act 1997, Independent Commission against Corruption Act 1988, Criminal Assets Recovery Act 1990 and the Australian Crime Commission Act 2002 (cth).

Having regard to the decisions in X7, Lee and Baff, referred to earlier, it will be essential that the drafting makes it abundantly clear that the power is being given regardless of existing or potential criminal proceedings and that the protections against self-incrimination et cetera, right to a fair trial and the like do not enable a refusal to answer a question, attend an inquiry or produce documents or things-subject to the derivative provisions which are discussed later.

While the ASADA Act is suggested as a model greater protections will be required.

Recommendation

I recommend that the Thoroughbred Racing Act be amended to empower Racing NSW to compel unlicensed persons to:

(i) produce documents, however created, and information to Racing NSW or other designated bodies,
(ii) attend hearings by stewards or the Appeal Panel and,
(iii) answer questions at such hearings;

I recommend that the Government consider using the model contained in the Australian Sports Anti-Doping Authority Act 2006 or, adopt such other model from existing legislation that the Government considers appropriate.

WHAT SAFEGUARDS ARE REQUIRED?

If Racing NSW is to be empowered as recommended then appropriate safeguards must be included in the legislation.

Those safeguards must be incorporated in recognition of the fact that the privilege against self-incrimination, the right to silence and non-interference with the principle of legality have been reduced in the public interest.

Derivative Provisions

The power is sought to ensure the integrity of racing can be dealt with by the exercise of an investigative or inquiry power in the interests of racing and the public. It should not however enable a person the subject of such compulsion to have the fact of attendance at an inquiry, the answers given under compulsion or the production of documents or things used in any way in an adverse fashion in criminal or civil proceedings or expose a person doing such things to criminal or civil penalty. These protections are the derivative protections.

The various statutes referred to as possible precedents contain derivative provisions and must be incorporated. Appropriately reworded the ASADA provisions provide such protections but so do the other acts.

Judicial Oversight

To overcome recent case law it is necessary for a form of judicial oversight to be incorporated. This is where the appropriate legislation will digress from the ASADA scheme.

Because of the interference with criminal and civil protections and the importance placed upon them by the community, the courts and Parliament, it is appropriate that that judicial oversight be undertaken by a Supreme Court judge.

Again it is not my function to suggest the precise wording of any legislative amendment.

I believe that the scheme should therefore require:

1. The CEO of Racing NSW to certify in writing that in the CEO's opinion the person or entity being required to comply has information or documents or things which are relevant to the subject-matter of the inquiry and the answers or documents or things will have a probative value.
2. Racing NSW must then be required to make an ex parte application to the Supreme Court of New South Wales for an order, in appropriate terms, authorising Racing NSW to compel the person or entity to attend an inquiry, answer questions and produce documents or things. Any evidence in support of such an application, including the CEO's certification, must be required to be on affidavit and the deponent subject to questioning by the court, if considered necessary. The form and procedures for such an application could follow those in existing legislation for the issue of warrants, listening devices and the like.
3. Racing NSW must be required to serve a sealed copy of the court order upon the person or entity being required to comply.
4. The terms of any such order should, subject to the discretion of the court, be required to contain warnings of the consequences of non-compliance.
5. Consideration should be given to empowering the court to decline to hear the matter on an ex parte basis and to require Racing NSW to serve its application upon the person or entity. Appropriate protections as to time for service and return dates can be considered. Power to order costs should be covered by existing provisions in the court.

The Presence of a Legal Representative at an Inquiry

In view of the fact that any inquiry conducted by Racing NSW itself or its stewards will more likely than not comprise a panel without legal expertise there may be concerns that the inquiry may be conducted in a way which will not afford appropriate protections to a person compelled to attend and answer questions or produce documents, particularly if there are criminal sanctions. For that reason consideration might be given to mandating the presence of a legally qualified person as a member of a panel conducting an inquiry which involves the exercise of the subject power. This will only arise after a Supreme Court order, if that proposal is accepted, and it will be obvious that a need for caution is required. It could be that such a legally qualified person may only be present as an adviser or assessor to guide and assist the panel.

The provision for assessors is well-known in many jurisdictions and relevantly here provided for in the hearings of the Racing Appeals Tribunal (S8A).

Because of the nature of a stewards' inquiry, that is, it follows an investigative path then, if appropriate, a charging, a plea a hearing and then penalty where the stewards act as investigator, prosecutor, judge and jury it is appropriate, because of the possible impact on the civil liberties and rights of a person or entity, that the stewards have legal advice.

A provision for a legally qualified person being present and involved in the decision-making process or as an assessor may make the introduction of these provisions more acceptable to those likely to be affected by them.

On balance I consider this is a proper safeguard.

In summary therefore the safeguards should incorporate protection against self-incrimination, derivative provisions, and the capacity in Racing NSW to exercise the powers only with a court sanction and legal assistance.

Recommendation

I recommend that the legislative amendment contain derivative provisions.
I recommend that there be judicial oversight of Racing NSW of the type set out earlier in this report.
I recommend that Racing NSW and the stewards in conducting an inquiry where a person attends or produces documents or things after a Supreme Court order, be required to have the presence of a legally qualified person.

SANCTIONS FOR NON-COMPLIANCE

Criminal or civil sanctions should be considered.

It is noted that in the ASADA legislation a civil penalty is provided for non-compliance in a sum of $3300.

The Protection of the Environment Operations Act provides in section 211, with the offence provision in 212 of the type under consideration, of an offence provision with a corporation penalty of $1 million and for an individual up to $250,000 although if dealt with in a Local Court the maximum penalty is $110,000.

