

TICKET SCALPING: ADVOCATING FOR THE EVENT ORGANISER

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Given the desire of sporting organisations to prevent and deter the practice of ticket scalping in Australia, and the fact that the Commonwealth Consumer Affairs Advisory Council [CCAAC] recently discouraged the introduction of new anti-scalping legislation, this article will examine the existing regulatory framework in Australia to explore whether Australian law effectively prevents and deters ticket scalping. Particular attention is given to the effect of Australia law on the different ticketing terms and conditions used by various sporting organisations. This highlights some of the inadequacies in the current Australian law from the event organiser's perspective and discusses whether a national uniform legislative scheme prohibiting ticket scalping would address some of these shortcomings. It also gives practical advice to event organisers in their bid to prevent ticket scalping.

Introduction

In May 2010, the issue of ticket scalping was thrust back into the Australian legal spotlight when, at the invitation of the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, the Commonwealth Consumer Affairs Advisory Council ('CCAAC') produced an issues paper examining the practice of ticket scalping and possible responses to the practice ('Issues Paper'). The CCAAC invited interested stakeholders to make submissions on the topic. Submissions were received from varying sources including individuals, sporting organisations, online auction websites and ticketing agencies.

A number of high profile sporting organisations voiced their opposition to the practice of ticket scalping and called for the introduction of a uniform national regulatory scheme against the practice.¹ Despite this, in its final report of November 2010 ('Final Report') the CCAAC decided that a uniform national regulatory scheme was unnecessary in the Australian context,² largely

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¹ See, eg, Tennis Australia, Submission to Commonwealth Consumer Affairs Advisory Council, *Issues Paper – Ticket Scalping: Ticket on-selling and consumers*, July 2010, 2; Cricket Australia, Submission to Commonwealth Consumer Affairs Advisory Council, *Issues Paper – Ticket Scalping: Ticket on-selling and consumers*, 23 July 2010, 3; The Coalition of Major Professional and Participation Sports, Submission to Commonwealth Consumer Affairs Advisory Council, *Issues Paper – Ticket Scalping: Ticket on-selling and consumers*, 5 August 2010, 3.

² Commonwealth Consumer Affairs Advisory Council, 'Consumers and the ticket market: Ticket on-selling in the Australian market' (Final Report, November 2010), iv.

because the existing legislative framework was considered ‘adequate to protect consumers from unfair trade practices.’³ Rather than focusing on the consumer, this paper intends to explore the issue of ticket scalping from the event organiser’s perspective.

Given the desire of sporting organisations to prevent and deter the practice of ticket scalping in Australia, and the fact that the CCAAC did not recommend the introduction of new anti-scalping legislation, this paper will use the existing regulatory framework in Australia to explore whether Australian law effectively prevents and deters ticket scalping. The paper will examine the current Australian legal position in relation to ticket scalping both at common law and under statute, with particular attention given to its effect on the ticketing terms and conditions used by sporting event organisers. Comparisons will be made between the ticketing terms and conditions used at different sporting events and the subsequent legal consequences of such terms and conditions under Australian law. Through this analysis, the paper will highlight some of the inadequacies in the current Australian law from the event organiser’s perspective and discuss whether a national uniform legislative scheme prohibiting ticket scalping would address some of these shortcomings.

In addition to highlighting important issues, this paper will give practical advice to event organisers in their bid to prevent ticket scalping. The paper will provide advice on ways to ensure event organisers comply with current ticket scalping laws, the most effective drafting of ticketing terms and conditions, and the legality of responses to ticket scalping such as cancelling scalped tickets. Consequently, the author’s intention is for event organisers to refer to this paper in order to determine what they can and can’t do in their quest to prevent ticket scalping.

However before launching into this analysis, it will be necessary to set the scene and describe what ticket scalping is and why it is a concern to sporting organisations. A brief description of some of the legal and non-legal impediments used by event organisers to prevent ticket scalping will assist to contextualise the issue.

In terms of the common law, the paper contends that, in Australia, ticket scalping in some circumstances is not prohibited, and that if the ticketing terms and conditions drafted by some sporting organisations were challenged in an Australian court there is a strong likelihood that the court would consider them to contravene the *Competition and Consumer Act 2010* (Cth). The paper also contends that the common industry practice of indiscriminately cancelling tickets offered for sale at a premium on internet auction sites is not permissible.

³ Ibid.

In terms of Australian legislation, the paper reviews the laws intended to assist event organisers by preventing ticket scalping. The paper proposes that by not introducing a national legislative scheme, the CCAAC squandered a golden opportunity to address outstanding problems with the existing anti-scalping legislation, namely the difficulties of enforcing the state based anti-scalping laws and the confusion for event organisers who operate across multiple jurisdictions. Ultimately, the paper concedes that uniform national anti-scalping laws would not stop the practice altogether, but would be a useful deterrent for event organisers.

Ticket Scalping: What is it?

In the Issues Paper the definition of ticket scalping was described as ‘the unauthorised on-selling of tickets [to an event] usually at a price higher than the ticket’s original face value, and purchased with the intention of making a profit’.⁴ The Issues Paper drew a distinction between ticket scalping and ticket on-selling. The latter was defined as the broad practice of selling previously purchased tickets, which could be done with or without the permission or authorisation of the event promoter or performer.⁵ On-selling therefore refers to selling tickets with or without authorisation, whereas scalping only refers to selling tickets without authorisation.

