

3 May 2011

New South Wales Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Commissioners,

Submission on Consultation Paper 12: Cheating at Gambling

1. Introduction

I would like to take the opportunity to comment on the New South Wales Law Reform Commission Consultation Paper 12 on Cheating at Gambling (the **Consultation Paper**).

This submission will address the issue of the scope of the offences for cheating at gambling as outlined in Chapter 6 of the Consultation Paper, and in particular **Question 6.2(1) and 6.2(4)**.

2. Scope of offence

It is submitted that the scope of the offence proposed at paragraph 6.36 of the Consultation Paper (the **Draft Provisions**) is too narrow in scope as it does not address a range of conduct, identified in the Consultation Paper, which may undermine the integrity of sporting or other events or the integrity of the sports betting market.

2.1 Participants who act on their own for financial benefit

The Draft Provisions do not address the situation where a participant in a sporting contest dishonestly under-performs or fixes an event or outcome for financial benefit without the complicity of any third party. Such behaviour is not covered by paragraphs 1(b) or (2) of the Draft Provisions, as those provisions are predicated upon there being a “scheme” or “arrangement”, which suggest that the complicity of another person is required. Furthermore, it is not clear whether the insider information provisions apply in respect betting on one’s own performance or intentions. In any event, even if the insider information provisions apply, it is submitted that the law should address these elements squarely, by calling out this conduct as a separate offence. It would be anomalous for an agreement between two people to be treated as

criminal, while the same act carried out by a participant in a sporting contest for the same purpose to fall outside the reach of these provisions.

2.2 Persons who seek to dishonestly influence a sporting event for financial benefit

The Draft Provisions do not address the situation where a person attempts to dishonestly influence a sporting or other event for a financial benefit, without seeking the complicity of a participant in that sporting contest. Such behaviour is not covered by paragraphs 1(b) or (2) of the Draft Provisions, as those provisions are predicated upon the complicity of a participant to the relevant event. An example of this kind of behaviour would be if a person were to attempt to spike the drink of a participant for financial benefit, or the kind of behaviour described at paragraph 5.35 of the Consultation Paper. In this case, although the integrity of the sporting contest is only indirectly undermined (as the participants are innocent of any dishonest conduct), the integrity of the betting market is damaged. Although, in many situations, this kind of conduct will likely breach other laws, it is submitted that the purpose motivating such conduct should mean that it is dealt with under these “match-fixing” laws.

2.3 Persons who seek to manipulate the pricing in a betting market

The Draft Provisions do not address the situation where a person attempts to manipulate the pricing of a betting market, without attempting to influence, in any way, the underlying sporting contest.

Betting exchanges are particularly susceptible to this kind of manipulation as the ability of participants to “back bet” and “lay bet” is similar to the “buying” and “selling” activity of a financial market. For example, a group of individuals may place a large number of “back bets” and “lay bets” at particular odds, affecting the odds available in the betting market. However, betting conducted at fixed-priced odds or at a totalizator is also subject to this manipulation. For example, a person may place a large number of bets on a given outcome to affect the odds available for other odds in that pricing contest.

The common thread which runs through this kind of activity is that the person is placing bets for the primary purpose of affecting the odds available in the betting market, and not in the expectation that they will collect on the bets placed. The large amounts of money which are wagered on sporting contests means that the possibility of betting market manipulation cannot

be ruled out. This kind of conduct affects the integrity of the betting market and, it is submitted, should be criminalised.

2.4 Persons who deliberately disseminate false information to manipulate the pricing in a betting market

Closely linked with the previous paragraph, the Draft Provisions do not address the situation where a person, for financial benefit, deliberately disseminates false information about a sporting contest in order to affect the odds available in a betting market. In the same way that a person should not be able to exploit insider information to obtain an advantage in the betting market, so a person should not be able to engineer a similar advantage through the dissemination of false information. Although it may be difficult to detect and prosecute this kind of behaviour (as the circulation of rumours and gossip may be pursued for ends unrelated to financial gain), it is submitted that this difficulty should not prevent the law from outlawing this kind of behaviour where it is able to be detected. Furthermore, by directing such laws at behaviour which is designed to affect the prices available in the betting market ensures that the everyday rumours and gossip that forms part of the life of the sporting community remain outside the scope of the criminal law.

