AUSTRALIAN INTERNET BOOKMAKERS ASSOCIATION

Locked Bag 5001
Alexandria
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The Hon James Wood AO QC
Chairperson
New South Wales Law Reform Commission
GPO Box 5199
Sydney NSW 2001

By email to: nsw_lrc@agd.nsw.gov.au

Dear Commissioners

Cheating and gambling

I refer to your invitation to make a submission in relation to terms of reference received by the Commission concerning the application of the criminal law to activities that might constitute cheating in the course of gambling.

This submission is made on behalf of the Australian Internet Bookmakers Association, a body representing most of the major Australian online bookmaking agencies, including Sportsbet, Sports Alive, Centrebet and Sportingbet.

The members of this Association strongly support the creation of the proposed offence. We believe the penalties to be appropriate and consider the formulation of the offence will adequately address most of the foreseeable actions and instances associated with cheating and sport. Importantly, it now addresses corrupt payments associated with the intended cheating or match fixing, with or without actual instances of betting occurring. This remedies one of the principal concerns we raised in our earlier submission.

However, we recommend some small amendments to the formulation to avoid the exploitation of any unintended loopholes.

This submission will also address the particular questions raised in the Consultation Paper.

Formulation of the offence

The Consultation Paper observes that the Commission is "not concerned with social or private gambling between friends".

While this caveat is appropriate for cheating at gaming, or for betting for modest amounts, it may create an unintended loophole with respect to sports betting and match-fixing, or event-fixing.

As the Paper notes, "there is an organised unlawful gambling market that operates locally and internationally...". The unlawful gambling market is not conducted by licensed persons or betting agencies, but instead by individuals. It would therefore seem more appropriate that the offence be framed to make it clear that betting with "any person" (friend or otherwise) in relation to a fixed event is an offence.

The second suggestion is to make it clear that the offence occurs in relation to any sporting event conducted "nationally or internationally".

While the primary objective is to protect the integrity of Australian sport, it must be recognized there is a risk that organised crime figures located in Australia may attempt to suborn the integrity of sporting events conducted outside of this country.

Furthermore, it must be recognized there is a risk to Australian sporting events that are the subject of unlawful betting conducted internationally (for example, on underage sporting competitions).

It would seem desirable that the offence provision be wide enough to cover any element of match-fixing, if there is an Australian connection.

Accordingly, the definition of a "sporting event" in the draft formulation should be extended by the insertion of the phrase "nationally or internationally", and also "regardless of whether the sport or the event is the subject of approval for betting in Australia or otherwise".

The third aspect which may need further consideration is the inclusion of "reckless" as part of the mental element of the offence. As the Consultation Paper shows, the inclusion of recklessness in the formulation of a criminal offence has usually been associated with such offences as making a false representation to improperly gain a financial advantage.

"Recklessness" may therefore be an appropriate part of the mental element for the insider information restrictions, but may be too wide in its application to all of the substantive provisions (see proposed subsection four), especially given the emphasis on "dishonesty" in the commission of the substantive offence.

This Association cautiously supports the proposed offence regarding the use of "insider information" although further discussion may be needed around the concept that a person who has heard a rumour as to the existence of a fix, and places a bet in reliance on it, may also be committing an

offence. It may be a question of evidence as to the source of the rumour and therefore how close that person is to the "fix", which decides culpability.

Administration of the law

The Consultation Paper poses a number of questions regarding the implementation and administration of any new law in New South Wales. Namely:

> 6.1 (1) Should consideration be given to the introduction of a Gaming and Wagering Act that would consolidate, within the one Act, the relevant provisions for the regulation of all forms of gambling, and that would provide for a general offence of cheating and fraud, in relation to gambling, along with specific offences of direct relevance for each of the several specific activities including those concerned with wagering, gaming (including the Casino), and lotteries?
>
> 2) Alternatively, should the Crimes Act 1900 (NSW) be amended, so as to incorporate within it a specific set of offences concerned with cheating and fraud in the context of gambling, in the place of those currently found in the Unlawful Gambling Act 1998 (NSW), and in the associated gaming and racing legislation?
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> 6.2 (1) Should an offence or offences to the effect of the proposed draft provision in paragraph 6.36, or some variation of it, be adopted?
> (2) If so, should it be inserted as part of the Crimes Act 1900 (NSW) or added to some other Act or Acts?
> (3) Should it co-exist with the statutory fraud and secret commissions provisions contained in the Crimes Act 1900 (NSW)?
> (4) Are the proposed definitions for the provision in paragraph 6.39 sufficiently wide or too wide?
> (5) What should be the available maximum penalty?
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> 6.3 (1) Are there any limitations arising from the jurisdictional reach of the Crimes Act 1900 (NSW), or the Unlawful Gambling Act 1998 (NSW), or of the common law offences of cheating and conspiracy to defraud, that would limit or inhibit the prosecution of cheating in the context of sporting events?
>
> (2) If so, what is the solution?

While these are issues that are primarily matters for the further consideration of the New South Wales Government, this Association observes that the sooner the proposed offence is implemented the better. To this end, it is suggested the best approach is to place the proposed provision within the Crimes Act. This reinforces the normative intention of the provision to make it plain to all persons that the offence is regarded as a serious crime, warranting serious penalties.

The alternative of placing a provision in the relevant gaming and wagering legislation *in place of* current provisions would require wider review and reform of the relevant Acts, which may lead to lengthy delays in implementation. Delay is not desirable. Placement of the offence in the Crimes Act as an immediate step would not preclude later review and reform of the existing gambling legislation.

For similar reasons, the proposal to consolidate all of the current gambling legislation in a single Act, along the lines of the Victorian model, is not supported. Experience with the Victorian Act suggests that consolidation can lead to an unworkable and sometimes unclear piece of legislation. This is because the Act attempts to consolidate a variety of gambling schemes which can only be accommodated by way of qualified definitions, or carve-outs by way of exemptions. Thus, for example, a "wagering provider" in one Part of the Victorian act is to be distinguished from a "betting

provider" in another part, and then there are provisions which deal with Victorian betting providers and betting providers from other States and Territories. This is not necessarily an ideal or workable approach to the presentation of legislation. As well, the formulation of a single Act would delay the implementation of the cheating provision while the various anomalies in the current laws are identified and worked through.

Likewise the proposal to establish a New South Wales Gambling Commission should not delay the implementation of the cheating offence. Currently the New South Wales Administrative Orders provide for a Minister for Gaming and a Minister for Sports. If it was decided that a cheating offence should be included in the current gaming and wagering Acts *in addition to* the current provisions, rather than being placed in the Crimes Act, this could be achieved relatively speedily by way of replicated provisions being placed in the relevant laws.

As to the Question 6.2(1), proposed amendments to the draft provision were identified earlier in the submission.

We suggest that the new offence can coexist with the statutory fraud and secret commissions provisions currently contained in the Crimes Act.

We support of the maximum penalty being 10 years imprisonment. As the Paper noted, "the enlargement of the available penalty would open the door to the use of telecommunications interception and of surveillance devices (including access to stored communications data and data surveillance) that would appear to be important for the investigation of this kind of offence."

As to the jurisdictional reach of the Crimes Act, any limitations on it are inherent in all State or Territory legislation rather than being unique to the NSW Crimes Act. The primary difficulty is, of course, enforcement, particularly where the alleged offenders are located outside of New South Wales and/or Australia. To bolster the extra-territorial application of the New South Wales (and other States') law is it may therefore be desirable for Federal legislation to be prepared which would support the application of Federal powers in support of the state laws.