In the Federal Court case of *eBay International AG v Creative Festival Entertainment Pty Ltd* (*eBay*),⁶ Rares J defined ticket scalping in his judgment as a practice occurring ‘when people buy tickets with no intention of going to the event and then offer[ing] them for auction at prices higher than the cost price on sites such as those of eBay’.⁷

For ticket scalping to occur, a secondary market for the event ticket must exist. In the primary market event tickets are originally released and sold at their face value by the event organiser or its ticketing agent/s. In the secondary market tickets that were previously purchased in the primary market are on sold for a profit, at a loss or at their face value. Individuals or businesses who engage in the sale of tickets in the secondary market are ticket on-sellers.

To summarise, the Issues Paper contended that the three key elements of ticket scalping are that: on-sellers resell tickets purchased in the primary market to purchasers in the secondary market; the intention of the on-seller when originally purchasing the event ticket was to resell it for a profit; and the

⁴ Commonwealth Consumer Affairs Advisory Council, ‘Ticket scalping: ticket on-selling and consumers’ (Issues Paper, May 2010) 3.

⁵ Ibid.

⁶ (2006) FCA 1768.

⁷ Ibid [3].

resale is unauthorised by the event promoters.⁸ Contrast this with opportunistic on-selling which occurs when a purchaser genuinely cannot attend an event because of a change in circumstances, thereby creating a genuine need to sell their ticket.⁹ Even if an opportunistic on-seller sold their ticket at a premium, they would not be considered a scalper because their original intention when purchasing their ticket was to attend the event – it only changed when subsequent circumstances changed.

Why does ticket scalping matter?

In Tennis Australia's submission to the CCAAC, it stated that it was against the unauthorised on-selling of tickets for profit.¹⁰ Tennis Australia adopted this stance because it believes that it has an obligation as a not for profit organisation to ensure that events of national and international significance it organises, in particular the Australian Open Tennis Tournament, are accessible to as many people as possible.¹¹ Tennis Australia sets ticket prices to ensure accessibility; however it contends that ticket scalping practices undermine their efforts.¹²

In Cricket Australia's submission to the CCAAC, it raised a similar argument to that of Tennis Australia.¹³ It also added that 'scalping is a direct breach of contract that should not be aided or assisted in any circumstances',¹⁴ and that 'scalping involves profiteering by individuals who take advantage of our [Cricket Australia's] policy of setting affordable ticket prices and our strategy of providing an opportunity for all Australians and Australian families to attend cricket matches'.¹⁵ As a result Cricket Australia was of the view that a national and consistent framework against ticket scalping is required to protect consumers against ticket scalping.¹⁶

The Coalition of Major Professional and Participation Sports' submission to the CCAAC gave additional rationales against ticket scalping – namely that it exposes consumers to counterfeited tickets, undermines the integrity of authorised sales, and preys on the genuine fans of the sport.¹⁷ Consequently it supported the introduction of legislation that is 'consistent, effective, simple and national'.¹⁸

It is important to note that the purpose of this paper is not to debate the advantages and disadvantages of ticket scalping. Rather, the above merely

⁸ Commonwealth Consumer Affairs Advisory Council, above n 4.

⁹ Commonwealth Consumer Affairs Advisory Council, above n 2, 45.

¹⁰ Tennis Australia, above n 1, 2.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Cricket Australia, above n 1, 3.

¹⁴ *Ibid.* 6.

¹⁵ *Ibid.*

¹⁶ *Ibid.* 5.

¹⁷ The Coalition of Major Professional and Participation Sports, above n 1, 3.

¹⁸ *Ibid.*

highlights the sporting industry's anti-scalping stance and the calls for national, uniform anti-scalping legislation. This is important because it outlines the reasons why event organisers are taking action against ticket scalping. The next part of the paper will briefly look at some of the legal and non-legal mechanisms which event organisers are already implementing to deter, prevent and prohibit ticket scalping at their respective events.

Practical Impediments to Ticket Scalping

A series of innovative and practical mechanisms have been implemented by event organisers to prevent ticket scalping.

Some event organisers have ceased selling tickets in the traditional first-come-first-served manner, and require prospective ticket holders to enter a ballot. The ballot is a competition, where winners are picked at random and then given the opportunity to purchase a select number of tickets to the respective event. The ballots are intended to discourage re-selling by making it harder to purchase large numbers of tickets because being at the front of the queue does not guarantee the holder a ticket.¹⁹ The Big Day Out music festival in Australia is one such event that sells tickets via the ballot system, but only after an initial allocation of tickets sold on a first come first serve basis have sold out.²⁰ In terms of sporting events, at the 2006 Commonwealth Games in Melbourne, prospective purchasers were also required to apply for tickets, with no guarantee given by the organising committee that an applicant would receive the tickets requested.²¹

In Australia, event organisers or ticketing agents could consider selling tickets to events via auction processes on online auction sites.²² In the US, Ticketmaster USA has already adopted this practice as a way of preventing scalping. The rationale behind this is that it enables Ticketmaster to more effectively gauge demand for an event and set ticket prices for such events at the appropriate level, thereby reducing the opportunities for ticket resale.²³

Another method of sale used to prevent scalping is personalised tickets. The Glastonbury Festival, which sold out 137,500 tickets within less than two hours in 2007,²⁴ introduced a system whereby tickets included photographic ID of the original buyer to enforce non-exchangeability.²⁵

¹⁹ Big Day Out Ticket Home Page <<http://www.bigdayout.com/tickets.php>>.