The Independent Commission against Corruption Act provides in Part 9 the penalty of $5500 or 12 months imprisonment for not complying with a notice and a penalty of $2200 or 6 months imprisonment for not producing documents and a penalty for failing to attend of $2200 or imprisonment for 2 years.

The Criminal Assets Recovery Act provides a penalty for not producing documents of $550,000 for body corporate or $110,000 or 2 years imprisonment for an individual (s37) or if dealt with in a Local Court then it is $110,000 (s53). The Local Court penalties would apply for non-attendance or non-answering failure.

Allowing for the high-level commission type powers in these just mentioned statutes there is nevertheless a powerful public interest necessity, if an order is made by a Supreme Court judge, for a person to comply. For that reason I am of the opinion that a criminal sanction should be provided for non-compliance.

The level of any appropriate monetary criminal penalty must carry with it an element of deterrence. The level of penalties is a matter for Government on the advice of its officers but it would seem that a penalty of less than $5500 would not carry that element of deterrence.

As a reason for the seeking of and the making of a court order is based upon integrity of the industry that integrity may remain at risk if an offender is prepared to continue to ignore an order for production. Consideration might be given to continuing daily penalties of a monetary nature

while an order is not been complied with. The amount of any such daily penalty would need to be considered in line with other legislation which provides for it and be fixed by Government in consultation with its officers. It should be noted however that the various commission bodies referred to in this paper such as the ICAC, PIC and NSW Crime Commission do not have powers to impose daily penalties.

The question whether there should be an imprisonment sanction would seem to be resolved on the same issue of deterrence and considering the public interest necessity for compliance. I consider an imprisonment term to be an appropriate alternative and/or additional sanction. The level of any term of imprisonment is a matter for Government on the advice of its officers but it would seem that a penalty of less than 6 months imprisonment would not carry an element of deterrence.

If these are considered to be the appropriate levels of penalty then the legislation should provide for summary prosecution in the Local Court. It would not be appropriate to vest Racing NSW or the stewards with power to impose criminal sanctions which would flow from non-compliance with a Supreme Court order. Racing NSW and the stewards would otherwise retain the range of penalty sanctions available to them under the Australian Rules of Racing for specific breaches of those Rules.

Recommendation

I recommend that the legislative amendments include criminal sanctions for non-compliance and that those sanctions provide for a monetary penalty and a term of imprisonment.

I recommend that ,if criminal sanctions of a monetary nature are included, that consideration be given to including a continuing daily monetary penalty until the order is complied with.

POST REPORT ISSUES

Statutory review

The statutory review of the Act has commenced and is being conducted by Mr Foggo.

The Government may consider it appropriate to incorporate the recommendations in this report for consideration in that review. If the Government does not consider the recommendations in this report to be urgent then that would be an appropriate course as it would enable the review to embark upon a consultation process which has not been undertaken in the preparation of this report. It will particularly enable Racing NSW to make comment upon the recommendations.

Appeal or current cases

The Department of Attorney General and Justice will be able to advise the Government of any prospective cases being dealt with at first instance or on appeal which might have some impact upon the recommendations in this report. The resources available to me do not enable me to undertake this exercise.

In particular the Pedrana case may provide findings which are relevant to the recommendations in this report.

Department of Attorney General and Justice

It is noted that in the submissions to you by that Department it was suggested that there be liaison between Racing NSW and the Police to establish procedures to ensure that the police are notified of circumstances where Racing NSW suspects criminal behaviour, thereby allowing the police an opportunity to investigate prior to any Racing NSW inquiry taking place.

That recommendation arose as a result of concerns from case law and generally that the powers sought might not be enforceable because of possible prejudice to a fair criminal trial. Accordingly that Department is of the view, particularly because of the cheating at gambling provisions, that if criminal activity is suspected it should be investigated by the police and not Racing NSW.

If the Government adopts the recommendations in this report then it would seem that it has done so in the knowledge of the issues raised by the Department. Nevertheless the recommendation for that liaison is supported and it should commence.

Recommendation

I recommend that, if the Government is not to act urgently on these recommendations, that they be referred to the statutory review of the Thoroughbred Racing Act.
I recommend that the Government have regard to any pending cases that might impact upon the recommendations in this report.
I recommend that the Minister write to Racing NSW suggesting that it should liaise with the Police to establish protocols for the notification by Racing NSW to the Police of any activity coming to the notice of Racing NSW which might involve criminal activity.

ATTACHMENT 1

13 June 2013

The Hon. George Souris MP
Minister for Tourism Major Events Hospitality and Racing,
and Minister for the Arts
Level 30
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister,

I noted an article by Lisa Davies and Sean Nicholls in the Sydney Morning Herald of 8 May 2013 in which you were quoted as saying that any request from Racing NSW to extend its powers to compel non-licensed persons to attend stewards inquiries would be given due consideration.

Racing NSW was heartened by your comments because, as you know, this matter has long been an issue of considerable concern. In fact a submission was made to you on 20 July 2011 seeking the necessary legislative action to address the problem.

The integrity of the thoroughbred racing industry is a critical component of the Board's obligations and is fundamental to industry prospects in a competitive and increasingly complex wagering and gaming environment.

Recent occurrences relating to the "More Joyous' Inquiry, where several non-licensed persons Initially declined invitations to attend the Inquiry and non-licensed person Mr Eddie Hayson has now refused to provide to the Racing NSW Stewards the details of the persons that provided him with inside information, have again highlighted shortcomings in Racing NSW's powers and procedures. The issues involved are legally complex, involve civil rights considerations, and can only be resolved by the enactment of appropriate legislation.

Licensed persons are expressly bound by the Rules of Racing and subject to the procedures and findings of the stewards and the associated Appeals Panel and Racing Appeals Tribunal In some circumstances, certain unlicensed persons may be held by implication to have subjected themselves to the same regime. However, the issue is not well defined and clarification would be important, for example, in relation to the behavior of racecourse attendees or the behavior of unlicensed persons in relation to the "conduct prejudicial" provisions.

