

15 February 2011

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Dear Commission

### Review of the coverage of the criminal law in relation to cheating at gambling

We refer to the above inquiry and provide the following preliminary written submission.

#### Our background

Thank you for the opportunity to make a submission in respect of the above inquiry.

We act for a significant number of national and state sporting organisations. We consider we undertake more work for and on behalf of sport than any other law firm in Australia.

#### Terms of Reference

1. The Terms of Reference address a number of issues relating to the coverage of the criminal law over cheating and gambling. While we have not responded to each of the Terms of Reference we have provided general submissions which address the issues raised in the Terms of Reference.

#### Current law relating to cheating at gambling

##### The Unlawful Gambling Act 1998 (NSW)

2. The key legislative provisions that attempt to regulate this area are section 18 of the *Unlawful Gambling Act 1998* (NSW) (**UG Act**) and Part 4AA of the *Crimes Act 1900* (NSW).
3. Section 18 of the *UG Act*, which makes cheating an offence, relies heavily on the fraud aspect of cheating. The legislation does not define fraud, which allows a

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broader interpretation when prosecuting such offences. However, this leaves the courts to rely on common law conceptions of fraud. There is no guarantee that the common law will adequately cover complex factual scenarios which may arise when multiple parties or companies (domestic and offshore) are involved.

4. Section 18 of the *UG Act* does not explicitly cover use of inside information. Additionally, it does not explicitly criminalise the actions of those who profit or attempt to profit from influencing (in the case of a sporting event) athletes or officials.
5. Some cheating in sport may occur with the intention of losing money (in order to deflect investigation into unusual betting accounts or practices). There may be some utility in including a provision into section 18 that states that it is immaterial whether the person engaged in such conduct wins anything or improves his chances of winning anything. This would reflect the approach adopted in the United Kingdom.<sup>1</sup>

#### The Crimes Act 1900 (NSW)

6. The Part 4AA fraud offences under the *Crimes Act 1900 (NSW)* cover a much broader range of circumstances. The focus of the legislation is the intentional or reckless use of deception to gain advantage. In this case, section 192D(1)(b) provides coverage for circumstances when one person has induced a person (i.e. an athlete or official) to do something which results in obtaining a financial advantage.
7. As there is the possibility that organised crime syndicates may be involved in such activity, it would be useful to develop such fraud related offences explicitly in sporting and gambling contexts. Such offences would raise awareness in the community of the boundaries of sports related gambling and function as a deterrent against those opportunistically considering engaging in such practices.
8. Such provisions need to criminalise more than just "inducing a third person" because organised syndicates may elude conviction if there is too great a distance in a chain of people (from an evidentiary perspective) between the person placing the bet and/or the person inducing an official or athlete.
9. As the integrity of sport relies heavily on the integrity of its competitors and officials, it would be preferable for there to be athlete and official focused offences. Although some Part 4AA offences may be suitable for some deceptive activities, athlete and official focused offence(s) would develop a culture, expectation and understanding in society at large that all athletes and officials should be incorruptible. Formulating these types of offences could draw on the already existing player and official "codes of conduct" of a number of high profile sports in Australia.

#### The common law position

10. A consideration of the common law offence of conspiracy to cheat and defraud has been extensively covered by a Report of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.<sup>2</sup> Generally, the common law requires two key components. First, the existence of an agreement and secondly, a requirement that the act agreed to amounts to a criminal offence. The

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<sup>1</sup> S.42(2)(a)(b) *Gambling Act 2005 (UK)*.

<sup>2</sup> Report: Model Criminal Code, Chapter 3 *Conspiracy to Defraud, May 1997*

[http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/vwFiles/MCLOC\\_MCC\\_Chapter\\_3\\_Conspiracy\\_to\\_Defraud\\_Report.pdf/\\$file/MCLOC\\_MCC\\_Chapter\\_3\\_Conspiracy\\_to\\_Defraud\\_Report.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/MCLOC_MCC_Chapter_3_Conspiracy_to_Defraud_Report.pdf/$file/MCLOC_MCC_Chapter_3_Conspiracy_to_Defraud_Report.pdf)

fault elements require intent to enter the agreement and the use of dishonest means to inflict economic loss.

## New South Wales

11. In short, existing offences are not directed to cheating in a sports betting context. The establishment of specific offences relevant to conduct in sport and sports betting will result in a more effective approach to eliminating match fixing and other activities that undermine the integrity of sport. In addition, establishing a regulatory body which has the power to gather and analyse intelligence and investigate potential breaches of the legislation will create a more complete framework which will protect the integrity of Australian sport.

