

MEMORANDUM

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TO **Campbell Moncur**
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Incorporated

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Control over disposition of Racing Clubs' assets

We understand that New Zealand Thoroughbred Racing Incorporated (**NZTR**) is currently considering the racing requirements of each racing club, and facilities available at each racecourse, with the view to determining whether it is necessary to rationalise the number of racecourses at which race meetings are held so that the business of thoroughbred racing in New Zealand is more efficiently administered and managed.

As a result, there is a possibility that (if the New Zealand Racing Board (**NZRB**) is in agreement) certain racing clubs may only be issued a licence by NZRB to hold race meetings at a racecourse owned or leased by another racing club (rather than their own racecourses). With the possibility of such rationalisation through licensing, some racing clubs whose racecourses are no longer being used for race meetings may wish to dispose of their racecourses and associated assets.

We understand that NZTR is concerned to ensure that any funds received from the disposition of racing assets following rationalisation be used for the objects for which racing clubs were established; that is, to promote and further racing and the provision of race meetings. Accordingly, NZTR has asked us to advise whether it could direct racing clubs to use the funds received from the disposition of their property for the purposes of racing, and ensure that the funds are not used for other purposes which are unrelated to racing.

Summary

- In our view, there are reasonable grounds for arguing that NZTR could:
 - develop and implement a policy relating to the rationalisation of racecourses on the basis that such a policy is necessary to ensure that the business of thoroughbred racing in New Zealand is more efficiently administered and managed; and
 - for that purpose, give a direction to racing clubs pursuant to clause 11(2)(g) of the NZTR Constitution to use the proceeds arising from the disposition of their racecourses and associated assets only for the purposes of racing. (From the constitutions we have considered to date, it appears that this would be consistent with the objects of the racing clubs' own constitutions, which each club is required to act in accordance with in any event.)
- Such an approach is not without risk. The question of whether the provisions of NZTR's Constitution enable NZTR to make a direction of this nature is a matter of judgement. It is likely that a racing club may challenge NZTR's power and right to do so, and it is possible that a Court could take the view that:
 - NZTR, in giving such a direction, is not acting reasonably; or
 - on a narrow reading of clause 11(2)(g), NZTR's direction is not within the scope of that power.

There is also a risk that the manner in which NZTR exercises any such power or gives any such direction, and the process it follows in developing its policy, exercising its power or giving a direction could be challenged on grounds of natural justice.

- There is a spectrum of other possible options, with varying degrees of complexity or for which the agreement of a majority of the racing clubs would be required, that NZTR could consider pursuing in order to have greater certainty regarding a racing club's use of the proceeds from the sale of its property following a rationalisation of racecourses. These options could conceivably be pursued either in isolation or in combination, depending on NZTR's preference, and include incorporating appropriate conditions in funding agreements, amending NZTR's Constitution and seeking legislative amendment.
- Our advice in this memorandum is of necessity general in nature. It would be necessary to consider, and provide specific advice on, any specific proposal developed by NZTR in light of the surrounding facts and circumstances. At that time, advice should also be obtained on the process that ought to be undertaken by NZTR for implementing any such proposal.

Our advice

1. Requirement to race at another club's racecourse

Before setting out our advice on whether NZTR could direct racing clubs to use the proceeds from the sale of their property for the purposes of racing and associated issues, we address briefly the ability to restrict a club's ability to hold a race meeting at its racecourse. This "right" is fundamental to whether a rationalisation of racecourses could occur in the manner being considered by NZTR.

NZRB (as compared to NZTR) has a statutory right to designate the racecourse at which a club is to hold a race meeting under its licence. Therefore, NZRB may, through its licensing process, prohibit a club from holding a race meeting at its own racecourse and direct it to hold the race meeting at another racecourse.

NZRB's functions under section 9(1) of the Racing Act 2003 (the **Act**) include:

- determining the racing calendar and issuing betting licences; and
- developing policies which are conducive to the overall economic development of the racing industry and the economic well-being of people who and organisations which derive their livelihoods from racing.

Under section 42 of the Act, NZRB's Dates Committee establishes the dates on which betting races will occur for a calendar year, allocates those dates among the racing clubs and determined any conditions which should be imposed on betting licences. In doing so, the Dates' Committee must consult with each of the recognised industry organisations on the proposed dates, allocation and conditions.

Following that consultation process (which ought to include consultation with each of the clubs, at least) the Dates Committee determines the dates on which racing is to occur, allocates those dates to clubs and determines any conditions to be imposed on the betting licences allocated by it.

NZRB must issue betting licences to the clubs who have been allocated betting races by the Dates Committee. The betting licence, itself, must state:

- the name of the racing club;
- the name of the racecourse at which the betting races are to take place;

- the date on which the betting races may be held; and
- any other terms and conditions that the Board of NZRB considers appropriate.