2.5 Persons who exploit insider information, where they know or ought to have known, that such insider information was obtained unlawfully or relates to unlawful conduct

As stated in the Consultation Paper, placing bets based on rumours and “mail” has always occurred and should not be criminalised. However, where a person knows or ought to have known that a piece of information was obtained from an “insider”, was obtained illegally or relates to unlawful conduct, then that person should be within the scope of the criminal law (if they seek to exploit that information).

Only attaching criminal liability to individuals who are one-removed from an “insider”, as proposed in the Consultation Paper, leaves this kind of illegitimate behaviour open to exploitation by organised crime, and also fails to address the risks to the integrity of the betting market posed by the exploitation of such insider information. It is submitted that, as a matter of culpability, there is no real difference between Person A placing a bet based on information obtained from an “insider”, and Person B placing a bet after being told by Person A that they

received such information from an “insider” (where there is no prior conspiracy between Person A and Person B).

As a matter of practicality, it will likely be more difficult to prove that a person who received insider information other than from an “insider” knew or ought to have known that such information was obtained unlawfully or relates to unlawful behaviour. However, it may be reasoned that the more a person knows that a piece of information was actually obtained from an insider, was obtained illegally or relates to unlawful conduct, the more that they will regard that information as reliable and be willing to risk money on that outcome occurring.

This issue may be dealt with by amending paragraph 3 of the Draft Provisions, or amending the definition of an “insider”. It is submitted that the better approach is to amend the definition of “insider” as set out in the following paragraph.

2.7 The definition of “insider” should not be limited to participants

It is submitted that the definition of “insider” should not be limited to participants who possess insider information.

In so far as the Draft Provisions have been modeled on the insider trading provisions in the *Corporations Act 2001* (Cth), it should be noted that the meaning of “insider” in that legislation is defined as a person who possesses insider information, and relevantly knows that such information constitutes insider information. Furthermore, these provisions are not limited to company directors or officers.

It is submitted that the obligations which constrain the behaviour of a person who possesses “insider information” (where that person know that such information is “insider information”) should not vary depending on whether or not that person is a participant in the relevant sporting contest. As such, the prohibition on exploiting insider information that applies to participants, should also apply to persons who come to possess that same information, regardless of how it came into their possession.

This amendment would also address the potential inconsistent application of the Draft Provisions, where a match is fixed but the insider information provision is only engaged where a

third party learns of the fix from a participant, but not if they learn of the fix from a non-participant who may be a party to the match fixing.

Definition of “information is generally available”

Although this change to the definition of “insider” would broaden the scope of the Draft Provisions, it is submitted that other amendments may be made to tailor these provisions to the particulars of the wagering industry in order to prevent this kind of amendment from having undesired consequences.

For example, a person should not be prohibited from betting on an outcome where that person observes that the odds for that outcome have significantly shortened; betting on the favourite is a common way that people wager. If a person deduces that other people know something not generally known about an outcome, they should not be prevented from placing a bet on that outcome (for example, if the odds on a Booker Prize nominee suddenly shorten shortly before the result is to be announced, a person may think that the results have been leaked). Such deduction or suspicion risks falling within the definition of “information” under the insider information definition.

The *Corporations Act* 2001 (Cth), at section 1042C(1), deals with this problem by defining when “information is generally available”, and it is submitted that a similar approach should be taken here to define when information is generally available.

2.8 Definition of “insider information”

It is submitted that the definition of “insider information” should also be amended as follows:

- the definition should not be limited to “pending” events, as individuals are able to bet on events while they are occurring, or after they have occurred (but where the result is unknown);
- the examples provided in paragraph (a)(ii) of the insider information definition are only of application in the sporting context, and then, only for team sports. They should be expanded to include the intentions, plans or decisions of any participant in respect of the relevant sporting or other contest; and

- the definition should explicitly include information concerning any unlawful conduct in respect of the relevant sporting or other event. For example, although the Consultation Paper mentions that section 249K of the *Crimes Act* 1900 (NSW) adequately deals with the situation where a participant is blackmailed into fixing a sporting contest, it is submitted that after-the-fact knowledge of such blackmail should be covered by this definition to prevent individuals from trading on that information.