RACING NSW (ABN 86 281 604 417)
Level 7, 51 Druitt Street, Sydney NSW 2000
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The non-attendance of persons at Inquiries can severely hamper the ability of Racing NSW and its Stewards to properly investigate alleged wrongdoing in the industry and has the potential to cast doubts over the integrity of the thoroughbred racing industry. The only recourse available to Racing NSW in such instances is to "warn-off" persons who have refused to attend inquiries. In some cases this may not represent any penalty at all.

This is particularly relevant in the modern era. Whereas historically the majority of wagering activity occurred on the racecourse, the situation has now evolved where at least 90% of all wagering is conducted off the course making it increasingly difficult for stewards to monitor the activities of persons involved in betting transactions.

In its submission to the independent review into the provisions of the *Thoroughbred Racing Act* in 2006, Racing NSW identified difficulties it was having in respect of the lack of power the Board and its Stewards had over non-licensed persons who may have been involved with licensed persons in questionable activities or may have been in possession of information relating to such matters.

In all the circumstances Racing NSW believed that it was imperative that this matter be addressed either by the introduction of legislation to enhance the powers of the controlling authorities by, at the very least, enabling them to seek court orders compelling non-licensed persons to appear and give evidence before Stewards inquiries.

The report of the review acknowledged the difficulties being experienced by the racing industry and recommended that the Office of Liquor, Gaming and Racing coordinate the implementation of an appropriate review into the powers and procedures of controlling bodies in respect of the regulatory oversight of the racing industry across the three codes.

In response to this recommendation the then Minister appointed a Sydney barrister, Mr Malcolm Scott, to undertake a review into the regulatory oversight of the racing industry in New South Wales. Mr Scott was given wide terms of reference covering many aspects of the activities of Stewards and the operation of the current appeals procedures.

In his final report, Mr Scott recommended that the Racing Appeals Tribunal should have its role extended so as to enable it to deal with allegations relating to unlicensed persons acting in a manner which is contrary to the interests of the racing industry of New South Wales. Although Mr. Scott's recommendations went some way towards overcoming the difficulties currently being experienced by the Stewards it did not fully address all of the issues. In any event the recommendations were not acted upon.

In the circumstances it is now proposed that the Minister revisit the above issues with a view to introducing legislation to overcome the difficulties identified by Racing NSW.

Such legislation should provide:

- Power for Racing NSW to compel non-licensed persons to attend and give evidence before properly constituted inquiries and hearings being conducted by Racing NSW, its Stewards and the Appeal Panel; and

- Penalties for persons failing to comply with a direction to attend and give evidence before such an inquiry, with the appropriate sanction being equivalent to those imposed in respect for contempt of Court.

So as to give added weight to the legislation any amendments to the Act should also incorporate a provision under which information given by a person at an inquiry cannot be used as evidence against the person in any proceedings under any other legislation. This would overcome any issues arising in respect of persons, including licensed persons, refusing to answer a question before a Steward's inquiry, Appeal Panel hearing or Racing Appeals Tribunal hearing on the basis of self-incrimination. Given the new provisions in the *Crimes Act 1900* of Part 4ACA - Cheating at Gambling, persons charged under the Rules of Racing with cheating offences, such as use of prohibited substances, may well refuse to answer a question before a Steward's inquiry, Appeal Panel hearing or Racing Appeals Tribunal hearing on the basis that it would incriminate that person in any criminal proceedings under Part 4ACA.

The powers sought by Racing NSW are not unique as it is noted that provisions exist within the *Protection of the Environment Operations Act* 1997 which, among other things, empowers Authorized Officers to compel persons to attend interviews and provide information. In this respect, section 212 provides that a person cannot refuse to furnish records or information or to answer a question on the grounds of self-incrimination but that any information is not admissible in evidence against that person in any criminal proceedings. Introduction of a similar provision in respect of hearings held by Racing NSW, its Stewards, the Appeal Panel and the Racing Appeals Tribunal would mean that those bodies are not hampered in their ability to deal fully and expeditiously with matters arising under the Rules of Racing so as to preserve the integrity of thoroughbred racing.

Racing NSW considers the introduction of the above powers will ensure that thoroughbred racing in New South Wales will continue to lead the way on integrity issues.

I would be happy to meet with you to discuss these issue in more detail.

Yours Sincerely
RACING NSW

P N V'LANDYS
CHIEF EXECUTIVE

Racing NSW

5 August 2013

The Hon. George Souris MP
Minister for Tourism Major Events Hospitality and Racing,
and Minister for the Arts
Level 30
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister,

I refer to my letter of 13 June 2013 in which I requested that you give consideration to the enactment of legislation to extend the powers of Racing NSW and its stewards to compel non-licensed persons to attend properly constituted inquiries being conducted by Racing NSW and its Stewards.

I note that you have appointed Mr. David Amarti to review our submission and to favour you with a recommendation on the most appropriate means of addressing this issue.

We have now had the opportunity of discussing the matter with Mr Amarti. However during those discussions it became obvious that it would also be of assistance to Racing NSW and the stewards if they were empowered to demand the production of documents or things of a specified kind where those documents or things may be relevant to the matter under investigation or inquiry.

Accordingly, it would be appreciated if you would agree to Mr. Amarti also being requested to include this issue in his review.