In performing its functions, NZRB must:

- comply with principles of natural justice; and
- exhibit a sense of social responsibility by having regard to the interests of the community in which it operates.

If NZRB proposes specifying the racecourse of another race club as the racecourse at which a given race club must hold betting races under its betting licence, then in our view it must comply with natural justice and have regard to the interests of the community in which it operates before doing so.

Ultimately, provided NZRB complies with its statutory obligations (e.g. complies with natural justice and has regard to the interests of the community in which it operates), we are of the view that it has the power to specify that the betting races the subject of the betting licence for a racing club are to be held at a racecourse other than the club's own racecourse and impose such other reasonable conditions it wishes as part of the betting licence.

Such a proposal does raise commercial issues that NZTR would need to consider further, such as:

- whether the club who owns the racecourse on which another racing club is required to hold race meetings may charge the racing club holding the race meeting for use of its racecourse;
- whether the racing club who owns the racecourse on which another racing club holds a race meeting would receive compensation for the use of its racecourse by another racing club by other means (e.g. through greater funding from NZTR);
- the extent to which racing clubs holding their meetings at another club's racecourse should be responsible for the cost of maintaining or upgrading that other club's racecourse.

We have not considered these or related issues further as they are outside the scope of the current instructions, but if NZTR is considering progressing this proposal, then we are happy to do so.

2. Ability to direct clubs to use funds from the disposition of property for the purposes of racing

Racing clubs restricted by objects

The general starting point is that a club's right and power to deal with and dispose of its property arises from its own constitution.

We have not reviewed and considered the constitutions of all of the racing clubs. However, we have reviewed briefly the constitutions for Wellington Racing Club, Canterbury Jockey Club and Ashburton Racing Club. Each of these constitutions sets out the objects of the incorporated society in question which focus, in general, on the promotion of racing and conducting race meetings. They do not specify the venue at which the racing club must conduct its race meetings.

In carrying out any activity, a racing club, as an incorporated society, is bound (either explicitly by the provisions of its constitution and/or the Incorporated Societies Act or implicitly) to act in accordance with its objects. Accordingly, the objects in each racing club's constitution will dictate the manner and purposes for which a racing club may deal with its property. This would also

include the manner and purposes for which it can deal with proceeds arising from the sale of its property. If a racing club's objects are similar to those of the constitutions we have reviewed, the racing club would be required to deal with any proceeds arising from the sale of its property in a manner and for the purposes that are consistent with the promotion of racing and conducting race meetings.

It is possible, however, that a club may currently or in future have wider objects in its constitution that permit it to use its assets for purposes or carry on activities, other than racing and conducting race meetings. In such event, there is a risk that any proceeds realised from the sale of a club's racecourse property following any rationalisation would not necessarily only be used for the purposes of racing by that racing club. This leads us to consider, therefore, whether NZTR could direct or require racing clubs to use such proceeds solely for the purposes of racing.

NZTR's ability to direct racing clubs to deal with proceeds in a specific manner

In our view, neither NZRB or NZTR has the express right or power either through the Act or NZTR's constitution (in the case of NZTR) to *require* a racing club to sell its racecourse and associated assets, and use the proceeds from any such sale in a particular manner. However, we consider that there is a reasonable argument (although it is not without some risk) that:

- NZRB could include such a requirement as a condition of the betting licences issued by it in accordance with section 45 of the Act;
- NZTR could:
 - develop and implement a policy relating to the rationalisation of racecourses on the basis that such a policy is necessary to ensure that the business of thoroughbred racing in New Zealand is more efficiently administered and managed; and
 - for that purpose, give a direction pursuant to clause 11(2)(g) of the NZTR Constitution to racing clubs which as a condition of their licence must race at another club's racecourse that they use any proceeds arising from a sale of their racecourses and associated assets for the purposes of racing.

From the (albeit limited) constitutions we have reviewed to date, it appears to us such a direction would most likely be consistent with the objects of each racing club (as set out in their own constitutions). As indicated above, each racing club is required to act in accordance with its constitution.

By registering as a racing club with NZTR, racing clubs are bound to faithfully observe, perform and carry out the requirements of NZTR's Constitution. The Board of NZTR can suspend or cancel the registration of any racing club that commits a breach of NZTR's Constitution.

Therefore, if NZTR gives a direction to racing clubs, pursuant to clause 11(2)(g) of its Constitution to use the proceeds from the sale of its racecourse only for the purpose of racing and a racing club does not act in accordance with such a direction, it could be argued that the racing club is in breach of its obligations as a registered racing club and that its registration may be suspended or cancelled by NZTR. If a racing club is not registered with NZTR, the racing club may not be issued a betting licence or run a race meeting in accordance with a previously issued betting licence.

