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THE EFFICACY (AND OTHERWISE) OF THE 'NEW' SPORT ANTI-CORRUPTION LEGISLATION IN AUSTRALIA

DAVID THORPE*

Against a background of several serious local and international match-fixing scandals, this paper considers the efficacy of the 'Cheating at Gambling' provisions introduced recently within Australian jurisdictions for the purpose of combating corruption in sport, and compares the usefulness of these provisions with the general offence of fraud, the 'traditional' means by which the criminal law dealt with sports corruption. While the 'Cheating at Gambling' provisions are an arguable advance on previous statutory approaches in prosecuting and deterring sports corruption, this paper suggests that shortfalls remain, in particular whether the new provisions are able to deal adequately with the use of 'inside knowledge' and the 'soft' corruption of 'tanking', practices that have, over a considerable period of time, been tolerated if not accepted by some sports.

I: INTRODUCTION

In 2011 all Australian governments agreed to 'pursue nationally consistent legislative arrangements to address the issue of match-fixing'.¹The Foreword to the agreement states: '[t]his national policy on Match-Fixing in Sport represents a commitment by the Commonwealth and state and territory governments to work together to address the issue of inappropriate and fraudulent sports betting and match-fixing activities with the aim of protecting the integrity of sport.'²

The objective is: to protect the public interest and to secure the wider economic benefits that sports supplies. These objects were expressed in the second reading speech to the Crimes Amendment (Integrity in Sports) Bill by the Attorney General of Victoria in 2013.³

There is a financial and moral concern for governments and sporting organisations. Match fixing 'robs sport of its essential feature of uncertainty' and 'gnaws away at the fundamental foundations of sport. ... Once a sport's credibility is lost in the minds of supporters it is very difficult to retrieve.'⁴As Openshaw LCJ remarked on a cricket corruption case, '[t]he prizes for successful gambling can be very great, and the scope for corruption is therefore considerable. For the health, indeed the survival of the game as a truly competitive sport, it must be eradicated.'⁵

* Faculty of Law, University of Technology Sydney.

¹*National Policy on Match-Fixing in Sport* (2011), [3.2]

<[http://www.health.gov.au/internet/main/publishing.nsf/Content/F6DB8637F05C9643CA257C310021CCE9/\\$File/National%20Policy%20on%20Match-Fixing%20in%20Sport%20\(FINAL\).pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/F6DB8637F05C9643CA257C310021CCE9/$File/National%20Policy%20on%20Match-Fixing%20in%20Sport%20(FINAL).pdf)>.

²*Ibid.*

³Technological advances in recent years have greatly increased the potential for Australian sports to attract betting interest and the potential for criminal involvement around the world. ... All members will be cognisant of the importance of sports to our social, cultural and economic life... The fixing of matches and other sporting events is a pernicious activity that not only defrauds honest punters, but also undermines the confidence of fans and the broader community in the sport itself and in the players and other participants in the sport.' Victoria, *Parliamentary Debates*, Legislative Assembly, 7 March 2013 (Robert Clark, Attorney-General).

⁴R McLaren, 'Corruption: Its impact on Fair Play' (2009) 19 *Marquette Sports Law Review* 15, 15.

⁵*Majeed v R and Westfield v R* [2012] EWCA Crim 1186 (31 May 2012) [1].

Sport is of increasing importance to the national economy, according to the Productivity Commission, ‘Australians spent an estimated \$19 billion on gambling in 2008-09’⁶ and the Australian Bureau of Statistics reveals that income generated through sports and recreation activities was \$12.8 billion in 2011-12.⁷ Corruption threatens the viability of sport as a commercial enterprise and therefore the benefits that flow to society through the industry of sport.

To date, many Australian states have incorporated ‘Cheating at Gambling’ provisions into their criminal statutes.⁸ Against the background of several serious local and international match-fixing scandals⁹ and the suggested adoption of similar laws in foreign jurisdictions,¹⁰ this paper considers the efficacy of these ‘new’ ‘Cheating at Gambling’ provisions in combating sports corruption and compares the usefulness of these provisions with the general offence of fraud, the ‘traditional’ means which the criminal law dealt with corruption in sport. A number of examples of match fixing and other forms of sports corruption are included to illustrate and to give context to the likely functionality of the ‘Cheating at Gambling’ provisions.

Although the ‘Cheating at Gambling’ provisions advance the previous statutory approaches to deter and prosecute sports corruption, shortfalls still remain. In particular: whether the new provisions are able to deal with the use of ‘inside knowledge’ and the ‘soft’ corruption of ‘tanking’. Practices that have, over a considerable period of time, been tolerated if not accepted within some sports therefore their eradication may face a level of resistance.

II: THE OFFENCE OF FRAUD: THE ‘TRADITIONAL’ APPROACH TO SPORTS CORRUPTION

The ‘traditional’ means of criminally prosecuting sports corruption was through the general fraud provisions of State and Federal criminal statutes.¹¹ Fraud requires an accused to have engaged in conduct that is ‘dishonest’ in gaining a financial advantage or causing a financial disadvantage. In the context of sport: proving ‘dishonesty’ is hampered by the difficulty of showing that the accused athlete was dishonest as measured against the standards of ‘ordinary decent

⁶ Australian Crime Commission, *Threats to the Integrity of Sport* (2011).

⁷ The ABS reports, ‘There were 95,590 people whose main job was in a sport of physical recreation occupation at the time of the 2011 Census of Population and Housing. This was 21% higher than the corresponding figure from the 2006 Census’: *Value of Sport, Australia, 2013* <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4156.0.55.002>>.

⁸ *Crimes Act 1958* (Vic) div 2B; *Crimes Act 1900* (NSW) pt 4ACA; *Criminal Law Consolidation Act 1935* (SA) pt 5B; *Criminal Code Act* (NT) div 5A; Their provisions are in general uniformity amongst the various States. A table indicating differences can be accessed at: Parliamentary Committees (Qld), *Criminal Code (Cheating at Gambling) Amendmnt Bill 2013: Report No 23* (2013) <<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2014/5414T4908.pdf>> viewed June 2014.