> 6.4 (1) Are there any forms of dishonesty or cheating in connection with gaming that fall outside the reach of the current legislation that regulates gaming?
> (2) If so, what are they?
>
> 6.5 Should there be, in relation to cheating with respect to lawful forms of gaming:
> (a) an overarching offence of cheating included in either the Crimes Act 1900 (NSW) or in the Unlawful Gambling Act 1998 (NSW); or
> (b) a series of cheating offences expressed in consistent terms to be included in the individual Acts concerned with gaming?
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> 6.6 (1) Should the maximum penalties for cheating at gaming be made consistent?
> (2) What should the maximum penalties for cheating at gaming be?
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> 6.7 Should the Inspectors under the several Acts concerned with gaming:
> (a) be given a common suite of investigative powers;
> (b) be subject to the same integrity standards and probity checking?

I now turn to the gaming side of cheating – more clearly a case of cheating "at gambling". The Consultation Paper notes "We have confined our consideration in this context to cheating with respect to lawful gaming. This is consistent with the approach currently taken in NSW and in all other Australian jurisdictions."

This Association suggests that draft offence provision should be extended to include all gaming, especially internet gaming.

Although internet gaming is not regulated in NSW and, in theory at least, is not permitted to be offered to Australians, the recent Productivity Commission Report on Gambling shows that this restriction is more marked in the breach than by observance. Indeed, the expenditure by Australians on internet gaming amounts to some $750,000,000 a year - more than double the lawful sports betting market. We would suggest that cheating at gambling should be included for two principal reasons: as with sports, there may be an Australian connection in the commission of the offence, even though the gambling operation is located offshore. The second is that Australians may well be amongst the consumers affected by this form of fraud.

Generally, the offence is committed where there is any attempt to tamper with gaming software, but cheating can also involve "real person" play – either online poker or, eventually, betting of the outcome of Person v Person Role Playing Games. As we suggested, a provision modelled on section 42 of the UK Gambling Act would appear to address these concerns.

We support a maximum penalty being 10 years imprisonment. Again it is desirable that the offence be inserted in the Crimes Act as an overarching is provision, in addition to the current offences described in the New South Wales gaming legislation. The choice of the particular offence for which a person is charged may be decided according to the seriousness of the circumstances. As the serious offences are more properly a matter for investigation by the police, it would not appear necessary to alter the current investigative powers or integrity standards and probity checking associated with New South Wales gaming inspectors.

6.8 Are there additional powers that should be conferred on Inspectors or Police under the context specific Acts mentioned or under a consolidated Act; and if so what should they comprise?

We consider existing police and inspectorial powers are adequate for the investigation of the prosecution of the types of offences that are proposed.

6.9 Should the powers of racing stewards to investigate and penalise breaches of the rules, or cheating, in the context of thoroughbred, harness and greyhound racing, be amended to apply to non-licensed people?

This Association does not support such an extension. The Rules of Racing presently allow orders to be made disqualifying or "warning off" any person whose conduct constitutes a threat to the integrity of racing. Also, proper forensic investigation of the more serious offence of cheating is likely to involve the exercise of such powers as telephone interceptions. This is more properly a power to be exercised by the police under the authority of a warrant.

Related issues

The Consultation Paper made note of several related issues within the wider gambling landscape:-

(a) the possible establishment of a single Gambling Commission or Authority in NSW;
(b) the procedures for the approval of betting events and gaming activities; and
(c) the roles of the sports controlling bodies and integrity units.

As to the first, this association has already had noted that the formation of a single Gambling Commission is primarily a matter for the New South Wales Government but that consideration of such an option should not delay the implementation of the offence of cheating at gambling.

With respect to the second, the Consultation Paper noted the effects of Victorian and other legislation. These comments perhaps do not do justice to the powers and roles of other State and Territory gambling regulators. For example, the Paper notes the express articulation of the kinds of factors to be taken into account by the Victorian Gambling Commission in deciding whether or not to approve an event for betting purposes, being:

> *when it considers that to allow betting on that contingency:*
> *(a) may expose the relevant event or class of event to unmanageable integrity risks; or*
> *(b) is offensive; or*
> *(c) is contrary to the public interest; or*
> *(d) is unfair to investors; or*
> *(e) should be prohibited for any other reason."*

We note that this is simply the articulation of criteria that are already applied by the gambling regulators around the country in the exercise of this kind of discretion. Although the Victorian Act "reduces this to writing" as it were, it does not mark any great advance on the processes or procedures followed by other interstate regulators, who take into account precisely these kinds of factors when deciding on approval of new bet types. It is somewhat unfair therefore to state that in both Victoria and South Australia there is "legislative direction" that is lacking in NSW concerning the process by which events or contingencies can be approved for betting purposes.