Yours Sincerely
RACING NSW

P N V'LANDYS
CHIEF EXECUTIVE

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ATTACHMENT 3

New South Wales Thoroughbred Racing Board Appeals Panel

Panel: Mr P. Hely, QC (Principal Member)
Mr W. Haylen, QC
Mr D. Leo
Mr J. Vandenberg
Mr R. Wicks

In the matter of the appeals of Dr Tim Roberts

Heard at the offices of the New South Wales Thoroughbred Racing Board on Wednesday, 22 April 1998.

REASONS FOR DECISION

1. "Spend" is a two year old gelding trained by Mr G. Rogerson from stables at Royal Randwick Racecourse. On 12th February 1998 Spend won the $100,000 Carlton Slipper at Gosford by 3½ lengths. It started in the race as the even money favourite. The first prize was $68,000. Had the placings stood, the price money would have been sufficient to qualify Spend as a runner in the Golden Slipper; without that prize money, Spend would fail to qualify, and in fact failed to qualify.

2. Methandriol is a synthetic anabolic steroid. It is thus a prohibited substance in terms of AR[1] 178B(2). It is also a prohibited substance in terms of AR 178B(1) because it acts on the central nervous system and on the musculo-skeletal system.

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1 Australian Rules of Racing

3. On 24th March 1998, the Stewards opened an enquiry into the positive swab (taken after the running of the race) flowing from the presence of Methandriol in the urine sample of Spend. During the course of that enquiry it emerged that on 15th January 1998 the stable veterinary surgeon, Dr Roberts, administered 5mm of Protabol to Spend. Protabol is a therapeutic drug which contains Methandriol.

4. At the time of its administration, Spend was tired, tucked up and his body condition was down. Protabol was administered by the Vet as a conditioner in the belief that the horse was about to be sent out for a spell. The spell was for a short period as the horse was to race again in four weeks. The horse was sent to spell at Oakbridge Park on Friday, 6th January 1998, and was returned to the stables on Thursday, 22nd January 1998.

5. Dr Roberts told the Stewards that his information from the manufacturer was that Protabol would clear from the horse's system in 21 days. The label on the product [Ex 35] refers to a withholding period of at least 28 days before slaughter for human consumption. A publication issued by the AEVA[2] [Ex 25] described a study of 2 horses in which the period of detection was 38 days in one horse and 42 days in the other. Dr Sykes (Tp 31) referred to a detection time of around 60-70 days. Since October 1993 the AJC racing calendar (see Ex 26 and 27] has contained the following entry.

Testing for anabolic steroids.

Trainers are reminded that anabolic steroids, including methandriol, are

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2 Australian Equine Veterinary Association, Detection of Therapeutic Substances in Racing Horses.

'prohibited substances' as defined in AR 1 and as such are screened for in race day samples. Trainers should also be aware of the prolonged and unpredictable excretion time of certain long-acting anabolic steroids following their administration."

As earlier indicated, a period of 28 days elapsed between the administration of the drug and the horse being brought to Gosford racecourse for the purpose of running in the Carlton Slipper.

6. At the conclusion of the Stewards' enquiry:

- the trainer, Mr Rogerson, was found guilty of a charge under AR 178, and pursuant to AR 196, fined $5,000;

- the horse was disqualified pursuant to AR 177, and the placings altered accordingly;

- the veterinary surgeon, Dr Roberts, was found guilty of a charge under AR 175(h)(ii), and fined $8,000.

Appeals to the Panel were lodged with respect to those convictions, as well as to the penalties imposed and the disqualification of the horse. The appeals of Mr Rogerson and the owners of the horse were dismissed by the Panel, and reasons for that decision were published on 8 April 1998. Dr Roberts sought an adjournment of the hearing of his appeal, and it was heard on 22 April 1998.

The circumstances surrounding the administration of the drug.

7. In October of 1997 Mr Rogerson was found guilty by the Stewards of a breach of AR 178 in relation to the administration of an anabolic steroid "Testosterone" into a gelding named "New Spec". A fine of $5,000 was imposed. An appeal to the Panel was dismissed in December 1997, and we were informed that an appeal to the Racing Appeals Tribunal from the decision is pending.

8. The relevance of that matter is that Mr Rogerson told the Stewards:

> *"My stable policy since the New Spec thing, of which you are all well aware, is that there's no anabolic steroids used on any racehorse that I train at any stables"* (Tp 10)

That was a policy of which Dr Roberts was aware (Tp 11)

9. The Stewards had before them a statement [Ex 34] signed by Dr Roberts, in which he gave an account of the events of 15th January 1998. In that account he said that he examined the horse and suggested to the stable foreman (Scott Hammersley) that the horse should be treated with an anabolic steroid during his spell. Mr Hammersley's response was that the horse would be racing in four weeks time, and he reminded Dr Roberts that Mr Rogerson did not want any anabolic steroids given to any of his horses - a policy of which Dr Roberts was already aware. Dr Roberts told Hammersley *"to leave it with me, I'll give it some thought."* Dr Roberts completed his rounds at other stables, and later that morning returned to Mr Rogerson's stable and treated Spend with Protabol.

10. Before the Stewards Dr Roberts sought to resile from that account in a number of respects, of which the two most important are:

- there was a further conversation between Dr Roberts and Mr Hammersley in the Vet's car parked at the back gate of the stables, in which Dr Roberts persuaded Mr Hammersley to agree to the administration of an anabolic steroid (Tp 15);

- Dr Roberts administered the drug immediately, rather than returning to the stables later in the morning. (Tp 22)

11. Mr Hammersley denied these matters. In that denial, he was supported by his wife, who told the Stewards of the conversation between Scott Hammersley and Dr Roberts which took place in the office, in her presence, (Tp 23-24). She also said that Scott Hammersley did not leave the office, when according to Dr Roberts, the further conversation took place at Dr Roberts' car.