⁹ *Police v Tandy* (Unreported, Downing Centre Local Court of New South Wales, Wahlquist J, 12 September 2011); *R v Amir* [2011] EWCA Crim 2914 (23 November 2011); *Kaneria v The English and Wales Cricket Board Limited* [2014] EWHC 1348 (6 May 2014); Lawrence Booth and Ed Hawkins, ‘Chris Cairns was Warned about “Greedy” Match-Fixing’, *Daily Mail* (online), 21 May 2014 <<http://www.dailymail.co.uk/sport/cricket/article-2634206/Chris-Cairns-warned-greedy-match-fixing-claims-Lou-Vincent-ex-wife.html>>; Liam Walsh, ‘Probe into Big Horse Racing Payouts’, *The Courier-Mail* (online), 18 September 2012 <<http://www.couriermail.com.au/news/queensland/probe-into-big-horse-racing-payouts/story-e6frg6nf-1226476067876>>; ‘Police Raid Ends Australia’s Biggest Match-Fixing Scandal’, *The Australian* (online), 15 September 2013 <<http://www.theaustralian.com.au/news/nation/soccer-match-fixing-ring-busted-police/story-e6frg6nf-1226719459238>>.

¹⁰ A number of countries, including New Zealand, India and the United Kingdom, have, or are in the process of considering specific legislation to combat sports corruption. These are referred to below.

¹¹ *Criminal Code Act 1995* (Cth) s 134.1; *Criminal Code 2002* (ACT) ss 326, 332; *Crimes Act 1900* (NSW) s 192E; *Criminal Code Act* (NT) s 227; *Criminal Code Act 1899* (Qld) s 408C; *Criminal Law Consolidation Act 1935* (SA) s 139; *Criminal Code* (Tas) s 252A; *Crimes Act 1958* (Vic) ss 81, 82; *Criminal Code Compilation Act 1913* (WA) s 409. Corruption may also be prosecuted under the common law offence of cheating and conspiracy to cheat. In the words of the NSW Law Reform Commission (*Cheating at Gambling*, Consultation Paper No 12 (2011) 70 [5.18]), these offences ‘have seemingly fallen into disuse’.

people'.¹²This test depends on which of two common law approaches a State has introduced into its criminal statutes: the *Ghosh* test¹³ which incorporates a subjective test based on the accused's awareness that his or her conduct was dishonest by the standards of ordinary decent people, and the *Feely* test,¹⁴ which applies an objective test where it is sufficient that the standards of ordinary decent people have been abridged.

In States which apply the *Ghosh* test, proving that an accused athlete was subjectively aware that the conduct in question was dishonest by the ordinary standards of the community is difficult: how is the prosecution to prove that in passing of 'inside knowledge' to a friend or family member on a matter crucial to a team's chances of victory, an athlete was aware that this conduct was dishonest by the standards of ordinary decent people?¹⁵

The general fraud offence will not be discussed further other than as a comparator to the Cheating at Gambling provisions.

III: THE 'CHEATING AT GAMBLING' PROVISIONS

In December 2012, the Parliament of New South Wales ('NSW') incorporated 'Cheating at Gambling' provisions into the *Crimes Act 1900* (NSW). Designated as pt 4ACA of the Act, these provisions are arguably a significant advance in combating sports corruption. The NSW provisions will be used to demonstrate the application of the 'Cheating at Gambling' provisions common to those States which have implemented the scheme.

The base offence of 'Engage in conduct that corrupts betting outcome of an event' is recorded at s 193N.¹⁶ It is important to note that the offence can be committed recklessly.¹⁷ Furthermore, the prescription limiting the offence to the intention of 'obtaining a financial advantage' or 'causing a financial disadvantage'¹⁸ which serves to prevent the criminalisation of a number of common sporting practices, such as tactical underperformance. The statute emphasises the point by stating that the 'element of the offence is established if, and only if, it is proved that accused' meant to obtain a financial advantage or cause a financial disadvantage or was aware another person meant to obtain a financial advantage or cause a financial disadvantage.¹⁹

¹²*R v Ghosh* [1982] 1 QB 1053 and *R v Feely* [1973] 1 QB 530 (English Court of Appeal); Nonetheless, there have been successful prosecutions; See for example *Police v Tandy* (Unreported, Downing Centre Local Court (NSW), Wahlquist J, 12-13 September 2011).

¹³*R v Ghosh* [1982] 1 QB 1053; *R v Feely* [1973] 1 QB 530; Although rejected by the High Court of Australia at common law in *Peters v The Queen* (1998) 192 CLR 493, 546-7, the *Ghosh* test of dishonesty is incorporated by statute in a number of Australian jurisdictions: Commonwealth of Australia, Australian Capital Territory, New South Wales, South Australia. For example, in New South Wales by s 4B(b) *Crimes Act 1900* (NSW) dishonest is defined as conduct 'known by the accused to be dishonest by the standards of ordinary people.'

¹⁴*R v Feely* [1973] 1 QB 530.

¹⁵One commentator has stated that the subjective requirement of the *Ghosh* test is 'so extremely difficult to properly satisfy that even those who are not morally obtuse and have actually acted with dishonesty (according to any definition) can too readily escape such a finding'; D Lusty, (2012) 36 *Criminal Law Journal* 286, 299.

¹⁶See *Crimes Act 1900* (NSW) s 193N.

¹⁷ *Ibid*, breach of which carries a maximum penalty of 10 years imprisonment.

¹⁸*Ibid* s 193L, 'financial' gain or loss refers to either the accused or another person of whom the accused was aware.

¹⁹*Ibid* s 193L.

The principal offence of corrupting a betting outcome is supported by two other provisions which initiate the crimes of ‘facilitate conduct that corrupts a betting outcome’²⁰ and ‘encourages another person to conceal from any appropriate authority conduct, or an agreement about conduct that corrupts a betting outcome’.²¹

The essential elements of the principal offence, ‘affect the outcome of any type of betting’, ‘contrary to the expected standards of integrity’ and the associated ‘event’ are discussed below.