More importantly, though the consultation Paper makes note of the Victorian provisions regarding sports, it does not do so with any depth. For example:

(a) the process for approval of a sports organization as the controlling body can be readily streamlined and made less expensive;
(b) there are inadequate review mechanisms for both betting providers and sporting bodies in the event of disputes. The Paper notes that "provision is made for the Commission to make a determination that the sports betting provider can offer a betting service on a sports betting event, where the sports betting provider and the sports controlling body have been unable to reach an agreement between themselves" but this is not strictly correct. Only the betting provider has a right to seek a review.
(c) there is no express power for a sporting body to approve a bet type,

to mention but some.

The most serious concern however is the constitutional question mark which hangs over the validity of the Victorian legislation. The Paper notes "the lack of uniformity between the States in relation to

what is permissible in the way of betting, and to the application, in relation to lawful wagering in Australia, of the constitutional protection concerning the freedom of interstate trade and commerce. ... This is an area of trade and commerce to which s 92 of the *Constitution* (Cth) has potential application, as appears from the decision of the High Court in *Betfair Pty Ltd v Western Australia*."

Amendments to the Victorian Act, or the passage of interstate legislation modelled on its provisions will not necessarily cure this deficiency.

In recognition of these deficiencies and in support of the integrity objectives, internet bookmakers and, subsequently other betting providers, negotiated agreements directly with the sports. These agreements had national reach (i.e. covered all events across the country), provided for the provision of information regarding suspicious bet types and expressly gave the power of approval of the bet types to the sports.

Recent events and commentary around sports betting have called for regulators and all sports bodies to have the power of veto over a "negative" bet types. It is important to note that these powers already exist and have been, and are, exercised by the sports and gambling regulators. In other words, the replication of legislation based on the Victorian model by the other States and territories will not materially add anything to the current arrangements.

Furthermore, this would not address the central issue for consideration which is the development of a nationally consistent approach. As the Consultation Paper noted, previous submissions have argued strongly for "a holistic, and, preferably, a national approach". This reflects the national (if not international) markets for sports betting in which both Australian betting providers and Australian punters now operate. For the individual States and Territories to simply aggregate power does not cure the overarching problem of each State and Territory trying to regulate a national market.

The paper made the comment that *"It is clear that sport and betting take their place on a stage that transcends State and National boundaries, and that there are constitutional impediments to State laws that seek to restrict cross-border transactions. Accordingly, it seems to be important that there be substantial uniformity in relation to any measures that are directed to securing the integrity of sporting contests and associated gambling activities. As such, it is not a matter on which we wish to make comment beyond noting that it seems generally unsatisfactory for lawful betting to occur across State boundaries on events or contingencies, which are not the subject of permitted betting in the home state of the gambler placing the bet."*

This is a comment promoting form over substance. It fails to appreciate the national and international market in which sports betting occurs.

There appear to be two alternatives. The first is for a Federal role to be exercised by the Federal government; the second is for greater coordination and cooperation between the States and Territories in such areas as the approval of bet types. For example, a simple mechanism for remedying differences is where the sports, having exercised a determination to approve or disapprove a particular bet type, notify all of the State and Territory regulators. Should any particular State or Territory have a significant concern over the propriety of the decision, it may raise this with the particular sport and the regulator of the particular betting provider. Any differences

are therefore to be resolved by way of discussions and agreement, rather than the pre-emptory exercise of any purported regulatory power.