²⁰ Ibid.

²¹ 2006 Commonwealth Games website <<http://www.melbourne2006.com.au>>.

²² Commonwealth Consumer Affairs Advisory Council, above n 2.

²³ Greg Sandoval, 'Can the net make ticket scalping legit?', *CNET News* (online), 5 June 2006 <<http://news.cnet.com/>>.

²⁴ 'Glastonbury tickets snapped up', *BBC News* (online), 1 April 2007 <<http://news.bbc.co.uk/2/hi/entertainment/6511115.stm>>.

²⁵ Ibid.

In relation to sporting events, FIFA implemented a series of these initiatives to make the practice of ticket scalping harder to achieve for the 2010 FIFA World Cup. Tickets were sold in phases so fans were given multiple opportunities to purchase tickets. Up until the final phase of sale, prospective purchasers had to apply for the ballot on the FIFA website to purchase tickets to 2010 World Cup matches. On the FIFA website, applicants were required to submit their personal details (for example their name, nationality and passport reference) to FIFA so that each ticket purchased was specifically tied to the ticket applicant.²⁶ Each of the tickets issued to the applicant had the purchaser's name printed on the ticket. When making an application, an applicant was only allowed to purchase four tickets per match for a maximum number of seven matches,²⁷ and tickets could not be purchased for different matches being played on the same day.²⁸

When collecting tickets, the person who made the application to purchase tickets had to present the payment card used to purchase the tickets, together with the FIFA Official Ticket Confirmation and another form of identification (a passport for example).²⁹ Also, foreign spectators could only collect the tickets that they purchased when they reached South Africa.³⁰ Arguably, this was a move by FIFA to prevent secondary markets emerging outside of South Africa.

Perhaps the most advanced way of preventing ticket scalping has been the advent of paperless ticketing. Instead of receiving tickets before the event, the credit card used to make the ticket purchase serves as the purchaser's ticket. The purchaser simply goes to the door with their guest and swipes their credit card for entry.³¹ Miley Cyrus's US concert tour in 2009 used only paperless ticketing.³² However it was suggested that this lead to a decrease in attendances because not all potential attendees have credit cards.³³

A new national ticketing service called Foxtix has been introduced in Australia which plans to compete against the existing duopoly held by Ticketmaster and Ticketek in the ticket market. Foxtix is planning to implement innovative technology which will reduce the possibility of scalping occurring and minimise the problems in the primary ticket market which lead to scalping.³⁴

²⁶ 2010 FIFA World Cup Tickets – Frequently Asked Questions <<http://www.fifa.com/worldcup/organisation/ticketing/index.html>>.

²⁷ 2010 FIFA World Cup Sales Regulations, below n 38, [10].

²⁸ Ibid.

²⁹ 2010 FIFA World Cup Tickets – Frequently Asked Questions, above n 26.

³⁰ Ibid.

³¹ Ticketmaster Paperless Ticketing – Information and FAQs, <<http://www.ticketmaster.com/paperless>>.

³² Richard Kastelein, 'Dual threats for the Secondary Ticket Market from the Live Nation Ticketmaster Merger', *EU Ticket News* (online), 30 January 2010, <<http://www.euticketnews.com/>>.

³³ Ibid.

³⁴ 'Foxtix to take on major event ticketing duopoly', *PerthNow* (online), 18 October 2010, <<http://www.perthnow.com.au/business/foxtix-to-take-on-major-event-ticketing-duopoly>>.

It will be interesting to watch developments and assess the impact they have on ticket scalping.

The Ticketing Contract as an Impediment to Ticket Scalping

As Creative Entertainment Pty Ltd pessimistically noted in its submission to the CCAAC, the above systems for reducing scalping are ‘expensive, time consuming and mostly only moderately effective.’³⁵

However, event organisers also use legal impediments to deter and prohibit the practice of ticket scalping. This usually takes the form of strict contractual obligations being imposed on purchasers regarding the resale of tickets to events. Ticketing terms and conditions allow event organisers considerable control over the conduct surrounding the purchase of tickets and entrance into the event stadiums. A term prohibiting ticket scalping is commonplace.

For example, in the much anticipated 2010–2011 Ashes Series, Cricket Australia drafted comprehensive ticketing terms and conditions (‘CA terms’) to cover all matches forming part of Cricket Australia’s 2010–2011 international cricket season. As part of the CA terms, patrons agreed not to:

re-sell any tickets to the matches played at the Venue at a premium ... without the prior written consent of Cricket Australia.³⁶

For the 2011 Australian Open Tennis Tournament, clause 2 and 3 of the ticket conditions of sale and entry (‘TA Conditions’) deal with ticket scalping:

each ticket ... gives you [the purchaser] a transferable but conditional licence for admission to Melbourne Park ... The licence granted to you will automatically terminate if you, without the prior written consent of Tennis Australia, resell the ticket at a premium ...³⁷

In an international context, FIFA drafted comprehensive ticket sale regulations (‘FIFA Regulations’)³⁸ and general terms and conditions (‘FIFA Terms’).³⁹ The clause that dealt specifically with ticket scalping was clause 4.1 of the FIFA Terms, which read:

³⁵ Creative Entertainment Pty Ltd, Submission to Commonwealth Consumer Affairs Advisory Council, *Issues Paper – Ticket Scalping: Ticket on-selling and consumers*, 26 July 2010, 1.

³⁶ Cricket Australia, 2010–11 Conditions of Entry to the Venue <<http://www.cricket.com.au>>.