A: ‘Affect A Betting Outcome’

The ‘Cheating at Gambling’ provisions shift the focus from corruption on the playing field to conduct that affects the ‘outcome’ of a bet associated with an ‘event’, such as a sporting event. In other words the offence is defined in terms of the corruption of ‘betting’ rather than corruption directed to influencing the outcome of a match. The scope of the provision is broad such that the corrupt conduct may have no influence on the outcome of a match but need only alter the outcome of a bet.²²

The requirement of ‘affect a betting outcome’ is not defined, though from the wording of the section is likely to include any alteration of odds, whether or not a bet is paid, the quantum of payment, and the cancellation of bets following concerns of corruption. The wording of the section prompts the question: does ‘affect a betting outcome’ include odds moving in favour of non-corrupt punters? To be effective the provision must be enlivened wherever the conduct in question leads to a change in odds. As those who are corrupt place bets, the odds will tend to move against them in favour of non-corrupt punters. Of course the final payout will favour the corrupt.

Given the sensitivity of the gambling market to minor changes in ‘factual’ information, a definition that focuses on a ‘betting outcome’ has the advantage of capturing conduct associated with a match that may have no influence on the match. For example, a charge of ‘corrupting a betting outcome’ was laid against a spectator at the Australian Open Tennis in 2014 for engaging in ‘court-siding’, a practice which involved ‘using a hidden device to send live point details from Australian Open tennis matches to a betting agency.’²³ The communicator had no sway over the match. Nonetheless, it can be reasonably assumed that bets were placed in accordance with the information supplied by the ‘spectator’, thereby altering the odds of the event to advantage the bookmaker concerned over other bookmakers.²⁴

²⁰ Ibid ss 193O-193M, ‘facilitate’ includes ‘encourage’. An intention going to financial gain or loss is required. Maximum penalty is 10 years imprisonment.

²¹ Ibid s 193P, an intention going to financial gain or loss is required. Maximum penalty is 10 years imprisonment.

²² Ibid s 193H.

²³ The charge was dropped after a magistrate found there was no reasonable prospect of conviction. Reasons for the magistrate’s decision were not given in the media report. It can be noted, however, that the accused ‘had previously been asked to leave a New Zealand tennis tournament’ after engaging in similar conduct; See Rachel Baxendale, ‘Courtsiding Tennis Betting Charge Dropped Against British Man’, *The Australian* (online), 26 June 2014.

<<http://www.theaustralian.com.au/sport/tennis/courtsiding-tennis-betting-charge-dropped-against-british-man/story-fnbe6xeb-1226846823981>>.

²⁴ Whether this form of information transference is contrary to the standard of integrity required to secure a conviction under the provisions is arguably debatable.

1: The Application Of 'If Engaged In' And 'Likely' To Affect A Betting Outcome

The 'Cheating at Gambling' provisions include conduct that 'if engaged in' is 'likely' to affect the outcome of betting. To revisit s 193H(a), conduct corrupts a betting outcome if it:

- (a) affects or, if engaged in, would be likely to affect the outcome of any type of betting on the event ...

Unfortunately the structure of sub-s (a) may lead to ambiguity as to its application.²⁵ What does 'if engaged in' refer to? Clearly, it is conduct. But what type of conduct? It would appear conduct that had *not* been engaged in, but *if it had* been engaged in, would have been 'likely' to have affected a betting outcome.

On one view, 'if engaged in' appears to address an 'attempt' at conduct that would corrupt a betting outcome. That is, conduct would corrupt a betting outcome if the conduct as agreed to (say, amongst conspirators), although not actually engaged in, would have been 'likely' to affect the outcome of any type of betting on the event, if it had been engaged in. A possible scenario would be the interruption of an act of planned corruption prior to fulfilment. In *R v Amir* a plan for Pakistan cricketer Salman Butt to bat out a maiden over in a test match at Lords was undone when the bowling of a new ball made it all but impossible not to score. As the Court of Appeal stated, '... when Butt faced his first full over, the maiden over did not occur. That was not a sudden change of mind. Butt did not suddenly repent of his involvement. It was simply that, as everybody would recognise, with a hard, new ball bowled in first-class cricket, a batsman could not guarantee that he would provide a maiden over.'²⁶In Butt's case the 'fix'²⁷ would have been revealed had he not scored. An attempt would also occur where, to use the above example, a player is dismissed while trying to avoid scoring. In these examples the 'conduct' of an attempt is clear.

At this point it is worth noting a comment of the NSW Law Reform Commission ('LRC') in respect to 'attempt' as opposed to 'withdrawal' from an agreement to enter into corrupt conduct:

It would seem appropriate that the offence be taken to be committed by a relevant party once the inducement is made, or an agreement is reached, to effect the fix; or once an offer is made or sought in relations to the payment or supply of a benefit ...Denial of the availability of an offence of withdrawal to a party who having entered into a relevant arrangement later acquires cold feet, would be likely to provide further teeth to the offence, and allow a law enforcement agency to intervene without having to wait until the event was held...²⁸

²⁵The placement of the comma after 'engaged in' creates doubt as to whether 'engaged in' refers to that part of sub-section (a) that follows it or is a continuation of 'affects' in (a). The better view is that 'engaged in' should be read as referring to that part of (a) that follows it, as if the comma were not present.

²⁶*R v Amir* [2011] EWCA 2914 Crim (23 November 2011) [14].

²⁷'... a deliberate "Fix", a word we use colloquially to connote corruption and dishonesty.' *Majeed v R and Westfield v R* [2012] EWCA Crim 1186 (31 May 2012) [15].

²⁸New South Wales Law Reform Commission, above n 11 [6.32]-[6.33].

Although the final form of s 193H is different to that proposed by the LRC, the concern expressed in respect to ‘attempt’ may well have found expression in the provision itself. Whether the relevant ‘conduct’ likely to affect a betting outcome is that of the initial agreement is open to debate.