3. Other matters

3.1 Withdrawing bets

It should be noted that in other places around the world, it is possible to cancel a bet after it has been placed. If this is permitted to occur in Australia, then the scope of the Draft Provisions should be expanded so that references to placing a bet, include situations where a person cancels a bet.

3.2 Uncertain scope where public has a direct role in influencing outcome

One area which the Draft Provisions do not deal with is where the public has a direct role in affecting the relevant outcome or event being wagered upon. An examples of this is reality television shows where the public is able to vote (and place multiple votes) to decide the outcome of the show. The fact that the competition permits an individual to exercise greater influence over the outcome of an event by voting multiple times (unlike in the case of general elections) and that the number of votes cast is often kept secret, makes this type of competition particularly susceptible to manipulation by organised groups. It is submitted that the offence proposed in paragraph 2.2 above should be drafted sufficiently wide to cover this kind of behaviour. The dishonestly element should be sufficient to exclude situations where the friends and family of a contestant vote for that contestant, even though they may indirectly financially benefit from that contestant winning money or other prizes.

3.3 Definition of “contingency”

It is submitted that the definition of “contingency” be amended as follows:

- expanded to include other events, and not just sporting events, as it is possible for a person to bet on an incident that occurs during the course of a non-sporting event; and
- expanded to include incidents that may occur in respect of a sporting or other event, and not just during the course of a sporting event. It is submitted that betting on outcomes

such as “who will be the next Australian cricket captain” or “who will win the Brownlow medal” may technically fall outside the meaning of an event, outcome or contingency of a sporting or other event.

3.4 The “dishonesty” requirement

It is submitted that the dishonesty requirement is not necessary for the insider information offences, nor for the market manipulation offences proposed above.

With the match fixing offences it is possible that a person may be motivated to interfere with a sporting or other event for reasons that may be considered legitimate (for example, deliberately losing a match to obtain a better draw in the next round of a competition), and accordingly fall short of the dishonesty requirement. This is even though that person may benefit financially from such interference (for example, obtaining greater prize money).

However, an element of insider information offence, as set out in the Draft Provisions and proposed by this submission, is that the person places a bet on an outcome or contingency related to the insider information. It is submitted that, by definition, there is no scope for this offence to catch what would otherwise be legitimate behaviour.

A similar argument applies to the market manipulation offences proposed above.

4. Proposed drafting

Possible drafting to address the points in this submission is set out at Appendix A for your consideration.

Yours sincerely,

Andrew Hii

Appendix A

1 Match fixing offence

(a) An offence is committed where a person, directly or indirectly, with the intent to obtain a **benefit** for himself or herself or for any other person or to cause a loss or disadvantage to any other person:

(i) **dishonestly** induces or attempts to induce a **participant**, or makes an offer to such a **participant**, or arrives at or attempts to arrive at an understanding with such a **participant**, to engage in any act or omission which constitutes a threat to, or which undermines, the integrity of any sporting or **other event**, including:

(A) deliberately under-performing or withdrawing from such event; or

(B) in any way fixing or influencing the outcome of such event, or of any **contingency** that may occur during it,

being an event, outcome or **contingency** upon which the person or any other person stands to lose or gain any money or monies worth, whether as a **participant**, or by betting on such outcome or **contingency**; or

(ii) **dishonestly** seeks to influence the outcome of any **sporting or other event**, or of any **contingency** that may occur during it, being an event, outcome or **contingency** upon which the person or any other person stands to lose or gain any money or monies worth, whether as a **participant**, or by betting on such outcome or **contingency**.

(b) An offence is committed where a **participant dishonestly** offers or agrees to carry into effect, or carries into effect, any scheme, arrangement or understanding of the kind contemplated under paragraph 1(a)(i).

2 Interfering with betting market offence

(a) An offence is committed where a person, directly or indirectly:

(i) places or purports to place a bet or bets; or

(ii) procures a third party to place or purport to place a bet or bets,

that have the effect of creating, or causing the creation of, a false or misleading appearance of the demand or supply for odds in a betting market for a **sporting or other event**, or on a **contingency** that may occur during such event, with the intent:

(iii) to obtain a **benefit** for himself or herself or for any other person other than by collecting on the bets described in paragraph 2(a)(i) or 2(a)(ii); or

(iv) to cause a loss or disadvantage to any other person other than by that person paying out on the bets described in paragraph 2(a)(i) or 2(a)(ii).