12. Other factors which tend to support the account given by Mr Hammersley are:

- it is consistent with the account given by Dr Roberts in Ex 34;

- on 27th February Mr Kelly, Steward, attended Mr Rogerson's stables and informed Mr Hammersley of the irregularity found in the urine sample. By Mr Kelly's observation the Hammersleys were surprised and a little shocked by the news which he gave them, and shocked that the stable accounts revealed the administration of a conditioner (Tp 25-26);

on 27th February Mr Hammersley telephoned Dr Roberts in his car and informed him of the irregularity with Methandriol. Dr Roberts' initial response was that *"it may have been in the vitamins"* (Tp 26), and it was not until he got back to his office and consulted his records that he realised the horse had had an anabolic steroid (Tp 26).

Dr Roberts had numerous conversations with Mr Rogerson between the date of Ex 34 and the Stewards' Enquiry. It was not until the morning of the enquiry, when Mr Rogerson rang Dr Roberts to confirm his availability to appear, that Dr Roberts told Mr Rogerson:

> *"Graeme, I have to tell you that that statement, there's a little something there that's not quite right."*

13. The Stewards did not accept the account given by Dr Roberts that Mr Hammersley was a party to the administration of Methandriol to Spend (Tp 45). The matter was conducted before us *"on the transcript"*, hence we are not in a position to form a view as to the credibility of those involved. Dr Roberts' case before us was that it did not matter which of the two versions of the events surrounding the administration of the drug was accepted, rather than that the Stewards were wrong in the conclusion to which they came. Whilst that is a correct statement so far as liability is concerned, in our opinion the circumstances in which the drug was administered are relevant on the issue of penalty.

14. Having regard to the matters referred to in 11, 12 and 13, and in the absence of any sworn evidence before us from Dr Roberts, in our opinion it is appropriate that we should proceed upon the basis that Mr Rogerson's declared policy was

against the use of anabolic steroids in his stables, that Dr Roberts knew of that policy, that Mr Hammersley reminded Dr Roberts of that policy in response to Dr Roberts' suggestion on the morning of 15th January 1998 that the horse should be treated with an anabolic steroid, and that Mr Hammersley did not authorise the administration of the drug.

15. Mr Rogerson was overseas (New Zealand) on 15th January 1998. He had no knowledge that Spend had raced with a drug in his system until told of that fact by a Steward on 27 February 1998. (But c/f LR 52A). Further:

- there was a white board kept in the stables on which treatments administered to horses were recorded (Tp 16) as well as withholding times (Tp 39);

- no entry was made on the white board in relation to Spend. Two other horses were treated on the same morning. No entry was made on the whiteboard in relation to them, apparently because all 3 horses were to be spelled (Tp 21, 41);

- there was a stable policy, communicated to Dr Roberts, against the administration of penicillin. *"A couple of times"* Dr Roberts administered penicillin after talking Mr Hammersley into agreeing to that course, and only afterwards was Mr Rogerson informed (Tp 42).

The application of the Rules of Racing to Dr Roberts

16. AR 175(h)(ii) provides:

> *"AR 175:*
>
> *The Committee of any Club or the Stewards may punish;*
>
> *(h) any person who administers, or causes to be administered, to a horse any prohibited substance -*
>
> *(ii) which is detected in any sample taken from such horse prior to or following the running of any race."*

17. Dr Roberts accepted that he administered a prohibited substance to a horse, which was detected in a sample taken from the horse following the running of a race. Nonetheless he contended that he was not guilty of the charge preferred against him, on the grounds that he was not shown to be a person who had agreed to be bound by the rules of racing, nor was he a licensed person, and thus was not a *"person"* to whom the rules applied. The TRB[3]'s power to disqualify persons (s14(2)(b)), and its power to penalise persons (s14(2)(l)) are confined to owners of horses; or licensed persons. The powers purportedly given by AR to the TRB must be confined to the persons within the statutory disciplinary regime of the TRB, namely owners and licensed persons. An outline of Dr Roberts' submission is Ex 39; and this is necessarily a brief summary of the contentions there put and later developed, both orally, and in written submissions styled "Appellant's submissions in Reply", which are on file.

18. The Australian Rules of Racing were formulated and adopted by the principal

3. NSW Thoroughbred Racing Board

Clubs in each State in the 1920s[4]. Each State could adopt local rules provided they are not inconsistent with the Australian Rules[5].

19. AR 2 provides:-

> *"Any person who takes part in any matter coming within these rules thereby agrees with each and every Principal Club to be bound by them."*

AR 7(d) provides:

> *"The Committee of a Principal Club shall have the control and general supervision of racing within its territory. Such Committee, in furtherance and not in limitation of all powers conferred on it or implied by these Rules, shall have power, in its discretion:-*
>
> *(d) To punish:-*
>
> *(i) any person contravening the Rules or disobeying any proper direction of any official, or*
>
> *(ii) any licensed person or official whose conduct or negligence in the performance of his duties has led, or could have led, to a breach of the Rules."*

AR 8(d) provides:

> *"To assist in the control of racing, Stewards shall be appointed according to the Rules of the respective Principal Clubs, with the following powers:-*
>
> *(d) To regulate and control, inquire into and adjudicate upon the conduct of all officials and licensed persons, persons attendant on or connected with a horse and all other persons attending a racecourse and to punish any such person in their opinion guilty of improper conduct or unseemly behaviour."*

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4 Pannam, The Horse and the Law (2nd Edn) p 297

5 AR 6

AR 196 provides:-

> *"Any person or body authorised by the Rules to punish any person may, unless the contrary is provided, do so by disqualification, or suspension and may in addition impose a fine not exceeding $50,000, or may impose only a fine not exceeding $50,000."*

20. AR 75 provides for a Forfeit List to be kept at the office of the Principal Club, which is to include all unpaid fines and a specification of the names of the persons from whom they are due. AR 76(a) provides that so long as any person is in the Forfeit List, he is, in effect, to be treated as if he were a disqualified person, and subject to the disabilities referred to in AR 182.

