

Juliette Overland
Senior Lecturer
Discipline of Business Law
University of Sydney Business School
Building H69
University of Sydney
NSW 2006 Australia
T
F
E

6 May 2011

New South Wales Law Reform Commission
GPO Box 5199
Sydney NSW 2001
By email: nsw_lrc@agd.nsw.gov.au

SUBMISSION ON CONSULTATION PAPER 12: CHEATING AT GAMBLING

Thank you for the opportunity to make a submission on Consultation Paper 12: Cheating at Gambling.

As my particular area of research interest and expertise is insider trading, this submission relates to the proposal to create offences relating to the use of “insider information” in connection with sporting events and the issues raised in question 6.2 of the Consultation Paper. For ease of reference, I have attached copies of the proposed offences contained in paragraph 6.36 and 6.47 of the Consultation Paper to the back of this submission.

As is noted in the Consultation Paper, the draft offence relating to the use of “insider information” in connection with sporting events has been modelled on the sections of the *Corporations Act 2001* (Cth)¹ which prohibit insider trading in relation to financial products. In this submission, I have chosen to refer to the new proposed offences collectively as “insider gambling”.

There are four principal issues raised in this submission:

- (i) Should there be a distinction made between the liability of “participants” and those who are not “participants”?
- (ii) Who should be prohibited from accepting bets when in possession of insider information?
- (iii) Should the terms “generally available” and “material” be defined?
- (iv) Is it necessary to require an element of dishonesty, and that acts or omission be intentional or reckless?

¹ To be referred to from now on as the *Corporations Act*.

1. Should there be a distinction made between the liability of participants and non-participants?

It is recommended that consideration be given to whether it is necessary or appropriate to confine primary liability for insider gambling to those who are regarded as “participants”. Under the draft insider gambling offences, non-participants would be prohibited from placing or accepting bets if they possess “insider information”,² but would not be prohibited from communicating the information to others, or procuring others to place bets. Additionally, the prohibition on non-participants placing or accepting bets would only apply where the information was received from a participant. It is not clear from the Consultation Paper why this distinction has been made and why only “participants” are capable of being regarded as “insiders”. This is in contrast to the position under ordinary insider trading laws.

Australian insider trading laws did previously make a distinction between “primary” and “secondary” insiders.³ Primary insiders were people with some connection to the relevant company (for example, directors, shareholders, employees and those with a professional relationship with the company) and who derived the inside information as a result of that connection. Secondary insiders were people with no particular connection to the relevant company, but who knowingly received the relevant information directly or indirectly from a primary insider. However, following a review of Australian insider trading laws which became known as the “Griffiths Report”,⁴ the distinction between primary and secondary insiders was abolished on the basis that the need to ensure the integrity of Australia’s financial markets was not served by making a distinction between different types of insiders.⁵ The prohibition on insider trading now applies equally to all persons who possess inside information, so that there is only a requirement for what it known as an “information connection” rather than a “person connection.”⁶ All who possess information which they know, or ought reasonably to know, is inside information are prohibited from trading in relevant financial products, regardless of their status or how they came to possess the information.

The reason for creating an offence of insider gambling appears to be similar in nature to that for insider trading. The Consultation Paper indicates that the underlying rationale for creating the proposed offence of insider gambling is the maintenance of “the integrity of any sporting or other event.” Thus both insider trading and insider gambling are to be prohibited to protect the “integrity” of the relevant industry. On this basis, since it is now considered inappropriate to distinguish between types of insiders in relation to insider trading, it would appear to make little sense to impose an artificial distinction between participants and non-participants in relation to insider gambling.

The distinction could also cause great difficulties in the enforcement of the law. To take action against a non-participant, it would need to be shown that they received the information from a participant. This may be difficult to prove, particularly if there is more than one possible source of the information. If a person possesses information which they know to be insider information, why should it matter from whom the information was obtained, for the purpose of determining whether the prohibition on insider gambling applies to that person?

