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Parliamentary Joint Select Committee on Gambling Reform

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SUBMISSION ON INTERACTIVE GAMBLING AND BROADCASTING AMENDMENT (ONLINE TRANSACTIONS AND OTHER MEASURES) BILL 2011

Thank you for the opportunity to make a submission on the Interactive Gambling and Broadcasting Amendment (Online Transactions and Other Measures) Bill 2011.

As my particular area of research interest and expertise is insider trading, this submission relates to the proposal in Schedule 4 of the draft Bill to amend the *Criminal Code Act 1995* to create a new offence in Division 135A of “obtaining a financial advantage by deception, in relation to a code of sport”. In particular, this submission focuses on the proposal to include the following in the definition of the term “deception”:

The use by a person of confidential information in relation to a code of sport, to which the person has access because of the person’s association with the code of sport, before that information is publicly available.

For ease of reference, I have attached copies of the relevant draft sections to the back of this submission.

The Explanatory Memorandum to the draft Bill states that deception is considered, amongst other things, to be “use by a person of confidential information in relation to a code of sport, to which the person has access because of that person’s association with the code of sport, before that information is publicly available.” This concept, which essentially amounts to ‘insider gambling’, is similar, but not identical, to the prohibition on insider trading which applies in relation to certain financial products under the *Corporations Act*. The *Corporations Act* prohibits any person in possession of information which

they know, or ought reasonably to know, is price-sensitive non-public information from trading, or procuring trading, in relevant financial products.¹

The New South Wales Law Reform Commission is currently undertaking a review of “Cheating at Gambling” following the release of its Consultation Paper 12. The Cheating at Gambling Consultation Paper also proposes to create a new offence, based on the premise that it is not appropriate to allow people to gamble when they possess relevant “insider information”.² However, although there are many similar concepts, unlike the New South Wales Law Reform Commission proposal, the ‘insider gambling’ proposals in the draft Bill which creates an offence of deception through the use of “confidential information” in relation to a code of sport, is not modelled on the sections of the *Corporations Act* which prohibit insider trading in relation to financial products.

There are three principal issues raised in this submission:

- (i) Why has liability been limited to people who have an “association with the code of sport”?
- (ii) What is meant by the term “confidential information”? What is meant by the term “publicly available”?
- (iii) Why is there no requirement that the information be “material”?

Due the seriousness of the issues raised, and their potential impact on the criminal law, it is hoped that significant reconsideration will be paid to these aspects of the draft Bill.

1. Why should liability be limited to people who have an “association with the code of sport”?

It is not clear why it has been considered necessary or appropriate to confine liability for ‘insider gambling’ to those who have an “association with the code of sport”. The draft offence provides that, in this context, “deception” will only occur where a person uses confidential information in relation to a code of sport, to which the person has access because of the person’s association with the code of sport, before that information is publicly available.

The term “association with the code of sport” is not defined in the draft Bill, but the Explanatory Memorandum states that ‘...this may apply to players, referees, persons associated with players, match officials, persons associated with the code of sport and other similar persons.’ It is not explained in the Explanatory Memorandum or elsewhere why liability should be limited to people who have an “association with the code of sport.”

This is in contrast to the position under ordinary insider trading laws. The prohibition on insider trading under the *Corporations Act* 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.”³ All who possess information which they know, or ought reasonably to know, is inside

¹ This occurs through the combined operation of s1043A and s1042A of the *Corporations Act*.

² I have also made a submission to the New South Law Reform Commission on the Cheating at Gambling Consultation Paper.

³ Corporations and Markets Advisory Committee, *Insider Trading Report*, November 2003 at 29-30.

information are prohibited from trading in relevant financial products, regardless of their status, relationships or how they came to possess the information.⁴

If a person possesses “confidential information” in relation to a code of sport, which they exploit for their own purposes (for example, by using the information when placing bets on a relevant sporting event) why should it matter if they have any particular association with that code of sport? Additionally, would the proposed offence be intended to apply to people who have no connection with the relevant code of sport but who acquire information from others – for example, if a person with an association to a code of sport passes information onto their spouse, or friend, or other unrelated parties, who then use the information to place bets on a sporting event, is it intended that those person would not have any liability under the draft ‘insider gambling’ offence? Under the current drafting, it would seem that no such liability would exist. It is suggested that the most important issue should be preventing the misuse of information, rather than focusing on the role or position of the person who possesses that information.