## The Victorian Approach

12. The Victorian approach has been to empower the Victorian Commission for Gambling Regulation (**VCGR**), a statutory body which reports to the Minister for Gaming with the power to regulate all gambling activities in Victoria. In fulfilling its mandate, the VCGR monitors the activities of those involved in the gambling industry, tests and approves gambling products for integrity and fairness and detects gambling offences through investigation, audit and supervision of gambling practices.
13. One of the key provisions that the Victorian government has developed is the requirement for information and revenue sharing between betting providers and sports controlling bodies. Where bets are taken on a particular sport and a sports controlling body has been approved (by the VCGR) as the relevant body for that sport, the betting provider must enter into an agreement with that sports controlling body. Under this agreement, the parties share information about betting (including irregular betting patterns) and the sport is given a share of the revenue generated from bets on that sport. Information transfer helps sports controlling bodies and betting providers to monitor any irregular betting practices or trends and threats to the integrity of the sport. In addition to the revenue stream (to be agreed between the two parties) this approach also encourages that both parties to take active steps to monitor the integrity of sporting event(s), minimising the ability for third parties to manipulate betting providers without detection and sanction.
14. The VCGR determines whether a sporting organisation can become a sports controlling body by considering, as required under section 4.5.12 of the *Gambling Regulation Act 2003 (Vic)*<sup>3</sup> whether the organisation:
  - (a) can control and organise its events;
  - (b) has adequate policies and codes of conduct to ensure the integrity of its event(s), including compliance with relevant international codes and conventions;
  - (c) has the expertise, resources and authority to administer, monitor and enforce the integrity of its systems; and
  - (d) has policies on information sharing with sports betting providers for the purpose of investigating suspicious betting activity.
15. The VCGR also has authority under section 4.5.29(1)(a) to prohibit betting on any contingencies if it considers that it may expose the event or class of event to unmanageable integrity risks.

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<sup>3</sup>*Gambling Regulation Act 2003 (Vic)*

16. There are currently no specific criminal sanctions for gambling related offences. Instead, section 321 of the *Crimes Act 1958* (Vic) criminalises conspiracy to commit an offence and could potentially be used where there has been a commit an offence which jeopardises the integrity of a sporting event. But this legislative provision for this type of prosecution has not yet been tested. Section 321A provides that the conduct is still an offence even if he/she is not aware of the existence of facts which would make the agreed course of conduct impossible. This section ensures that prosecutions could still succeed against those who intend to match-fix or affect an incident in a sporting event, but for some intervening circumstance, are not able to carry out their conspiracy.
17. Under section 193 of the *Criminal Procedure Act* (Vic) if a person is indicted for conspiracy to commit an offence and another charge of the commission of that offence, the court must order that the charges be tried separately unless the court considers that it is in the interests of justice that they be tried together.
18. This allows authorities to distinguish between conspiracy and commission of an offence. That distinction enables prosecutors to indict and convict more people who may have been involved or facilitating the criminal conduct. Particularly in the context of organised crime syndicates, this may be a very useful provision to protect Australian sports and betting providers from manipulation and diluted but functional networks.
19. Under section 321F, the offence of conspiracy at common law was abolished. However, the offence of conspiracy to cheat and defraud at common law still exists.

#### **Developments in the United Kingdom**

20. In the United Kingdom, the *Gambling Act 2005* (UK) creates the offence of cheating. Section 42 provides that a person commits an offence if he cheats at gambling or does anything for the purpose of enabling or assisting another person to cheat at gambling. A person still commits the offence, immaterial of whether they:
  - (a) improve their chances of winning; or
  - (b) win anything.
21. Although section 42 does not define "cheating," it states that it may consist of "*actual or attempted deception or interference in connection with the process by which gambling is conducted, or a real or virtual game, race or other even or process to which gambling relates.*"
22. The penalty for conviction on indictment includes a fine or imprisonment up to two years and on summary conviction, includes imprisonment for up to 51 weeks, a fine or both.
23. The UK has legislated for the following offences: conspiracy<sup>4</sup>, conspiracy to defraud<sup>5</sup> and fraud by false representation<sup>6</sup> whilst the offence of conspiracy to cheat and defraud at common law still exists.
24. In 2009, the British Government commissioned a Sports Betting Integrity Panel to "*examine all practical measures to further the overall objective of reducing the risk of*

<sup>4</sup> s.1 *Criminal Law Act 1977* (UK)

<sup>5</sup> s.12(1) *Criminal Justice Act 1987* (UK) (penalty of up to 10 years imprisonment)

<sup>6</sup> s.2 *Fraud Act 2006* (UK)

*corruption in British sport.*"<sup>7</sup> The report produced a broad range of recommendations which will be useful for the commission to consider.