21. The scheme of the Rules is thus that they apply to persons who take part in any matter coming within their purview, whether a racehorse owner, licensed person or otherwise, that punishments may include a fine, and that the sanction for non-payment of the fine is that the person fined is to be treated as if he were a disqualified person.

22. In our opinion the submissions put on behalf of Dr Roberts fail, and essentially for two reasons:-

- first, they are inconsistent with the decision of the Privy Council in Stephen -v- Naylor (1937) SR (NSW) 127;

- second, they pay insufficient regard to the provisions of the Thoroughbred Racing Board Act 1996 ("TRBA").

23 As to the first, the Privy Council accepted that disqualification may be appropriate for breach of the Rules, not because the offender submitted to the jurisdiction of the Club, but because his actions were related to racing and within the purview of the rules. In our view Dr Roberts' actions were related to or connected with racing in as much as he was administering a prohibited substance to a racehorse under the control of a licensed trainer on licensed premises in the knowledge that the horse was soon to race, and knowing that the trainer's policy was opposed to that form of treatment. Whilst there have been cases [eg B -v- Jockey Club; Ex parte Aga Khan (1993) 1 WLR 909] which refer to the consensual nature of the Rules, other cases [eg, Caddigan -v- Grigg [1958] NZLR 708 at 714] have endorsed the statement of Lord Roche in Stephen -v- Naylor that the person affected suffers not because he consented to be bound by the Rules, but because he brought himself within their purview. The decision of the New Zealand Racing Conference re Veterinary Surgeons D.W. Lawrence and M.J. Fellows provides a practical illustration of the application of these principles. There, a defence of want of jurisdiction over veterinary surgeons and a contention that the New Zealand Rules of Racing were not framed so as to include veterinary surgeons in private practice within their scope were both rejected, and Naylor's case applied.

24 As to the second, TRBA recognises the existence of the *"Australian Rules of Racing"* and the *"Rules of Racing"* (being an amalgamation of the Australian Rules and Local Rules) TRBA, s3 Schedule 1 Part 4, clause 14 provides that the continuity of the rules of Racing is not affected by the Act. The function of the TRB include:

"(a) all the functions of the principal club for New South Wales and

committee of the principal club under the Australian Rules of Racing,

(b) to control, supervise and regulate horse racing in the State,

(c) such functions as may be conferred or imposed on the Board by or under the Australian Rules of Racing or any other Act."

s13(1) TRBA

25 The importance of the Australian Rules of Racing is underlined by the fact that whilst TRBA contemplates that TRB will make Local Rules of racing, it does not explicitly confer a power to make Local Rules. The source of the power is apparently AR 6 fuelled by s13(1)(a), (b) and (e) and s14(1)(a) of TRBA.

26 In our opinion the scheme of the TRB Act is that the TRB (amongst other functions and powers) has both the function of giving effect to AR 7(d), 175, 196 and 76 in relation to Dr Roberts, and the power to do the things which those rules contemplate will or may be done in order to carry the Rules into effect. The fact that TRB has a statutory power in terms of s14(2)(b) to disqualify particular persons, and in terms of s14(2)(l) to impose penalties on owners and licensed persons, does not produce the result that an Act which declares an intention not to affect the continuity of the Rules of Racing, in some way results in the TRB having lesser powers in relation to other persons than those formerly enjoyed by the AJC. The powers enumerated in s14(2) do not limit the generality of the s14(1) power. The appellant's submissions give insufficient weight to the introductory words of s14(2).

27 Shortly put, TRBA contains a statutory recognition of the Rules of Racing, and authorises and empowers the TRB (and its Stewards) to give effect to those Rules.

Whilst it may be (and we express no opinion on this) that TRB could not sue to recover a fine except from persons referred to in s14(2)(l), it does not follow that TRB cannot implement the provisions of the Australian Rules by which persons who come within the purview of the Rules are *"fined"* for non-compliance, with the consequence that they are treated as disqualified if they choose not to pay the fine.

28 Accordingly, we think that Dr Roberts was properly convicted of the offence against AR 175(h)(ii) with which he was charged.

29 TRBA followed the Temby Report[6], although not all of the Report's recommendations were adopted. The Temby Report (6.9) appears to assume that veterinarians would need to be licensed if they were to be brought within the disciplinary regime of TRB, and the Report did not recommend in favour of licensing. There is no analysis in the Report of potential application of AR to persons who are or happen to be veterinary surgeons and we do not think that there is any justification for treating the Report as indicating or requiring a conclusion different from the one we have reached.

Mitigation

30 Dr Roberts has practised as a veterinary surgeon both in Australia and South Africa since about 1975. We assume that he is, in general, a respectable and responsible veterinary surgeon. We accept that his motive in administering the

drug to the horse was therapeutic treatment.

31. But,

- Dr Roberts knew that the trainer was opposed to that form of treatment;

- Dr Roberts has not satisfied us that the foreman consented to its administration, and *"on the transcript"* we are satisfied that he did not;

- Dr Roberts did not tell Mr Rogerson what had occurred until the morning of the Stewards' Inquiry;

- Dr Roberts did not record the treatment which he has administered on the stable "White Board".

32. In our opinion there is really nothing which can be said by way of mitigation of the offence proved. No doubt in some circumstances a vet who administers a prohibited substance in circumstances which enliven the operation of AR 175(h)(ii) may be completely blameless. For example, a drug administered for therapeutic reasons coupled with a warning as to the period in which the horse should not race, which warning is ignored by the trainer.