³⁷ Tennis Australia, 2011 Australian Open Conditions of Sale and Entry <<http://www.australianopen.com.au>>.

³⁸ 2010 FIFA World Cup Ticket Sales Regulations <<http://www.fifa.com/worldcup/organisation/ticketing/salesregulations.html>>.

³⁹ 2010 FIFA World Cup Ticket General Terms and Conditions <<http://www.fifa.com/worldcup/organisation/ticketing/termsandconditions.html>>.

Ticket Holders may not sell, offer for sale, resell, donate or otherwise transfer their ticket in any way, without the specific prior written approval of FIFA.⁴⁰

In clause 4.2 of the FIFA Terms, FIFA imposed further limitations on the purchase, sale and/or the transfer of tickets by purchasers. In relation to the purchase of tickets, clause 4.2 read:

Tickets may only be purchased from FIFA through FIFA or officially authorised agents of FIFA. Any Ticket obtained from any other source (for example, unauthorised intermediaries such as ticket brokers, internet auctions, internet ticket agents) will be rendered invalid, and all rights of entry into the Stadium will be nullified. Such tickets will be cancelled by electronic or other means, and any person seeking to use such a Ticket obtained through unauthorised sources will be refused entry into the Stadium, ejected from the Stadium and/or will have their Ticket seized by the FIFA World Cup™.⁴¹

In order for event organisers to be able to rely on these types of contractual terms and for them to play a role in deterring ticket scalping, they would need to be enforceable under Australian law. The next part of this paper will examine the ticketing contract in the context of the Australian legislative framework.

Australian case law

Australian courts have considered the issues surrounding ticket scalping. The two pre-eminent Australian cases in the area are *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) FCA 1768 and *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 ('*Hospitality Group*'). These cases raise a number of discussion points which event organisers need to consider when attempting to prevent, prohibit and deter the practice of ticket scalping.

General Principles

The starting point for an analysis of ticketing terms and conditions is to consider whether the terms and conditions have been incorporated into the ticketing contract, because if a term is not incorporated into the ticketing contract, it will not be enforceable.⁴²

⁴⁰ *Ibid* [4.1].

⁴¹ *Ibid* [4.2].

⁴² *L'Estrange v Graucob Ltd* (1934) 2 KB 394.

A term may be incorporated into a contract:

- (a) by signature on a contractual document;
- (b) by reasonable notice;
- (c) by a sufficient course of dealing; or
- (d) by reference.

The most obvious way by which terms are incorporated into a contract is by the parties signing a document. If execution occurs, knowledge of the terms need not be established. However, with a ticket contract there is usually no document signed by the parties, especially in instances where the contract is formed online. In such instances, the usual way by which terms are incorporated is by reference, when one of the parties gives the other notice of the terms and conditions of the contract.⁴³

Do the terms form part of the ticket contract?

The relevant principle has been espoused in a number of different cases in Australia. Justice Brennan in the *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 provided an authoritative statement on issue:

Where a ticket or other document is intended by the issuer to contain terms of the contract such as an exemption clause or a foreign jurisdiction clause or other special condition, the issuer cannot rely on those terms unless, at the time of contract, it did all that was reasonably necessary to bring the terms to the other party's attention.⁴⁴

This principle is of importance because the limitations on resale described above place substantial limitations on the ability of an original purchaser (and in the case of the FIFA World Cup, also the holder of a ticket) to deal with the ticket.

Therefore, in order for an event organiser to rely on a limitation of resale clause, it would need to be able to demonstrate that it did all that was reasonably necessary to bring the contents of the clause to the attention of the applicant/purchaser. This was one of the issues considered in *eBay*.

⁴³ *Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379, 386.

⁴⁴ *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 228–229 (Brennan J).

Facts

The *eBay* case concerned the Big Day Out music festival. Creative Festival Entertainment Pty Ltd ('Creative') had been promoting the Big Day Out since 1992. The Big Day Out is a music festival held each year in venues at the Gold Coast, Sydney, Melbourne, Adelaide and Perth. At each venue Australian and international performing artists appear and perform individual concerts. The concerts take place throughout the course of one single day across a number of stages.

Creative sold tickets to the Big Day Out in four different ways:

- (1) direct sale online from the Big Day Out website;
- (2) direct sale online from the website of its agent, Ticketmaster;
- (3) direct sale over the counter at Ticketmaster outlets and offices; and
- (4) direct sale over the counter by other retail outlets.

The ticket contract for the Big Day Out contained a clause (condition 6) which was printed on the back of each ticket and it read as follows:

Should this ticket be re-sold for profit it will be cancelled and the holder will be refused entry. This condition specifically prohibits ticket re-sale through online market or auction sites.

Creative, as the manager and organiser of the Big Day Out event began cancelling tickets that had been advertised for profit on eBay's online auction site. eBay took action against Creative alleging, amongst other things, that condition 6 was misleading.

The first issue Rares J in the Federal Court considered was whether condition 6 could be relied upon. In order to determine this issue, the Federal Court had to consider whether the purchaser was given notice of the clause. The Federal Court declared that the issue of notice was a question of construction and depended on the method of purchase of the ticket.

The court examined both online and over the counter methods of sale.

The key point from the Court's analysis of purchasing tickets online via the Big Day Out website was that the terms and conditions were displayed during the sale process and easily accessible and available for view. The purchaser also had to click on a box indicating that he or she had read the terms and conditions before a purchase could be made.⁴⁵

⁴⁵ *eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) FCA 1768, [43].