With regard to the LRC report, does the wording of the provision in respect to ‘engage in’ and ‘conduct’, criminalise the actual performance, a failed attempted performance, or does it apply more broadly to the conduct of entering into the agreement? The LRC report would suggest the offence begins at the agreement to enter into a scheme to corrupt a betting outcome. The difference between performance, a failed attempt and a plan can, in some circumstances, be stark. Consider the case of *Cronje v United Cricket Board of South Africa*.²⁹ Evidence was given that South African cricketer Herschelle Gibbs entered into an agreement with his captain (Cronje) that should he, Gibbs, limit his score to 19 runs or less he would be paid \$US15,000. Gibbs, however, changed his mind while batting and, in the words of the court, ‘ignored the money and played a very good innings. That occurred because Mr Gibbs could not resist the temptation of playing well.’³⁰ It would seem from the wording of s 193H(1)(a) that ‘if engaged in’ is used in conjunction with ‘likely’. Therefore, in relation to the term ‘engaged in’ was Gibbs’ conduct in agreeing to the scheme ‘likely’ to affect a betting outcome. Given that he batted normally (to win) Gibbs’ actual conduct did not affect a betting outcome. The question is whether the *conduct* that corrupts a betting outcome includes entering an agreement to engage in conduct that will affect a betting outcome. Once bets are placed in anticipation of the ‘fix’, a betting outcome, at least in terms of changes to odds, is likely. As a counterfactual, if Cronje (or another participant) had also changed his mind and not placed a bet, or not passed information to third parties, it would seem there would be no conduct to which the requirement ‘engaged in’ could attach unless, as stated above, one identifies the entry into the agreement as sufficient.

In respect to the possible application of s 193H the question is not whether Gibbs’ conduct changed the outcome of the match (which it clearly did not) but whether a betting outcome was affected. Because corrupt associates would have placed bets in the knowledge of Gibbs’ planned misdeeds it is most likely that the odds were altered. But again, this is putting the scheme into effect as opposed to conduct that falls short of any steps at implementation, such as meeting to discuss a possible arrangement or agreeing to an arrangement prior to actualising a plan. Whether the wording of s 193H(1)(a) in respect to ‘conduct’ can extend to a plan at the time it is made, or a plan that is ‘withdrawn from’ short of an attempt, is at best uncertain.

B: The ‘Expected Standard Of Integrity’: Avoiding The Need to Prove Dishonesty

A prosecutorial advantage of the ‘Cheating at Gambling’ provisions is the avoidance of ‘dishonesty’ as the actus reus of the offence and the incorporation of a propriety test based on the integrity expected of a reasonable person in a position to affect a betting outcome on an event.³¹

Although the ‘integrity’ test remains objective, unlike the common law requirement of proving dishonesty, the relevant conduct is measured by the standards expected of, say, a

²⁹(2001) 22 Indus 2577.

³⁰Ibid 2585.

³¹See *Crimes Act 1900* (NSW) s 193H.

reasonable athlete, manager, coach, referee or official within a particular sport. More advantageously to the prosecution in States applying the *Ghosh* test under their fraud statute, there is no need to prove that the accused was aware that his or her conduct was contrary to the standards of ordinary decent people.³² Nor, under s 193H(1)(b), is it necessary to prove that the accused was aware, or knew, that his or her conduct is contrary to the standards of integrity ‘a reasonable person would expect’ of persons in a position to affect a betting outcome.

What, then, is meant by ‘standard of integrity’? Is it broader in scope than dishonesty? According to the *Australian Oxford Dictionary*³³ integrity is: ‘moral uprightness; honesty; wholeness; soundness’. The word ‘integrity’ has greater scope than does ‘honesty’. At the very least ‘integrity’ involves a level of morality. What, given the player or official of the sport in question, is the correct moral standard? The selection of the word ‘integrity’ places within the ambit of the statute conduct that may not be dishonest by the standards of society at large but is immoral by the standards of a sport. Clearly, different sports may have different standards of what is acceptable. The particular standard will arguably originate with the rules of the game or the recognised policies or culture of the sport. For example, in the American National Basketball Association (‘NBA’) the best available team must be selected at all times.³⁴ Should a coach decide to ‘rest’ a player, the breach of the sport’s rules would more likely be the basis of a discussion of the ‘integrity’ element of the offence than in, say, a sport like cricket where players are commonly rested in preparation for future games.³⁵

Consider the potential application of the s193H(1)(b) in cases where there is no apparent dishonesty. In the *Case of Christopher Munce*,³⁶ a witness who placed bets after receiving inside information from the jockey, Munce, stated in evidence that although he considered himself to be a co-conspirator, ‘I have done something which I was aware was breaking the rules [of racing] but not illegal.’ There was no evidence that Munce, who had passed the information to confederates, had ridden his horse other than to win. In these circumstances there is difficulty in proving dishonesty. Nonetheless, under the ‘Cheating at Gambling’ provisions, it would seem the behaviour of the jockey was contrary to the standards of integrity a reasonable person would expect of someone in his position. The ‘position’ of the co-conspirator is not known, prompting the question of what standard is to be expected of the layperson? It can be suggested that the standard of ordinary decent people, to borrow from the fraud descriptor, may well apply to those who do not hold an official ‘sport position’.

C: The ‘Event’ In Which A Betting Outcome Is Affected

³²As mentioned above, under the *Ghosh* test not only must the prosecution prove that the accused was dishonest as measured against the standards of ordinary decent people, but that the accused knew that his or her conduct was dishonest by those standards.

³³Bruce Moore (ed), *Australian Oxford Dictionary* (Oxford University Press, 2nded, 2004).

³⁴Although not a written rule, the breach of the convention caused the San Antonio Spurs to be fined \$250,000 for conduct ‘contrary to the best interests of the NBA’ in 2012 after resting players in a game against the Miami Heat.

³⁵To be clear, resting players is not actionable under the provisions unless to do so involves the intention, or is reckless in respect to, gaining a financial advantage or causing a financial disadvantage.

³⁶Transcript of Proceedings, *HKSAR v Munce* (District Court of Hong Kong, No 839 of 2006, Kevin Browne, 1 March 2007).