33. But that is not the case here. Dr Roberts knew of Mr Rogerson's policy and chose to ignore it, presumably on the basis that he thought he knew what was best for the horse, and because he (wrongly) assumed that the prohibited substance would have dissipated from the horse's system prior to the race.

34. The Panel thought that the Stewards' penalty of $5,000 on the trainer was appropriate. We have no "comparables" in relation to a person in the position of Dr Roberts. But we think that Dr Robert's responsibility was greater than that of Mr Rogerson, and we agree with the penalty imposed by the Stewards.

35. The appeal is dismissed, the deposit forfeited.

Principal Member

5 May 1998

Victorian Premier Press Release

Tuesday 29 October 2103

Coalition acts to strengthen racing integrity

The Victorian racing industry, a critical part of the state's economy, will be further strengthened with the introduction of legislation implementing key recommendations of the Racing Integrity Commissioner.

Premier and Minister for Racing Denis Napthine today announced that legislation introduced into State Parliament this week would amend the Racing Act 1958 to:

- provide the Racing Integrity Commissioner with the power to compel witnesses to appear before inquiries and hand over evidence;
- make it clear that Racing Victoria has the power to apply the Rules of Racing to non-licenced persons; and
- require that the Rules of Racing Victoria include specific provisions to ensure that persons appearing before the Racing Victoria Racing Appeals and Disciplinary Board are afforded procedural fairness.

Dr Napthine said the legislative enhancements mean the Racing Integrity Commissioner can now require racing controlling bodies, registered clubs and licensed persons in the racing industry to cooperate with investigations and inquiries.

"Victoria has the best racing in Australia but there is always a need to keep ahead of the game and maintain strong safeguards against corruption," Dr Napthine said.

"Racing is a vital economic contributor to the state of Victoria, especially in rural and regional areas, and ensuring it remains corruption-free is essential to the $2 billion industry's ongoing strength.

"These reforms significantly strengthen the Racing Integrity Commissioner's powers and will ensure the integrity of Victoria's racing industry as a whole.

"These changes, which were recommended in the Own Motion Inquiry into Race Fixing in Victoria and the Final Report on the Investigation of the 'Damien Oliver Inquiry' by Racing Victoria Limited, mean the Racing Integrity Commissioner has the necessary tools to conduct his investigations and provide effective oversight of the sector."

The statutory office of Racing Integrity Commissioner was established to provide independent oversight of integrity issues across Victoria's three racing codes – thoroughbreds, harness and greyhounds. The current commissioner is Sal Perna.

Dr Napthine said the legislative changes will also remove any doubt that Racing Victoria has the power to apply the rules of racing to non-licensed persons similar to the powers exercised by other Victorian racing controlling bodies.

"All people participating in racing whether licensed or non-licensed will now need to adhere to rules of racing or otherwise be subject to penalties such as exclusion from racing," Dr Napthine said.

"These new legislative amendments will also ensure that people appearing before the Racing Victoria Racing Appeals and Disciplinary Board are afforded procedural fairness and natural justice."

Dr Napthine said further reforms relating to the three racing codes bodies' governance of integrity services were expected to be finalised within coming months. These reforms also originate from recommendations of the Racing Integrity Commissioner.

ATTACHMENT 5

RACING ACT 2002- QUEENSLAND

Part 3 Audits and investigations
113AT Commissioner's powers for audits and investigations
(1) In conducting an audit or investigation, the commissioner may—
(a) act in the absence of a person who has been given reasonable notice of the audit or investigation; and
(b) receive evidence on oath or affirmation or by statutory declaration; and
(c) disregard a defect, error or insufficiency in a document.
(2) The commissioner may administer an oath or affirmation to a person appearing as a witness before the commissioner.
113AU Power to require attendance and giving of evidence
(1) If the commissioner has reason to believe a person has information relevant to an audit or investigation, the commissioner may give the person a written notice requiring the person to attend before the commissioner to answer questions relevant to the audit or investigation.
(2) The notice must state—
(a) the place at which the person must attend; and
(b) a reasonable time at which, or a reasonable period for which, the person must attend.
(3) The notice may require the person to give evidence on oath or affirmation.
113AV Power to require information, document or thing
(1) If the commissioner has reason to believe a person has information or a document or thing relevant to an audit or investigation, the commissioner may give the person a written notice requiring the person to—
s 113AW
(1)
A person who is given a notice under section 113AU or 113AV must not, without reasonable excuse —
(a) fail to attend as required by the notice; or
(b) fail to continue to attend as required by the commissioner until excused from further attendance; or
(c) fail to produce a document or thing the person is required to produce by the notice.
Maximum penalty—100 penalty units.
A person appearing as a witness at the audit or investigation must not, without reasonable excuse—
(a) fail to take an oath or make an affirmation when required by the commissioner; or
(b) fail to answer a question the person is required to answer by the commissioner.
Maximum penalty—100 penalty units.
A person appearing as a witness at the audit or investigation must not give the commissioner information the person knows is false or misleading in a material particular.
Maximum penalty—100 penalty units.
(2)
(3)
(a) give the information to the commissioner in writing signed by the person or, in the case of a corporation, by an officer of the corporation; or
(b) produce the document or thing to the commissioner. (2) The notice must state—

(a) the place at which the information, document or thing must be given or produced to the commissioner; and
(b) a reasonable time at which, or a reasonable period within which, the information, document or thing must be given or produced.
113AW Offences by witnesses