The court contrasted the online method of sale from the Big Day Out website with the process for purchasing tickets online from the Big Day Out ticket agent, Ticketmaster.⁴⁶ Ticketmaster's terms and conditions of sale included a term which provided that a ticket sold to the Big Day Out was subject to the promoter's, or presenter's, conditions of sale. Ticketmaster's terms and conditions of sale were displayed and available for view on its website.⁴⁷ However, a purchaser on Ticketmaster's website was not directed to Creative's terms and conditions for purchasing Big Day Out tickets.⁴⁸ Further, there was no way of accessing any information regarding Creative's conditions of sale on the Ticketmaster website during the purchasing process. Finally, purchasers were not informed when purchasing tickets on the Ticketmaster website that Creative's full terms and conditions were available to be viewed on the Big Day Out website.⁴⁹

The court distinguished between these two methods of sale. Under the first method of sale, the Court concluded that objectively, a reasonable person in the position of the parties would have concluded that the limitation of resale clause formed part of the contract as the conditions were repeated, displayed and referred to numerous times throughout the ticket purchasing process on the different webpages.⁵⁰ However, under the second method of sale, the limitation of resale condition and all the other provisions which Creative argued formed part of the ticketing contract, were not communicated to the potential purchaser in the Ticketmaster online transaction. Nor was the potential purchaser given any opportunity to review or see those conditions prior to the transaction being completed and concluded. Therefore the limitation of resale condition, and arguably all the other terms and conditions, could not be said to be incorporated into the contract formed when a purchaser purchased tickets to the Big Day Out on the Ticketmaster website. As such the court concluded that Creative would not be able to rely on the limitation of resale condition if a person purchased tickets via the Ticketmaster website.⁵¹

The terms and conditions of the Big Day Out were also not available to be viewed when purchasing tickets over the counter at a Ticketmaster outlet.⁵² The Court concluded that it was only after the purchaser had paid money for the ticket, and physically been given the ticket to the event which contained the relevant terms and conditions, that they would be able to read the limitation of resale condition. This was too late. By the time notice was given of the limitation of resale condition, the ticketing transaction was completed. As such, the Court concluded that Creative would not be able to rely on the

⁴⁶ Ibid [40–55].

⁴⁷ Ibid [41].

⁴⁸ Ibid [45].

⁴⁹ Ibid.

⁵⁰ Ibid [25].

⁵¹ Ibid [55].

⁵² Ibid [56–59].

limitation of resale condition if a purchaser had purchased their tickets at the Ticketmaster offices or other retail outlets.⁵³

Ultimately the Court stated that if tickets were purchased via the Ticketmaster website or at Ticketmaster outlets, those tickets could 'not be cancelled and holders may not be refused admission even if such ticket is resold for profit.'⁵⁴

Practical lessons for event organisers

Learning from the analysis in *eBay*, event organisers need to ensure that:

- (i) their ticketing terms and conditions are included on its, and any of its authorised ticketing agents', websites through which transactions are being made;
- (ii) purchasers are directed and redirected to read the ticketing terms and conditions, with particular attention drawn to any onerous or unusual clauses; and
- (iii) purchasers should not be able to complete online transactions until they have indicated that they have read the ticketing terms and conditions.

A brief browse of the Ticketmaster and Ticketek websites reveals that there are instances where the event organiser's terms and conditions are not referred to, and are not made available prior to purchase. In the Final Report it was noted that Ticketek tickets usually contained a limitation of resale condition printed on the ticket.⁵⁵ This is something event organisers need to be mindful of – notice of limitation of resale conditions needs to be given prior to a contract being formed. Thus, some event organisers have made it a contractual obligation on their ticketing agent that all prospective purchasers be informed of the limitation of resale condition prior to making their purchase.⁵⁶ An indemnity against any breach of this obligation by the ticketing agent would provide further protection to the event organiser.

It is submitted that the relevant ticketing terms and conditions are generally available for view on the sporting organisations' websites. However, in order to ensure compliance with the notice requirements in *eBay*, the author of this paper recommends that all sporting organisations post a note on ticketing homepages directing customers to read the ticketing terms and conditions prior to making an application for tickets online. The note should also state the specific clause

⁵³ Ibid [58–59].

⁵⁴ Ibid [3].

⁵⁵ Commonwealth Consumer Affairs Advisory Council, above n 2, 37.

⁵⁶ See, eg, Cricket Australia, above n 13, 9.

numbers for special attention and should reiterate that such special attention in no way limits any of the other terms and conditions.

Similarly, the ticketing terms and conditions should be printed and displayed in a prominent position at all direct point of sales outlets, in a font big enough to read, with special emphasis drawn to the limitations on resale clause. Again, it should be reiterated at the outlet that drawing particular attention to the limitations on resale clause in no way limits any of the other terms and conditions.

The UK has already documented a number of best practices regarding notice requirements for ticket agents and retailers. The Society of Ticket Agents and Retailers ('STAR') was formed in the UK by a number of companies and organisations operating within the ticketing industry to promote high standards of service to consumers.⁵⁷ STAR members comply with a code of practice ('STAR Code') designed to help protect consumers and enhance public perception of the ticketing industry. The STAR Code is not, and does not seek to be, a binding legal document,⁵⁸ however there are procedures for dealing with breaches of the Code, and disciplinary procedures can be imposed on members if deemed appropriate.⁵⁹

In clause 1 of the general conditions of the Code, it is stated that consumers are to be provided with full information in all ticket transactions, before purchase takes place.⁶⁰ As part of the full information requirement, STAR members must 'ensure that the terms and conditions attached to tickets are fully explained. Restrictions on transferability should be made clear, as well as any cancellation rights which the Customer may have.'⁶¹ If Australian sporting event organisers complied with this provision of the STAR Code, they would not be in breach of the notice requirements espoused in *eBay*.