2. What is meant by the term “confidential information”? What is meant by the term “publicly available”?

Whilst the draft Bill provides that deception will include the “use by a person of confidential information in relation to a code of sport, to which the person has access because of the person’s association with the code of sport, before that information is publicly available”, neither the term “confidential information” nor the term “publicly available” is defined. It is suggested that this is a significant omission from the draft Bill.

Under the *Corporations Act* provisions which prohibit insider trading, the terms “inside information” and “generally available” are defined. Whilst at times, the meaning of these terms has been contentious and the subject of significant judicial consideration in a number of insider trading cases,⁵ the inclusion of definitions at least provides some scope and context for the relevant offence. It is recommended that consideration be given to including definitions for the “confidential information” and “publicly available” for the offence of ‘insider gambling’ as well.

Issues which need to be considered before appropriate definitions can be drafted:

- (i) Why is an obligation of confidence required? If the information is not publicly available, is it necessary that the information also have a requirement of confidentiality?
- (ii) Who needs to have knowledge of or access to the information before it would be considered to be publicly available? Does it need to be known or available to the general public, or only those who have a connection with the relevant code of sport?

⁴ Originally, Australian insider trading laws did make a distinction between “primary” and “secondary” insiders. 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 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.

3. Why is there no requirement that the information be “material”?

The draft offence of ‘insider gambling’ does not contain any requirement that the relevant information be material. It is suggested that this is a serious omission. Why should an offence be created if the information is unlikely to be sensitive in nature? The offence of insider trading only exists in respect of information which is likely to have a material effect on the price or value of relevant financial products. It would be appropriate to import a similar concept into any offence of ‘insider gambling’.

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

Yours sincerely

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Schedule 4 - Amendments about obtaining a financial advantage by deception, in relation to a code of sport

Criminal Code Act 1995

1 After Division 135

Insert:

Division 135A— Obtaining a financial advantage by deception, in relation to a code of sport

135A.1 Definitions

In this Division:

code of sport has the meaning prescribed by the regulations.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

deception, in addition to the definition in section 133.1, includes:

- (a) conduct by a person that contrives the outcome of a sporting match or the occurrence of a micro-event during a sporting match;
- (b) deliberate underperformance by a player during a sporting match that achieves a particular result in the sporting match;
- (c) contriving the withdrawal of a player during a sporting match to achieve a particular result in the sporting match;
- (d) use by a person of confidential information in relation to a code of sport, to which the person has access because of the person's association with the code of sport, before that information is publicly available;
- (e) making a deliberately incorrect refereeing or like decision during a sporting match to influence the outcome of the sporting match;
- (f) deliberate interference before a sporting match with the equipment or playing surface to be used during the sporting match;
- (g) offering a bribe or making a threat, or engaging in any other coercive behaviour, against a person to achieve a particular result in a sporting match;
- (h) any other conduct prescribed by the regulations.

micro-event has the meaning prescribed by the regulations.

sporting match has the meaning prescribed by the regulations.

135A.2 Constitutional basis for Division

This Division relies on:

- (a) the Commonwealth's legislative powers under paragraphs 51(i), (v) and (xx), and section 122, of the Constitution; and
- (b) any implied legislative powers of the Commonwealth.

135A.3 Obtaining a financial advantage in relation to a code of sport by deception

A person is guilty of an offence if:

- (a) the person, by a deception, dishonestly obtains a financial advantage from another person; and
- (b) the other person is a constitutional corporation; or
- (c) the deception affects the activities of a constitutional corporation; or
- (d) the deception takes place in the course of trade or commerce:
 - (i) with other countries; or
 - (ii) among the States; or
 - (iii) between a State and a Territory; or
- (e) the financial advantage is obtained in the course of trade or commerce:
 - (i) with other countries; or
 - (ii) among the States; or
 - (iii) between a State and a Territory; or
- (f) the deception takes place in a Territory; or
- (g) the financial advantage is obtained in a Territory.

Penalty: Imprisonment for 10 years or 10,000 penalty units, or both.