Section 193H requires that the conduct corrupts the betting outcome of ‘an event’, such as a sporting event. Section 193J defines an ‘event’ that is the subject of corrupt conduct as, ‘any event ... on which it is lawful to bet under a law of this State, another State, or Territory or the Commonwealth’ and, at s 193J(2), incorporates an ‘event contingency’.³⁷ A bet includes: to place, accept or withdraw a bet, or cause a bet to be placed accepted or withdrawn.³⁸

An ‘event contingency’, also known as ‘spot-fixing’, a ‘micro-event’ bet or an ‘exotic’ bet, refers to causing a pre-determined outcome in a specific segment of a match, such as points scored in a half of netball. Compared to fixing the outcome of a match, it is the relative ease with which a spot-fixing ‘event’ can be perpetrated by a single athlete that necessitates its inclusion within the ‘Cheating at Gambling’ provisions; an ease reflected in words of Hamblin J describing the conduct of corrupt English county cricketer Mervyn Westfield: ‘As he was later to admit in the Crown Court, he bowled deliberately badly having agreed to concede 12 runs in his first over in return for financial reward. In the event he conceded 10 runs, including a wide, and received £6,000.’³⁹

‘Contingency’ manipulation appeals to corrupt athletes ‘with a conscience’ because it is unlikely to determine the outcome of a match but may still deliver high financial returns to wrongdoers. In short, the athlete does not let his or her team mates down by fostering a deliberate loss. For example, in 2011 Pakistani cricketer Mohammad Amir was found guilty of ‘conspiracy to accept corrupt payments’ and ‘conspiracy to cheat’ when, in a Test match at Lords, he agreed to bowl three no-balls at pre-arranged times, such as the ‘first ball of the third over’.⁴⁰ Without the pang of guilt, the contingency bet is merely a means to financial gain irrespective of whether the match itself is lost. In May 2014, New Zealand cricketer Lou Vincent, playing for Sussex in England, was charged under the anti-corruption code with ‘14 offences in relation to two county matches played under the ECB’s jurisdiction.’⁴¹ In a 50 over game between Sussex and Kent, Vincent was run out for only one run off seven deliveries. A team mate, bowler Naved Arif, also charged with ‘six offences in relation to a 40 over game between Sussex and Kent’, conceded 41 runs in six overs without a wicket. Sussex lost the match and entry into the semi-final. It was reported that the ‘match attracted bets totalling more than £12 million on one legal gambling website alone.’⁴²

IV: SHORTFALLS IN THE APPLICATION OF THE ‘CHEATING AT GAMBLING’ PROVISIONS

³⁷Ibid s 193J(1), ‘In this Part, an “event” means any event (whether it takes place in this State or elsewhere) on which it is lawful to bet under a law of this State, another State, a Territory or the Commonwealth; s 193J(2), ‘In this Part an “event contingency” means any contingency in any way connected with an event, being a contingency on which it is lawful to bet under a law of this State, another State, a Territory or the Commonwealth.’

³⁸Ibid s 193I.

³⁹*Kaneria v The English and Wales Cricket Board Limited* [2014] EWHC 1348 (6 May 2014) [5].

⁴⁰*R v Amir* [2011] EWCA Crim 2914 (23 November 2011).

⁴¹*Vincent and Arif Charged by ECB* (25 June 2014) England and Wales Cricket Board <<http://www.ecb.co.uk/news/articles/vincent-and-arif-charged-ecb>>.

⁴²ESPN Cricinfo Staff, *ECB Charge Vincent, Naved Arif with Fixing* (25 June 2014) <<http://www.espnricinfo.com/england/content/story/746715.html>>.

A: Non- Performing And Under-Performing

One of the easiest (and most difficult to detect) ways to commit an offence of sports corruption is non-performance, or underperformance, of an athlete in his or her sport. Moreover, there is no capacity within the Australian criminal statutes, including the ‘Cheating at Gambling’ provisions, to prosecute athletic underperformance which is not done with the intention to gain financial advantage or cause financial disadvantage, even where deliberate and damaging to the interests of gamblers. There can be no doubt that this shortfall will from time to time prevent the prosecution of corrupt conduct, however, as discussed in detail below, there is little alternative given the practicalities of competitive sport.

Under s 193H(3)(b) ‘engage in conduct’ as it applies to corrupting a betting outcome of an event includes ‘omit to perform an act’. Provided the other elements are present, the scope of the words is sufficient to capture most forms of conduct where there is less than full performance.

Non-performance for financial gain could involve an athlete being out of position at a critical moment. Underperformance could include riding a horse more slowly than is optimal for a particular stage of a race – or perhaps failing to hold a horse back in an endurance race. More perniciously, both forms could include deliberately setting out to lose a match by performing to less than the maximum. What makes the prosecution of such conduct difficult is proving the difference between illicit underperformance and poor judgment, fatigue, or an ‘off-day’.

Despite the scope of the provision, it does not touch an increasingly common practice in sport: underperforming for professional advantage. As noted above, the offence of engaging in conduct that corrupts a betting outcome is narrowed by the requirement of s 193N(b) that the act in question be performed, ‘with the intention of obtaining a financial advantage, or causing a financial disadvantage in connection with any betting on an event’. It is the requirement of ‘financial gain or loss’ that prevents several common practices in sport from being caught within the statute. In fact some sports permit match manipulation as a rule or as a convention. For example, under the *Code of Behaviour* of Cricket Australia players must perform to the best of their ability ‘other than for tactical reasons in relation to the cricket match.’⁴³ Less predictable conduct is the player who for no apparent reason other than failing to control his or her emotions, underperforms or is so belligerent that they are disqualified. In 2011 at the Australian Golf Open, US golfer and ‘major winner’ John Daly, apparently disturbed at receiving a mandatory two stroke penalty for playing the wrong ball, hit seven balls (all he had in his bag) into the water and walked off the course.⁴⁴ There was no intent as to financial loss or gain. On some level gamblers must accept these events as part of sport.

On other occasions apparent underperformance may be purely personal in nature. In tennis, allegations of underperformance have been made for several years. At a Wimbledon semi-final match Venus Williams ‘breezed to victory’ against her sister, Serena, prompting the statement

⁴³Cricket Australia, *Code of Behaviour* 8.1(d) [2013].