(4) A person who is given a notice under section 113AV must not give the commissioner information, or a document containing information, the person knows is false or misleading in a material particular.
Maximum penalty—100 penalty units.
(5) Subsection (3) or (4) does not apply to a person who, when giving a document—
(a) tells the commissioner, to the best of the person's ability, how the information is false or misleading; and
(b) if the person has, or can reasonably get, the correct information—gives the correct information to the commissioner.
(6) In this section—
giving, information to a person, includes stating information to the person.
113AX Power to refuse to investigate complaint
(1) The commissioner may refuse to investigate a complaint about an integrity process of a control body or, having started to investigate a complaint, may refuse to continue the investigation, if—
(a) the matter is being investigated by another entity; or
(b) the commissioner is reasonably satisfied it is appropriate for another entity to investigate the matter.
(2) If the commissioner refuses to investigate, or continue to investigate, a complaint under subsection (1), the commissioner must prepare a report stating—
(a) the reasons the commissioner refused to investigate, or to continue to investigate, the complaint; and
(b) whether the commissioner is likely to investigate, or continue to investigate, the complaint in the future; and
(1)
This section applies to—
(a) an audit; or
(b) an investigation other than—
(i) an investigation that the commissioner has refused to investigate or to continue to investigate under section 113AX; or
(ii) an investigation about a complaint if the complaint has been withdrawn.
After finishing the audit or investigation, the commissioner must prepare a report that includes—
(a) the commissioner's findings; and
(b) the commissioner's recommendations, if any, based on the findings; and
(c) any other matter the commissioner considers reasonable to include in the report.
The commissioner must give a copy of the report to the Minister.
The commissioner may also give a copy of the report to another person approved by the Minister.
(2)
(3) (4)
(c) any other matter the commissioner considers reasonable to include in the report.
(3) The commissioner must give a copy of the report to the Minister.

ATTACHMENT 6

Australian Sports Anti-Doping Authority Act 2006

13A Power to require information or documents to be given

(1) The NAD scheme must authorise the CEO to give a person a written notice (a disclosure notice) requiring the person to do one or more of the following within the period specified in the notice:

(a) attend an interview to answer questions;

(b) give information of the kind specified in the notice;

(c) produce documents or things of the kind specified in the notice.

(1A) The NAD scheme must provide that the CEO must not give a disclosure notice to a person unless:

(a) the CEO declares in writing that the CEO reasonably believes that the person has information, documents or things that may be relevant to the administration of the NAD scheme; and

(b) if:

(i) the person is a registered medical practitioner; and

(ii) the notice is given to the person in his or her capacity as a registered medical practitioner;

the CEO declares in writing that the CEO reasonably believes that the person has been involved, in that capacity, in the commission, or attempted commission, of a possible violation of the anti-doping rules; and

(c) 3 ADRVP members agree in writing that the belief referred to in paragraph (a) (and, if applicable, paragraph (b)) is reasonable.

(2) The NAD scheme may make provision in relation to:

(a) disclosure notices; and

(b) the form and conduct of interviews; and

(c) the form in which information, documents, things and answers to questions must or may be given.

(3) Without limiting subsection (2), the NAD scheme must provide that a person who is given a disclosure notice has the right to be notified in writing of the possible consequences of a failure to comply with the disclosure notice.

13B CEO may retain and copy documents etc.

Inspecting and making copies of documents

(1) The CEO may:

(a) inspect a document produced in response to a disclosure notice; and

(b) make and retain copies of, or take and retain extracts from, such a document.

Retaining documents and things

(2) The CEO may take, and retain for as long as is necessary, possession of a document or thing produced in response to a disclosure notice.

(3) While the CEO retains the document or thing, he or she must allow a person who would otherwise be entitled to inspect the document or view the thing to do so at the times that the person would ordinarily be able to do so.

13C Failure to comply with disclosure notice

Failure to give information or produce documents in time

(1) A person contravenes this subsection if:

(a) the person is given a disclosure notice; and

(b) the notice requires the person to:

(i) give information; or

(ii) produce documents or things;

of a kind specified in the notice; and

(c) the person fails to comply with the notice within the period specified in the notice.

Civil penalty: 30 penalty units.

(2) Subsection (1) does not apply if the person gives the CEO a statutory declaration stating that:

(a) the person does not possess the information, document or thing; and

(b) the person has taken all reasonable steps available to the person to obtain the information, document or thing and has been unable to obtain it.

Note: A person bears an evidential burden in relation to the matter in this subsection: see section 73R.

Failure to attend interview

(3) A person contravenes this subsection if:

(a) the person is given a disclosure notice; and

(b) the notice requires the person to attend an interview to answer questions; and

(c) the person fails to comply with the notice.

Civil penalty: 30 penalty units.

Failure to answer questions

(4) A person contravenes this subsection if:

(a) the person is given a disclosure notice; and

(b) the notice requires the person to attend an interview to answer questions; and

(c) the person refuses or fails to answer a question.

Civil penalty: 30 penalty units.

13D Self-incrimination

(1) An individual is excused from complying with a requirement to answer a question or to give information if the answer to the question or the information might tend to incriminate the individual or expose the individual to a penalty.

(1A) A person is not excused from producing a document or thing as required by a disclosure notice given to the person on the ground that the document or thing might tend to incriminate the person or expose the person to a penalty.

(2) However, in the case of an individual, none of the following:

(a) the document or thing produced;

(b) the producing of the document or thing;

(c) any information, document or thing obtained as a direct or indirect consequence of producing the document or thing;

is admissible in evidence against the individual in:

(e) criminal proceedings, other than proceedings for an offence against section 137.1 (false or misleading information) or 137.2 (false or misleading documents) of the Criminal Code that relates to this Act; or

(f) any proceedings that would expose the individual to a penalty, other than proceedings in connection with this Act or the regulations.

(3) To avoid doubt, proceedings (however described) before a sporting administration body or the Court of Arbitration for Sport or other sporting tribunal that relate to sports doping and safety matters are proceedings in connection with this Act or the regulations.