Do the terms and conditions apply to donees?

Ticket scalping has traditionally been thought of only in the context of a transaction involving three parties; the event organiser as original seller, the ticket scalper as the original purchaser and subsequent onseller, and a third party as the new purchaser of the ticket in the secondary market.

However, when purchasing tickets to an event, this is not always the case. Justice Rares acknowledged as much when he stated in *eBay*:

⁵⁷ The Society of Ticket Agents and Retailers website <<http://www.star.org.uk/aboutus>>.

⁵⁸ The Society of Ticket Agents and Retailers, *Code of Practice: Tickets with Confidence*, January 2011, [2.3] <<http://www.star.org.uk/media>>.

⁵⁹ *Ibid* [Part E].

⁶⁰ *Ibid* [1].

⁶¹ *Ibid*.

It must be appreciated that a variety of possible circumstances could surround each sale. The original purchaser may have bought the ticket for his or her own use; or for a gift for a spouse, child, friend, colleague or in anticipation of inviting someone else, as yet not identified, to go with them. In addition, often for convenience, one person will buy tickets to an event for a number of different people and obtain reimbursement.⁶²

As such the Court considered whether an assignee or donee of a ticket who became a holder of a ticket otherwise than through a resale for profit by the original purchaser, would be bound by the terms and conditions contained in a ticket contract and, if not, whether such a holder would therefore be free to resell for profit or engage in the practice of ticket scalping.

In relation to the *eBay* case, and specifically tickets to the Big Day Out, any one purchaser was permitted to buy up to four tickets. Therefore the Court concluded that ‘it must necessarily have been a term of sale of tickets to the Big Day Out that such tickets were assignable and that persons other than the original purchaser would be entitled to use the tickets in order to gain entry at the venue.’⁶³

It follows from Rares J’s reasoning that, in the circumstances listed above, a transferee or assignee of a ticket would not have had any contact with Creative for the purchase of the ticket and, as such, would have no knowledge of any of the contractual terms of the ticket contract. The transferee or assignee therefore, could not have entered into a contract with the event organiser. It also follows that that same transferee or assignee could not have been expected to comply with conditions he or she had no knowledge of.

As such, in *eBay* the Court concluded that an assignee or a donee of a ticket to the Big Day Out or person who bought a ticket to the Big Day Out from an original purchaser (ie, someone who contracted with Creative or its selling agents) was not bound by any terms contained in the ticket contract documents, including condition 6 which prevented the resale of tickets to the Big Day Out for profit, and therefore they were free to act as a ‘scalper’ and to seek to resell that ticket at a profit.⁶⁴

This issue of donees selling tickets to events was actually first considered by Finkelstein J in the Federal Court in 2001 in the *Hospitality Group* case.

The case concerned the Australian Rugby Union (‘ARU’) which is the peak body administering rugby union football in Australia. In 1999, two international

⁶² (2006) FCA 1768, [66].

⁶³ *Ibid* [65].

⁶⁴ *Ibid* [67].

test matches were played at Stadium Australia in Sydney. Tickets could be obtained either:

- (a) directly via the ARU's ticketing agent, Ticketek;
- (b) as part of a corporate hospitality package; or
- (c) as part of a travel package.

Along similar lines to the tickets in the *eBay* case, all tickets issued by the ARU for sale to the public contained a condition that the ticket was not to be resold at a premium or for commercial purposes without the prior written consent of the ARU.

Hospitality Group Pty Limited ('THG') and ICM (Marketing) Pty Limited ('ICM') were part of a global group of companies which provided catering and corporate hospitality services at major sporting events in a number of countries. In May 1998, THG and ICM entered into contracts with clients for the provision of hospitality packages to the 1999 rugby tests. THG and ICM acquired tickets for their clients from a number of original purchasers who had been able to purchase multiple tickets through Ticketek.

THG and ICM had knowledge of the particular term of the ticket contract which prevented the resale of tickets to the Rugby test matches at a premium. Nevertheless, THG and ICM still entered into the contracts with the original purchasers to buy the tickets at a premium. The Court therefore held that THG and ICM wrongfully induced a breach of the ARU ticket contract.⁶⁵

In light of the conclusion reached by the Court regarding inducement to breach, the Federal Court was not strictly required to determine whether THG or ICM became contractually bound to ARU.⁶⁶ However, if either of them had become contractually bound to the ARU they would have been in breach of contract when selling tickets to their clients at a premium. Therefore, whilst the Federal Court's comments on the issue can only be considered *obiter*, they are still valuable for the purposes of this discussion.

The comments of Finkelstein J support the conclusion that was reached in the *eBay* case. Justice Finkelstein stated that it would be difficult to perceive a mechanism whereby THG or ICM became bound by the terms of the condition on the tickets, either by assignment or novation.⁶⁷

In relation to an assignment, Finkelstein J stated that even if there was an assignment from the original purchaser to THG/ICM, that assignment would

⁶⁵ (2001) 110 FCR 157, [105, 132].