⁴⁴Associated Press, *Daly Melts Down, Withdraws at Australian Open* (10 November 2011) Golf Week <<http://golfweek.com/news/2011/nov/10/daly-melts-down-withdraws-australian-open/>>.

that ‘claims that the game was rigged simply won’t go away’,⁴⁵ perhaps suggesting that it was Venus’s turn. In the Williams example there was no financial advantage to the loser Serena - the loss ended her tournament and a place in the final. Men’s tennis player Marat Safin in 2000 ‘became the first player in history to be found guilty of not giving his best effort at a Grand Slam - in effect, tanking by not seeming to try.’⁴⁶ That there was no ‘intention to gain a financial advantage’ is, one would imagine, cold comfort to gamblers.

Less certain, however, are those practices where the intention of conduct is to manipulate an event for a gain that has indirect or collateral financial benefits. Sporting teams, at the instruction of a coach, may underperform for purposes of adjusting their place in a round robin, to gain draft picks, or to compete against a lesser opponent in a finals series. For example, eight athletes from China, South Korea and Indonesia were disqualified by the Badminton World Federation at the 2012 London Olympics when they ‘sought to lose their qualifying matches in an attempt to manipulate their draws’, conduct ‘that is clearly abusive or detrimental to the sport.’⁴⁷

In Australian Football (‘AFL’) the practice of ‘tanking’, in which involves deliberately losing matches to improve the prospects of a club’s early choice in the player draft, offers similar indirect financial advantages. The media reported that in 2009 the then coach of the Melbourne Demons, Chris Connolly, faced allegations ‘which include tampering with the draft, not coaching to his full ability and bringing the game into disrepute’ after the ‘Demons lost six of their last seven matches to finish the season on four wins and qualify for a priority draft pick.’⁴⁸ While in the fullness of time a club may gain financially after securing talented players, in the absence of an intention to gain a financial advantage or cause a financial disadvantage, and irrespective of any moral or ethical wrong, these practices are outside the reach of the ‘Cheating at Gambling’ provisions.

Of greater concern is the deliberate debilitation of an opponent to secure an on-field advantage that brings with it off-field returns in monetary form. In 2008 at the Singapore F1 Grand Prix, Renault team members Flavio Briatore and Pat Symonds were reported to have ‘conspired with one of its drivers, Nelson Piquet Jr, to cause a deliberate crash.’⁴⁹ The crash enabled Renault driver, Fernando Alonso, to win the race.

Given the potential damage to external interests, it is reasonable to question whether the requirement of financial gain or loss should have been incorporated into the ‘Cheating at Gambling’ provisions. Certainly there are foreign jurisdictions that have selected words of a broader application to incorporate into their ‘cheating at sport’ statutes – though in common with the Australian provisions, nonetheless falling short of condemning manipulation for recognised tactical purposes. In South Africa the *Prevention and Combating of Corrupt Activities Act 2004* requires only that that a person who commits an offence ‘in respect of corrupt activities

⁴⁵Michael Mewshaw, ‘Stop the Tennis “Tankers”’, *Daily Mail* (online), 25 June 2011 <<http://www.dailymail.co.uk/sport/article-55801/Stop-tennis-tankers.html>>.

⁴⁶ Ibid.

⁴⁷Samantha Lane, ‘Badminton Boss “Sorry” as Athletes Expelled over Match-Fixing Scandal’, *The Sydney Morning Herald* (online), 2 August 2012 <<http://www.smh.com.au/olympics/news-london-2012/badminton-boss-sorry-as-athletes-expelled-over-matchfixing-scandal-20120801-23fv2.html>>.

⁴⁸Associated Press, *Tanking Charges against the Melbourne Football Club* (8 January 2013) news.com.au <<http://www.news.com.au/sport/afl/tanking-charges-against-the-melbourne-football-club-out-in-the-open/story-fndv8pdq-1226549291328>>.

⁴⁹ Andrew Smith, *All Bets are Off: Match-Fixing in Sport – Some Recent Developments* (2011) 9(1) *Entertainment and Sports Law Journal* 62.

in sporting events ... directly or indirectly accepts or agrees or offers to accept any gratification',⁵⁰ where gratification includes, in addition to financial benefits of many types, 'any valuable consideration or benefit of any kind' and 'any right or privilege'.⁵¹ While the application is more inclusive of certain forms of underperformance there is doubt that 'any right or privilege' could extend to, say, a beneficial draft pick. This is not the case in India where the Draft Prevention of Sporting Fraud Bill 2013 proposes that:

A person is said to commit the offence of sporting fraud in relation to a sporting event if he, directly or indirectly ... wilfully fails to perform to his true potential for economic or *other advantage* or benefit to himself or for any other person unless such under performance can be attributed to strategic or tactical reason deployed in the interest of that sport or team.⁵²

While there is a 'tactical' exception to underperformance, whether the drafters of the Bill would have intended, had their minds turned to it, the proposed exclusion to extend to practices such as draft manipulation is debatable.

B: *The Use Of 'Inside Information'*

The 'so-called' gambling industry attracts punters who believe there is, (to a degree) equality of relevant information available to all participants of a gambling event. Individuals or groups of individuals who are able to privately access information pertinent to the outcome of a sporting event are advantaged not only of predicting a result but in acquiring relatively favourable odds. The 'Cheating at Gambling' statute,⁵³ at s 193Q, introduces provisions that make criminal the wrongful use of 'inside information'.

Unlike 'conduct that corrupts a betting outcome', conviction under section 193Q does not require that the accused sought to obtain a financial advantage or to cause a financial disadvantage.

The 'inside information' provisions are a major advance that recognises the sensitivity of those in the gambling world, whether punter or official, to the selective dissemination or use of close information about a sporting event. In 2013, for example, race horse owner John Singleton had a public quarrel with his trainer Gai Waterhouse over an accusation that she gave 'inside information to her bookmaker son Tom Waterhouse',⁵⁴ that led ultimately to an inquiry by Racing Stewards NSW. Just prior to placing a \$100,000 bet on his horse 'More Joyous', Singleton was informed by a third party that the horse had health problems possibly affecting its capacity to race. As reported in the media, Singleton said, 'When her own son, who is a bookmaker, is saying she's got problems I didn't know about ... well you have to ask the racing officials, you

⁵⁰*Prevention and Combating of Corrupt Activities Act 2004* (South Africa) s 15.