Whilst on the face of it there are reasonable grounds for arguing that a direction under clause 11(2)(g) of the nature expressed above could be made, it is not without risk (Please let us know if you would like more detailed advice on this aspect of our memorandum). This is a grey area. The question of whether the provisions of NZTR's Constitution enable NZTR to make a direction of this nature is a matter of judgement. It is likely that a racing club may challenge NZTR's power and right to do so, and it is possible that a Court could take the view that:

- NZTR, in giving such a direction, is not acting reasonably; or
- on a narrow reading of clause 11(2)(g), NZTR's direction is not within the scope of that power.

There is also a risk that the manner in which NZTR exercises any such power or gives any such direction, and the process it follows in developing its policy, exercising its power, or giving a direction could be challenged on grounds of natural justice.

If NZTR determines to further consider the proposal to rationalise racecourses, then it would be necessary to consider, and provide specific advice on, any specific proposal developed by NZTR in light of the surrounding facts and circumstances. At that time advice should also be obtained on the process that ought to be undertaken by NZTR for implementing any such proposal.

Other options

There is a spectrum of other possible options, with varying degrees of complexity or for which the agreement of a majority of the racing clubs would be required, that NZTR could consider pursuing in order to have greater certainty regarding a racing club's use of the proceeds from the sale of its property following a rationalisation of racecourses. These options could conceivably be pursued either in isolation or in combination, depending on NZTR's preference. As with our advice around NZTR's capability to direct the racing clubs under clause 11(2)(g), we consider there are reasonable grounds to argue that NZTR could act in the following manner, but it is not without risk of challenge.

The options include:

- Recommending that NZRB includes a condition in all betting licences to the effect that racing clubs may only deal with the proceeds from a sale of their racecourses and associated assets for the purposes of racing. NZRB has the right under section 45 of the Act to issue betting licences with conditions, following the Dates Committee's recommendations pursuant to section 42 of the Act. In our view, NZRB could include a condition of this nature in the betting licences issued by it. However, as with the proposal for NZTR to direct the racing clubs in a given manner, such an approach it is not without risk.
- Using the funding agreement NZTR enters into with the relevant racing clubs to bind the clubs to act in a certain manner (i.e. only use sale proceeds for the purposes of racing) as a condition of receiving funding from NZTR. Again, as with the proposal for NZTR to direct the racing clubs in a given manner, it is not without risk.
- Amending NZTR's Constitution to explicitly direct racing clubs to only deal with such proceeds for the purposes of racing, or alternatively requiring a racing club to provide a copy of their constitution to NZTR for approval on registration and to obtain NZTR's approval to any proposed amendment to its constitution. This would enable NZTR to cancel or suspend the registration of any racing club purporting to amend its constitution by amending its objects to permit it to use its assets for purposes other than racing. However, such an amendment would require a majority support of the racing clubs at an Annual General Meeting or Special General Meeting as it would be an alteration of NZTR's Constitution. We are unsure whether NZTR considers it would have sufficient support to have such an alteration passed.
- Seeking a legislative amendment expressly directing racing clubs to deal with such proceeds solely for the purposes of racing. This would remove the need for NZTR to direct the clubs to do so or rely on the clubs acting only in accordance with their own constitution. Naturally, this is the most authoritative and certain approach to ensuring racing clubs act in the manner required. However, from our experience, a legislative amendment such as this,

from policy development and legislative drafting through the various Parliamentary steps to its assent, would result in a timeframe for the amendment to be included in legislation (if the Minister agrees to progress it and there is sufficient support in Parliament for the amendment to be passed) around the end of 2010. Accordingly, legislative amendment despite its inherent certainty may not be practically the most desirable approach to take.

One qualification on all of these approaches (including a clause 11(2)(g) direction) is that their potential success (or the ability to minimise the risk of a successful challenge) will to a large extent depend on the specific circumstances and the form of any agreement, direction, constitutional or legislative amendment, as well as the process followed for the implementation of any such agreement, direction or amendment.

Withdrawal from registration

Finally, there is a risk that a disgruntled racing club could refuse to exercise its right to conduct race meetings at another racing club's racecourse as required under a betting licence, and in the face of being required to do so, cancel its registration as a racing club with NZTR.

Although there is no explicit right for a racing club to withdraw or cancel its registration as a racing club with NZTR we consider it likely that there is an implicit right to do so on reasonable notice. The effect of such cancellation of registration would be that the racing club would no longer be bound by NZTR's constitution nor the Racing Act, and arguably could act in any manner it wished, provided it continued to be consistent with its own constitution. It would, however, have no right to run race meetings at any racecourse, nor to receive any funding from NZTR or NZRB.

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