(b) An offence is committed where a person makes a statement, or disseminates information, where:

(i) that statement or information is false in a material particular or is materially misleading; and

(ii) that statement or information is likely to have a material effect on the betting of an event, or **contingency** occurring within it; and

(iii) the person making the statement knows, or ought reasonably to know, that the statement or information has the characteristics described in paragraphs (b)(i) and (b)(ii); and

(iv) the person makes the statement, or disseminates the information with the intent:

(A) to obtain a **benefit** for himself or herself or for any other person; or

(B) to cause a loss or disadvantage to any other person,

by betting or accepting bets on an outcome or **contingency** that is related to the subject matter of the statement or information.

3 Insider trading offence

(a) If a person:

(i) possess **insider information**; and

- (ii) knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of **insider information** are satisfied in relation to that information,

then that person commits an offence, if they:

- (iii) place or accept a bet on the outcome of an event or **contingency** which is related to the subject matter of the **insider information**; or
- (iv) procure a third party to place or accept a bet on the outcome of that event or **contingency**; or
- (v) directly or indirectly communicates the **insider information**, or causes that information to be communicated to, a third party who the insider knows, or ought reasonably to know, would be likely to:
 - (A) place or accept a bet on that event or **contingency**; or
 - (B) procure another person to place or accept a bet on the outcome of that event or **contingency**.

4 **General**

- (a) For the purpose of these provisions no offence is committed unless the relevant act or omission was intentional or reckless.
- (b) It is not necessary for proof of any of the offences contained in this section that the act or omission results in a win or gain, affects the outcome of any event or any contingency within an event, or secures any financial advantage or causes any financial disadvantage.
- (c) The maximum penalty available for any such offence shall be imprisonment for 10 years.

5 **Definitions**

“**benefit**” includes any money or monies worth, any release or forbearance in relation to any pre-existing, or future obligation, any avoidance of a loss or punishment, and any other favour or service, or valuable consideration of any kind.

“**contingency**” means any incident or happening that may occur during the course of, or in respect of, a **sporting or other event**, including those that relate to the run of play or that constitute something that may be done or achieved by a **participant** or team in the course of a contest or series of contests.

“**dishonest**” means **dishonest** according to the standards of ordinary people and known by the defendant to be **dishonest** according to these standards.

“**generally available**” means, in respect of information, if that information:

- (a) consists of readily observable matter; or
- (b) meets both of the following subparagraphs:
 - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly bet on the **sporting or other event** in respect of which the betting might be affected by that information; and
 - (ii) since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or
- (c) consists of deductions, conclusions or inferences made or draft from either or both of the following:
 - (i) information referred to in paragraph (a); or
 - (ii) information made known as mentioned in subparagraph (b)(i).

“**insider information**” is information that:

- (a) is not **generally available** in relation to a **sporting or other event**, including:
 - (i) information concerning any arrangement of the kind referred to in sub-paragraph (1)(a)(i) or 1(b), or an offence referred to in under paragraphs 1(a)(ii), 2(a) or 2(b);
or
 - (ii) information concerning any other unlawful conduct in respect of that sporting or other event; or

- (iii) information concerning the intentions, plans or decisions of any **participant**, team, venue or sports controlling body; or
 - (iv) information concerning the health or status of any **participant**; and
- (b) if it were **generally available**, a reasonable person would expect it to have a material effect on the betting on that event, or on a **contingency** occurring within it.

“**other event**” means any non-sporting event that is a declared betting event within the meaning of the *Racing Administration Act 1998* (NSW), or an event upon which bets can be placed under the laws of any other State or Territory.

“**participant**” means a person competing or taking part in a **sporting or other event**; his or her agent; any person who is a member, coach, manager, official or a person providing services of any kind for a team or club that is involved in such an event; any person who acts as a judge, referee or official of any kind in relation to such an event; and any person who is engaged as a curator or official at any venue where the event is to take place.

“**sporting event**” means any contest between individuals or teams, or that involves a thoroughbred, harness or greyhound race, that is usually attended by the public, and that is governed by rules which include the constitution, code of conduct or rules for the context, of the sports controlling body that stages the event, or of the regulatory agency under whose constitution, code of conduct or rules it is conducted.