⁵¹*Ibid* s 1.

⁵²Draft Prevention of Sporting Fraud Bill 2013 (India).

⁵³*Crimes Act 1900* (NSW).

⁵⁴Brendan Cormick, 'John Singleton Dumps Gai Waterhouse in Public Spat', *The Australian* (online), 27 April 2013 <<http://www.theaustralian.com.au/sport/turf-thoroughbreds/john-singleton-dumps-gai-waterhouse-in-public-spat/story-fnjufri-1226630686505>>.

have to ask Gai, you have to ask Tommy.’⁵⁵ Although Waterhouse was found not to have acted improperly⁵⁶ the incident illustrates the extremes of reactivity within gambling circles to the use of, or what is thought to be the use of, inside information and the potential financial losses faced by those ‘not in the know’.

Section 193Q has two subsections, each dealing with a different form of inside information. Subsection (1) criminalises the use of information about ‘corrupt conduct’; sub-s (2) is more general criminalising the use of ‘inside information’.⁵⁷

Again, the inside information provisions do not, in contrast with the fraud offence, necessitate that the accused act with ‘dishonesty’. This presents as substantial prosecutorial advantage in that the mere transmission or use of information in sport is unlikely to be classified by a court as relevantly ‘dishonest’. Consider the following example. In 2012 Australian jockey Damien Oliver was suspended by Stewards of Racing Victoria after it was revealed he placed a \$10,000 bet on a rival horse, ‘Miss Octopussy’, while, in the same race, he rode the horse ‘Europa Point’. ‘Miss Octopussy’ won. Oliver’s horse did not place. Oliver was charged with breaching r 83(c) of the *Australian Rules of Racing*.⁵⁸

Oliver was also liable under the Rules of Racing for possessing and using a phone in the jockeys’ rooms. According to an investigation following the Stewards inquiry there were, however, no outward indicators of an offence of dishonesty: ‘In investigations of this nature, evidence of “suspicious” riding or betting assists stewards in establishing potential breaches of the rules. In the Oliver Inquiry there was neither.’⁵⁹ If it is accepted that Oliver rode to win, there is great difficulty in proving dishonesty under the general fraud provisions in either placing a bet or using the phone to facilitate a bet. According to *The Australian*, ‘[f]ormer Western Bulldogs footballer and now form analyst/punter Mark Hunter placed the bet of \$10,000 on Oliver’s behalf on Miss Octopussy with Queensland bookmaker Laurie Bricknell.’⁶⁰ The question, though, in respect to the illegal use of insider information is whether the relevant conduct falls within the specifications of the ‘Cheating at Gambling’ provisions. Here, given the wording of the statute, the answer is likely to be an affirmative.⁶¹

Although the meaning of ‘corrupt conduct information’⁶² is relatively simple, that which constitutes ‘inside information’ and the use of inside information in the context of sport is more complex and its application indefinite.⁶³

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ See *Crimes Act 1900* (NSW) ss193Q(1) and 193Q(2).

⁵⁸ Australian Racing Board, *Australian Rules of Racing* (as at September 2014), Every jockey or apprentice may be penalised ... (c) if he bet, or facilitates the making of, or has any interest in a bet on any race or contingency relating to thoroughbred racing, or if he be present in the betting ring during any race meeting.

⁵⁹ Office of the Racing Integrity Commissioner (Vic), *Final Report on the Investigation of the Damien Oliver Inquiry* (2013) 16.

⁶⁰ Courtney Walsh and Brendan Cormick, ‘Damien Oliver Breaks Down at Stewards Hearing’, *The Australian* (online), 20 November 2012 <<http://www.theaustralian.com.au/sport/damien-oliver-breaks-down-at-stewards-inquiry/story-e6frg7mf-1226520217239>>; Associated Press, ‘Jockey Apologises for Betting Scandal’, *The Daily Telegraph* (online) 20 November 2012 <http://www.dailytelegraph.com.au/video/id-ZvdHcyNzrRiuKOlA-06sHrOBWbiUr_2S/Jockey-apologises-for-betting-scandal>.

⁶¹ Oliver was disqualified from racing by Racing Victoria for a period of 8 months and a further 2 month suspension (track-work permitted) plus a 1 month suspension for using his mobile phone in the jockeys’ room.

⁶² *Crimes Act 1900* (NSW) s 193Q(3) defines ‘corrupt conduct information’ as that where ‘if the information is about conduct, or proposed conduct, that corrupts a betting outcome of the event.’

⁶³ See *Crimes Act 1900* (NSW) s 193Q(4).

There is a requirement for those wishing to prosecute the user of ‘inside information’ to be able to show that the information leading to the placement of a bet was not publicly observable or publicly available and, if it were available, that it would have caused persons who bet on such an event to enter, or to avoid, the bet.

A common occurrence in cases of sports corruption is the passing of information from one person to another; ‘down the line’ as it were.⁶⁴ It can be noted that ss193Q(1)-(2) is phrased such that all those who pass such information to another may be criminally liable irrespective of their position in the line.

Under s 193Q(1), the base requirement of knowledge of ‘corrupt conduct’ limits the scope of the provision but also provides a degree of certainty as to when an offence has been committed: when knowledge of ‘corrupt conduct’ (as opposed to the more general ‘inside information’) is passed to another who the communicator knows, or should reasonably know, will use it to place a bet. For example, in *R v Amir, MazharMajeed*, the agent for Pakistani cricketers Amir and Butt, met with a third man for the purpose of informing him of the exact moment three no-balls would be bowled in a test match.⁶⁵ In this case there was corrupt conduct in the form of a contingency event of which a third party was told, and who it was known would place a bet according to the provided information.