⁶⁶ *Ibid* [133].

⁶⁷ *Ibid*.

not carry with it the imposition of any contractual obligations on THG/ICM.⁶⁸ The ARU would however have been within its rights to enforce the conditions of entry to the stadium for the match as a new contract is formed with a ticket bearer (whomever that may be; original purchaser, assignee, transferee, etc) when that person enters the stadium. Therefore in order to enter the stadium, THG/ICM as assignee may have had to perform any obligation upon which the right of admission to the Stadium was dependent.

However, the Court stated this did not mean that ARU could enforce obligations imposed on the original purchasers as against THG/ICM.

If there had been a resale or use by the assignee in contravention of the condition, that may entitle ARU to refuse to perform its obligation to procure admission to the Stadium. However, such a resale or use would not impose any secondary obligation on the assignee for breach of contract. To say that an assignee cannot enforce the benefit of a contract without accepting the burden is quite different from saying that an assignee undertakes a contractual promise. The principle is simply that the assignee cannot enforce the contract without accepting the burden.⁶⁹

The Court was saying that if an assignment had taken place ARU may have been within its rights to refuse the ultimate ticket holder's entry into the stadium. However ARU would not have been able to assert that THG/ICM was in breach of contract if it had then gone and sold a ticket assigned to it at a premium as the contractual obligations on the original purchaser did not flow with the assignment.

Justice Finkelstein also believed that there would not have been a novation.⁷⁰ He stated that in order to show a novation, ARU would have had to demonstrate to the court that a new contract was entered into at some point between ARU and a subsequent bearer (ie, THG/ICM), whereby that bearer became contractually bound to ARU⁷¹ – novation involves tripartite participation.⁷² There must be an extinguishment of the original obligations and substitution of new obligations with the new party, the assignee.⁷³

Justice Finkelstein concluded that there was, however, 'no point at which it could be said that ARU assented to becoming a party to a new contract, thereby extinguishing the existing contract between the original purchaser and ARU.'⁷⁴

⁶⁸ Ibid [136].

⁶⁹ Ibid [133].

⁷⁰ Ibid [137–139].

⁷¹ Ibid.

⁷² Ibid [138].

⁷³ Ibid [138, 139].

⁷⁴ Ibid [139].

This was because ARU had no knowledge of, and no control over, who the assignee might be. There could not be a new contract if ARU was not aware of the other party to the contract.

Further, there was no tacit extinguishment of the original obligations because there was no inconsistency between the original and new obligations. The primary obligation of ARU (with any contract with an original purchaser or with any subsequent bearer of the ticket) was to procure admission of the bearer of the ticket into the stadium. For a novation to have occurred, ARU would have had to have agreed to the refusal of entry to the original purchaser. As Finkelstein J stated 'ARU could hardly be thought to have agreed tacitly to an arrangement that was directly inconsistent with its express wishes'.⁷⁵

The clear conclusion that the Court reached then, was that there had been no assignment of the contractual obligations to THG/ICM, nor was there a novation of the contractual obligations on the original purchaser to THG or ICM.⁷⁶

Practical lessons for event organisers

In Australia, prospective purchasers are permitted to purchase multiple tickets to an event at the same time. The issue is whether a limitation of resale condition would bind a guest of a ticket applicant or ticket purchaser.

The Australian Rugby Union used the ticket contract in a bid to bind donees for the 2003 Rugby World Cup which was held in Australia. Clause 5 of the ARU Ticket Conditions for the Rugby World Cup 2003 prohibited resales and transfers of Rugby World Cup 2003 tickets. Clause 2 stated that the conditions were to apply to a ticket holder 'even if the holder of the ticket did not have any notice of the Conditions or the breach'.⁷⁷

The author of this paper queries how a guest can agree to such a term if no notice of the limitation of resale condition is given. Moreover, there might simply be no privity of contract between the guest and event organiser. Thus, even though the ticket conditions for the Rugby World Cup were stated to apply to ticket holders even if they did not have notice of the ticket conditions, a court would be unlikely to enforce that provision in such circumstances. In fact it would be plausible for the ticket holder to argue that the condition be voided on the grounds that it is contrary to law.

FIFA also attempted to circumnavigate this issue through clause 14 of the FIFA Regulations, albeit in a different manner. Clause 14 read:

⁷⁵ Ibid [135].

⁷⁶ Ibid [133–139].

⁷⁷ Australian Rugby Union, Rugby World Cup 2003 Ticketing Terms.

Each Ticket Applicant shall be fully responsible for ensuring that each Ticket Holder who, directly or indirectly, receives a Ticket through him has read, understood, accepted and complies with the [Terms] ... For that purpose, the Ticket Applicant will provide such Ticket Holder with a copy of the [Terms] ...⁷⁸

Recall that for the 2010 FIFA World Cup a ticket holder was prohibited from reselling their ticket by any unauthorised means. It is possible that FIFA could argue a breach of clause 14 of the Regulations by the *ticket applicant* if one of his guests sells their ticket for a premium as it is the ticket applicant's responsibility to ensure each guest complies with the FIFA Terms. However, it is another argument altogether to contend that a guest of a ticket applicant could not resell a ticket on this basis. Again the lack of privity is determinative.

It follows that in many instances in Australia, a prospective purchaser could purchase multiple tickets to an event, keep one for themselves, give the remaining tickets to guests, and if the guests resold the tickets for a profit, there would be no recourse for the event organiser against the guests for breach of contract. At common law, there would be a perfectly legitimate way to scalp tickets to a sporting event in Australia.