² It is perhaps worth noting that the *Corporations Act* uses the term “inside information” rather than the term “insider information” used in the Consultation Paper for the draft insider gambling offences.

³ See, for example, s128 of the *Securities Industry Code 1980* (NSW).

⁴ The Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, “Fair Shares for All: Insider Trading in Australia”, 11 October 1990.

⁵ *Ibid* at [3.34] to [3.36]; Corporations and Markets Advisory Committee, *Insider Trading Discussion Paper*, June 2001 at [0.20].

⁶ Corporations and Markets Advisory Committee, *Insider Trading Report*, November 2003 at 29-30.

Of course, the source of information may have a direct impact on the reliability and materiality of that information, and this has long been recognised in insider trading cases.⁷ That is, information which is received from a reliable source is more likely to be material than information which is not. As information will not amount to insider information unless it is material (based on the definition of “insider information” included in the Consultation Paper) the same principles will be relevant to the offence of insider gambling. This means that information which is received from a participant may be more likely to be material than information which is not (which means it is more likely to be regarded as being insider information). This is another reason why the proposed distinction between participants and non-participants should be reconsidered.

2. Who should be prohibited from accepting bets when in possession of insider information?

If the distinction between liability for participants and non-participants is to be maintained, why is it only an offence for a non-participant to accept a bet when they have insider information, and not an offence for a participant? This does not appear to be logical, and the reason for this different treatment is not explained in the Consultation Paper. It is suggested that neither participants nor non-participants should be entitled to accept bets on sporting or other events when they possess insider information and that the proposed offence should be redrafted in this respect.

3. Should the terms “generally available” and “material” be defined?

As acknowledged in the Consultation Paper, the insider trading prohibition under the *Corporations Act* is clearly the model for the proposed offence of insider gambling. However, there are some significant departures from the *Corporations Act* provisions, would should perhaps be reconsidered. Key terms used in the insider trading prohibition, such as the concept of “generally available” information and the “material” effect of information, have been replicated in the insider gambling offence, but there are no corresponding definitions for these terms as there are in the *Corporations Act*. At times, the meaning of these terms has been contentious and the subject of significant judicial consideration in a number of insider trading cases.⁸ It is recommended that consideration be given to including definitions for these terms for the offence of insider gambling as well. Suggested definitions for these terms (based on the corresponding *Corporations Act* definitions) are:

Information is “**generally available**” if:

- (a) it consists of readily observable matter; or
- (b) it has been made known in a matter that would, or would be likely to, bring it to the attention of persons who commonly place or accept bets on the types of sporting or other events which the information relates to; or
- (c) it consists of deductions, conclusions or inferences made or drawn from information referred to in paragraph (a) or (b).

A reasonable person would be taken to expect information to have a “**material effect**” on the betting on a sporting or other event or contingency if (and only if) the information would, or would be likely to, influence persons who commonly place or accept bets on sporting or other events or contingencies in deciding whether or not to place or accept bets on the relevant sporting or other event or contingency.

⁷ See, for example, *R v Rivkin* [2003] NSWSC 447; *R v Hannes* (2000) 158 FLR 359.

⁸ See, for example, *R v Firms* (2001) 19 ACLC 1495; *R v Kruse* [1999] 98/11/0908 (Unreported, O’Reilly J, District Court NSW, Dec. 2, 1999); *R v Rivkin* [2003] NSWSC 447; *ASIC v Citigroup Global Markets Australia Pty Ltd* [2007] FCA 963.