As mentioned above, unlike ‘corrupt conduct information’, the offence of passing ‘inside information’ (s 193Q(2)) does not possess a base offence (corrupt conduct) but requires the wrongdoer to simply pass information that is ‘inside information’. The very definition of ‘inside information’ requires that a line of demarcation be drawn between information that is public and information that is private. This is the essence of the offence and as such is unavoidable. However, the generality of the definition of ‘inside information’ (‘consists of matter that is readily observable by the public’) may well generate argument by defendants as to whether the information passed was in fact ‘inside information’ or non-offending ‘publicly observable information’. In this respect there are several points to consider: One, is the information ‘public’? Two, if it was ‘inside information’ does it remain so after passing through several sets of hands? Three, at what point does the information move so far from its source that it is merely rumour? Four, would a person place a bet on information so far removed from a credible source knowing that its accuracy may resemble that of a ‘Chinese whisper’? To illustrate, in the matter concerning horse trainer Gai Waterhouse mentioned above, information on a horse’s state of fitness passed through a number of hands until it reached the owner who reacted with anger at having been denied the information at first hand. While the reaction of the owner was real it was, at least according to the findings of Racing NSW, based on information that was incorrect.

Nonetheless, whatever the potential definitional barriers, there are a number of practices common, and commonly accepted as a norm within sport which, with the introduction of ‘Cheating at Gambling’ legislation, now form the basis of criminal prosecution. Of particular effect is s 193Q(5) which is extensive in reach applying to the ‘deductions, conclusions and inferences’ that a person may draw from inside information. In other words, a person need not spell out that a horse is unable to win, it is sufficient that he or she reveal an injury to the horse

⁶⁴*Kaneria v The English and Wales Cricket Board Limited* 2014 EWHC 1348 (6 May 2014); *Police v Tandy* (Unreported, Downing Centre Local Court of New South Wales, Wahlquist J, 12 September 2011).

⁶⁵*R v Amir* [2011] EWCA Crim 2914 (23 November 2011) [17].

that allows the person informed to draw a conclusion, to deduce, that the horse is unable to win. To illustrate the concept, in 2011 the AFL player Heath Shaw placed a bet that his team mate, Nick Maxwell, would be the first to kick a goal. Maxwell had been unexpectedly moved from a back position to a forward position closer the goal posts. As word got around the odds on Maxwell moved from \$101 to \$26 for a \$1 bet. Although Maxwell did not score first, Shaw's \$10 share in \$20 bet would have returned him more than \$1,000. Shaw was fined \$20,000 by his club and Maxwell \$5000 (and \$5,000 suspended) for recklessly disclosing inside information. In this situation there was no 'fix', there was no guarantee that Maxwell would kick a goal. But for a person with knowledge of AFL, the positional move increased the chances of Maxwell kicking a goal, and at prevailing odds apparently made the bet worthwhile.

V: CONCLUSION

The introduction of 'Cheating at Gambling' statutes by the governments of Australia are a timely attempt⁶⁶ to deter and prosecute practices of corruption that threaten the ongoing viability of sport as a commercial entity and the public enjoyment of viewing a fair contest between sporting opponents. This general concern was recorded in the submission of the Australian Government (Office for Sport) submission to the NSW Law Reform Commission which stated of match-fixing, 'if left unchecked this corruption will devalue the integrity of sport and diminish the acceptability and effectiveness of sport as a tool to develop many aspects of our society.'⁶⁷

Although recent, the 'Cheating at Gambling' provisions will, with some certainty, have a profound impact on both preventing and prosecuting corruption in sport. A prosecutorial advantage of the 'Cheating at Gambling' provisions over the general fraud offence, the 'traditional' means of prosecuting sports corruption, is the shift in the basis of corruption from that occurring on-field to any illicit practice that 'affects a betting outcome'. In doing so, forms of sports corruption previously beyond the reach of the criminal law are now the subject of prosecution.

The statutory recognition of a 'contingency' bet in conjunction with 'affect' a betting outcome has moved the definition of corruption beyond that of fixing an entire match, to include relatively minor practices that may have no impact on the outcome of a game but which, nonetheless, destroy a spectacle within a match, to curtail audience numbers and media interests, in addition to damaging the financial interests of broader stakeholders.

The welcome utilisation of an 'integrity' standard based on a reasonable person's expectations of someone in the accused's position, avoids the difficulty of proving the fraud element of dishonesty under the *Ghosh* and *Feely* tests. Indeed, a standard linked to that expected of, say, players and officials will serve to deter the common, but discredited, practice of betting on 'my team' in the apparent belief that the bet does not have wider implications, particularly where it is perceived to be that of someone 'in the know'.

⁶⁶Timely, not least because the Cheating at Gambling provisions have been introduced at a time when the gambling industry is undergoing a revolution in the means and forms of betting. The immediacy of 'on-line' gambling, the interest of the public in sport on a national and international level and the acceptance of exotic bets have changed the gambling landscape beyond that possibly envisaged a mere decade ago.

⁶⁷New South Wales Law Reform, above n 11[6.32]-[6.33].

The 'Cheating at Gambling' provisions provide for the prosecution of those who underperform for financial gain. The requirement that the conduct in question be linked to financial return leaves a number of corrupt, or at least 'softly' corrupt, practices untouched, in particular 'tanking' and draw manipulation. There is, however, little alternative, short of an additional provision to excuse 'accepted tactical practices' (with all the definitional difficulties such clauses are likely to promote), should authorities wish to avoid prosecuting the recognised norms of many sports.

Of perhaps the greatest potential impact is the criminalisation of the use of 'inside information'. It is common within any sport for legitimate discussion and rumour to abound –in fact forms of diversion and entertainment for the followers of sport. Differentiating between this and the illicit use of inside knowledge is a potential challenge likely to require the devotion of extensive surveillance resources. More difficult, however, is overcoming an institutional acceptance that those in the know have a right to use their inside knowledge for their own advancement, even to the cost of those uninformed.

In considering the efficacy of the 'Cheating at Gambling' provisions, it must be borne in mind that an indirect benefit is to dissuade young athletes from the temptation to engage in corrupt practices that, should they be detected, carry with them a criminal record and removal for the source of their livelihood.

Despite apparent shortfalls, the increasing commercial interest in sport and the damaging effects corruption has on the business of sport, and indeed the enjoyment of the public in the unpredictable spectacle of sport, the 'Cheating at Gambling' provisions are an advance in promoting the continued well-being of a major Australian industry.