25. Essentially, the report recommends that three key elements are required to maintain integrity in sports and the public's confidence in sports, which play a crucial social and economic role in society. These three elements are:
  - (a) *"The adoption of robust rules and disciplinary procedures;*
  - (b) *the implementation of a comprehensive education programme for all participants; and*
  - (c) *the creation of an integrity unit which has the capability to gather and analyse intelligence.*"<sup>8</sup>
26. The integrity unit was considered best placed within the (British) Gambling Commission which had the power to: investigate, prosecute, void bets and develop reporting requirements for betting operators.
27. The report also recommends that all sports governing bodies implement a code of conduct. It recognises that some sports will require unique definitions or sanctions depending on the sport. Particular attention was given to the need to define "participant" and "inside information" with appropriate breadth to ensure the effectiveness of the code.
28. The European Sports Security Association<sup>9</sup> (**ESSA**) is an example of a monitoring body established by European betting providers which provides an early warning system to sports betting providers and sports bodies, by tracking irregular betting patterns or suspected use of inside information. ESSA has memoranda with high profile sports bodies, such as The FA, UEFA, FIFA, ATP, WTA and DFB. It was established in 2005 in response to an increased awareness of the risks faced by sporting bodies and betting providers.

### **Player / Participant Code of Conduct**

29. Many of Australia's most popular sports have developed codes of conduct that bind their players, officials and those closely affiliated with the sport and help Australian sports to develop a consistent and ingrained culture of sports integrity. If a breach of these codes of conduct could also result in criminal offences being committed, it is likely to be a significant deterrent which could prevent (often young and vulnerable) competitors from considering involvement with fixing a result or an incident in the course of a sporting event. If athletes and officials are incorruptible, spot and spread betting will not jeopardise the integrity of sport. However, sporting organisations should be able to adopt their own code of conduct, as long as it complies with minimum standards, as they are best placed to run and regulate their sport according to its needs.
30. When drafting a code of conduct, particular attention should be given to the breadth of the definition of "participant" to ensure that all people involved in the sport who

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<sup>7</sup> Report of the Sports Betting Integrity Panel, Chaired by Rick Parry, February 2010  
[http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/reference\\_library/publications/6607.aspx](http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/reference_library/publications/6607.aspx)

<sup>8</sup> Chair's Forward para 3.

<sup>9</sup> <http://www.eu-ssa.org/>

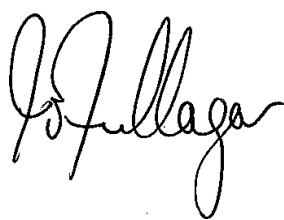
could influence a sporting event will be within the reach of the sporting bodies, its tribunals or disciplinary bodies.

31. Whilst a sporting organisation will be able to take action against its own players, officials and other participants, it will not have any power to take action against third parties (e.g. members of the public who pay a person to fix part or all of a match). Therefore, sporting codes of conduct should not be the only approach in attempting to prevent this behaviour

## Conclusion

32. By establishing relevant criminal offences, third parties (members of the public) will be subject to serious penalties if they participate in match fixing or spot fixing. Such offences will also mean that the actions of athletes, officials etc will be (potentially) subject to serious consequences (such as fines or jail) in addition to any suspension or other sanctions imposed by the sport.
33. Protecting the integrity of Australian sport is a critical issue. The high volume of bets and variety of betting products has the potential to jeopardise the integrity of Australian and international sporting events. Taking a proactive approach and developing precise, efficient and relevant criminal laws to respond to this emerging threat is a vital part of responding to this challenge. Maintaining an open and engaged relationship with betting providers will also help capitalise on potential synergies for intelligence gathering and the monitoring of gambling products.
34. In conjunction with extensive education programmes for athletes and officials, a comprehensive and consistent legal framework will establish a culture of protecting and maintaining integrity in sport.
35. We would be pleased to assist the Commission in relation to its review of the existing law and the preparation of any recommendations for change. We are also happy to answer any queries the Commission might have arising from the above. Please feel free to contact us directly on [REDACTED]
36. We would be grateful if you could inform us of the outcome of this inquiry.

Yours faithfully



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