A National Sport Integrity Unit

This Association has consistently argued for the formation of a National Sport Integrity Unit (see, for example, submissions and evidence given to the Productivity Commission.) It is the missing link in the current Australian scheme of regulation. This is one element of the United Kingdom model, reviewed by the Commission, that has most relevance to the local context. The other is the development of a Code of Conduct for use by the sports.

"While most, if not all, sports controlling bodies in Australia have a code of conduct and a disciplinary system, they are by no means consistent or comprehensive in their coverage of the activities that need to be regulated or prohibited. However, the establishment of minimum standards along the lines proposed in the Report of the Sports Betting Integrity Panel (UK) has obvious attractions. As proposed in that Report, such standards would apply to all participants, that is, all people under the control of the relevant sports controlling body.

Betting on Other Events.

It is appropriate that this Association comments on some of the other matters raised, albeit in passing, in the Consultation paper.

(a) Interest Rates and ASX Indices

The Paper observes, "that, as a result of recent changes to the list of approved betting events ... bets can now be lawfully placed on international and ASX indices and on official Reserve Bank of Australia interest rates (both on movements and ranges of movements)."

This comment does not give due weight to the role and power of ASIC. ASIC has disallowed betting on ASX indices on the basis that these are "financial products" requiring appropriate licensing. Likewise, though betting on interest rates is conducted by several betting agencies, it is understood ASIC has this issue under review.

(b) Betting on Reality and TV shows

The Paper is correct to note that "cheating for example, through the use of insider information or otherwise cannot be entirely excluded. Rigged game shows or quizzes are not unknown, and there is obviously a possibility that contestants in a reality show could agree on a particular outcome in return for some benefit."

This risk has been recognized by both betting providers and by regulators. In this regard, this risk is borne by the betting providers and is regarded as acceptable due to the small size of permitted bets and the suspension of any betting market in advance of the conclusion of the particular contest.

Furthermore in relation to these and other events such as an election, the Commission observes "there is no relevant controlling body that can supervise the event, or enforce a code of conduct or other rules that would govern the behaviour of those who are involved in the event, or who may place a bet on it.... This then gives rise to a broader question of whether betting on events and contingencies should be confined to those activities where there is an effective controlling body such as a sports controlling body."

We suggest this may be a further example of promoting form over substance. The integrity of elections is subject to intense public scrutiny - the possibility of cheating in betting on this event is remote. Election betting has been conducted for over a decade in Australia and for longer periods in such places as the United Kingdom, without concerns being raised. While some persons may have issues regarding the propriety of such a bet type, betting on elections is now an accepted feature of Australian elections, with the media often regarding the betting markets as more accurate indicators of betting intentions then the polls.

(c) Fees

The commission observed *"the adoption and implementation of integrity measures can be expensive, and that the financial support that is supplied by betting agencies that have entered into sponsorship arrangements, or into arrangements of the kind that are in place in Victoria, may be insufficient to fund such activities."*

This comment is challenged on several grounds. The costs of regulation may be excessive only when duplicated schemes of regulation are put in place. Betting providers are paying fees to the sporting bodies on top of existing taxes and charges. Economies of scale and development of appropriate expertise is yet another reason why there should be a single national sports integrity unit. This Unit could be adequately funded by the fees currently paid by betting providers. There is no justification for any increase in fees.

(d) Suspension of markets and Voiding of bets

Finally the paper noted "Consideration may also need to be given to the circumstances in which betting markets could or should be suspended or voided, and the powers needed to achieve this, where there is a reasonable cause for suspicion that cheating."

This is supported. The circumstances in which markets could be suspended or all betting voided, warrant further discussion and certainty, in the interests of both betting providers and punters.

In conclusion, I look forward to the next step in the consultation process around the establishment of a specific cheating offence. The Commission's policy decisions will have major impact on both the sports and the gambling industries.

Thank you for the opportunity to comment. Please do not hesitate to contact me if you would like further information or explanation.

Kind regards

Tony Clark
Executive Officer AIBA
23 May 2011