4 Is it necessary to require an element of dishonesty, and that acts or omission be intentional or reckless?

The offence of insider trading under the *Corporations Act* does not contain any separate requirement of dishonesty, intention or recklessness - there is a requirement that the person must actually know, or ought reasonably to know, that the relevant information is inside information.⁹ This means that it must be demonstrated that the person knew, or ought reasonably to have known, that the relevant information was not generally available and that it was likely to have a material effect on price of the relevant financial products, and this is commonly referred to as the “knowledge” element of insider trading. However, for the draft offence of insider gambling, as well as a requirement that a person actually knows, or ought reasonably to know, that the relevant information is insider information, it is also necessary to show that the person “dishonestly” placed a bet or “dishonestly” communicated the information to another person, as well as a further requirement that the relevant act or omission was intentional or reckless. These extra elements of dishonesty, intention and recklessness go far beyond what it required to prove insider trading. In light of the fact that “knowledge” element of the insider trading offence is considered to be one of the most difficult parts of that offence to prove and, and that this difficulty appears to create one of the greatest obstacles to the successful prosecution of insider trading offences,¹⁰ it is perhaps hard to see why it should be necessary to include the additional requirements for dishonesty and intention or recklessness for the proposed insider gambling offence. It is suggested that this issue be reconsidered.

I appreciate being given the opportunity to make a submission on the Consultation Paper. Please do not hesitate to contact me if I can be of further assistance.

Yours sincerely

Juliette Overland
Senior Lecturer, Business Law
University of Sydney Business School
University of Sydney NSW 2006
T:
F:
E: _____

⁹ This occurs through the combined operation of s1043A and s1042A of the *Corporations Act*.

¹⁰ See, for example, the Explanatory Memorandum, *Financial Services Bill 2001* (Cth) [2.78] to [2.79]; Corporations and Markets Advisory Committee, *Insider Trading Discussion Paper*, 2001 [2.139]; Roman Tomasic and Brendon Pentony, “The Prosecution of Insider Trading; Obstacles to Enforcement” (1989) 22 *Australian and New Zealand Journal of Criminology* 65; Lyon and du Plessis, *The Law of Insider Trading in Australia* (2005) 163-168.

Proposed offences

- (1) An offence is committed where:
 - (a) a person, directly or indirectly, with intent:
 - (i) to obtain a **benefit** for himself or herself or for any other person; or
 - (ii) to cause a loss or disadvantage to any other person, **dishonestly** induces or attempts to induce a **participant**, or makes an offer to such a **participant**:
 - (iii) 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
 - (iv) not to bring to the attention of a member of the Police Force, or other appropriate authority such as a sports controlling body, any such offer or inducement or attempted inducement in relation to a scheme or arrangement of the kind contemplated by sub-paragraph (1)(a)(iii); or
 - (b) a **participant** dishonestly offers or agrees to carry into effect, or carries into effect, any scheme or arrangement of the kind contemplated by sub-paragraph (1)(a)(iii).
- (2) It shall also be an offence where an **insider** possesses information in relation to a **sporting or other event** or contingency that he or she knows or ought reasonably to know is **insider information**, and with that knowledge,
 - (a) **dishonestly** places a bet directly or indirectly on the outcome of that event or contingency, or
 - (b) directly or indirectly **dishonestly** communicates the information or causes that information to be communicated to a third party who the **insider** knows or ought reasonably to know would or would be likely to place a bet on that event or contingency; or
 - (c) procures a third party to place a bet directly or indirectly on the outcome of that event or contingency
- (3) It shall also be an offence where a third party, to whom information is disclosed by an **insider**:
 - (a) knows or ought reasonably to know that the information is **insider information**; and
 - (b) with that knowledge, **dishonestly** places directly or indirectly a bet or accepts a bet on the outcome of the event or contingency to which the **insider information** relates.
- (4) For the purpose of these provisions no offence is committed unless the relevant act or omission was intentional or reckless.
- (5) 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, or in the securing of any advantage, or the causing of any disadvantage.
- (6) The maximum penalty available for any such offence shall be imprisonment for 10 years.

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 a sporting 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 the 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.

“**insider**”, for the purposes of sub-sections (2) and (3), means a **participant** who possesses **insider information**.

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

- (a) is not generally available in relation to a pending sporting or other event, including:
 - (i) information concerning any arrangement of the kind referred to in sub-paragraph (1)(a)(iii); or
 - (ii) concerning any injury to a player or team tactics; 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, or 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 contest, 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.