However, there is hope for event organisers. Clause 4 of the CA Terms provides an innovative way of dealing with this issue. In addition to preventing selling tickets at a premium, clause 4 of the CA Terms prohibits a patron from 're-sell[ing] to any third party who will, or is likely to, re-sell any such tickets at a premium or use any of them for advertising, promotional or other commercial purposes without the prior written consent of Cricket Australia.'⁷⁹

If a patron did indeed sell their ticket to a third party who ended up scalping their ticket, Cricket Australia could argue a breach of clause 4 of the CA Terms, and subsequently cancel the ticket. No such action could be taken in the other previous examples because in those examples, the original purchaser is entitled to give or resell tickets to scalpers. Whilst there are of course potential evidentiary difficulties of proving that a sale to a third party was likely to result in a ticket being scalped, this is nonetheless a step forward in an event organiser's fight against ticket scalping.

Is the term relating to the limitation of sale of tickets misleading?

In the *eBay* case, the Court found that Creative's use of the limitation of resale condition constituted misleading or deceptive conduct in contravention of section 52 of the *Trade Practices Act 1974* (Cth) because it conveyed one or more of the following representations:

⁷⁸ 2010 FIFA World Cup Ticket Sales Regulations, above n 38, [14].

⁷⁹ Cricket Australia, above n 36, [4].

- (1) every ticket that is resold for profit will be cancelled by Creative;
- (2) the holder of any such ticket will be refused entry to the festival;
- (3) Creative has the means available to it of detecting the tickets which are subject to such resale with sufficient frequency to warrant an assertion of inevitability of such cancellation and refusal of entry;
- (4) Creative has the means to cancel each and every such ticket so sold and to refuse the ticket holder entry to the festival;
- (5) the provision is enforceable as a condition of the ticket in all cases.⁸⁰

In the *eBay* case, the limitation on resale condition was stated in bold, direct and unqualified language – if the ticket is resold for profit ‘*it will be cancelled and the holder will be refused entry*’. Creative’s senior executives, Mr Lees and Ms McBeath, both gave evidence that they would search through eBay’s website searching for tickets to the Big Day Out being advertised for sale.⁸¹ When they found such a ticket, it would be immediately cancelled. No further investigation was undertaken by Creative’s executives – if the ticket was for sale on eBay, it would be cancelled.⁸²

The Court concluded that through the wording of the limitation of resale condition and the conduct of Creative’s senior executives, Creative conveyed, in substance, a representation that Creative was legally entitled to and would detect and cancel any ticket for any Big Day Out 2007 festival which was resold by *anyone* for profit. It also conveyed to an ordinary reasonable person, on an ordinary reasonable reading of the condition, that the person who sells a ticket for profit would be discovered, the ticket sold would be detected and cancelled and the holder of that ticket would be refused entry.⁸³

However this ordinary reasonable reading was inconsistent with the Court’s earlier conclusion that there were instances where an on-seller *was* entitled to resell a ticket for profit.

Also, Ms McBeath’s evidence was that Creative could not cancel tickets which had been sold on eBay unless it could identify the ticket number. She said that was ‘... because we can’t trace every ticket’.⁸⁴ Creative conceded that it could not detect all resales at a profit by putting forward an ‘if we catch you, we will cancel the ticket’ argument.⁸⁵ Therefore, Creative did not have reasonable

⁸⁰ (2006) FCA 1768, [1].

⁸¹ *Ibid* [69].

⁸² *Ibid*.

⁸³ *RAIA Insurance Brokers Ltd v FAI General Insurance Ltd* (1993) 41 FCR 164, [172–175] (Beaumont and Spender JJ).

⁸⁴ (2006) FCA 1768, [74].

⁸⁵ *Ibid*.

grounds to make the representation that every ticket resold for profit would be cancelled.⁸⁶

Ultimately the Court concluded that Creative had engaged in conduct which was, or was likely to be misleading and deceptive conduct towards members of the public because the limitation on resale condition conveyed false representations.⁸⁷

Practical lessons for event organisers

It is useful to look at practical examples of ticketing terms and conditions to see how they might be interpreted in Australia.

The FFA drafted terms of admission ('FFA Terms') which apply to all ticket holders attending an event organised by the FFA.⁸⁸ The A-League grand final held at Suncorp Stadium in Brisbane on 13 March 2011 in front of a sell-out crowd of over 50,000 spectators was one such event.⁸⁹ Clause 3 of the FFA Terms stated that a 'ticket holder' must not 'resell or transfer, or attempt to resell or transfer the ticket at a premium'.⁹⁰

The author of this paper contends that the use of the term 'ticket holder' conveys a representation to the ticket purchasing public that neither ticket purchasers nor assignees are entitled to resell their ticket at a premium. However this would be inconsistent with the Court's earlier conclusion that, in certain circumstances, a guest of an original ticket purchaser would not be bound by the ticketing contract, and would therefore be able to sell their ticket at a premium, absent any statute law to the contrary.

If an Australian court analysed the terms used for the FIFA World Cup, it would also probably lead to an unfavourable outcome for the event organiser. Like condition 6 in *eBay*, clause 4.2 of the FIFA Terms used very strong and definitive language when limiting the sale of FIFA World Cup Tickets:

Tickets may only be purchased from FIFA through FIFA or officially authorised agents of FIFA. Any Ticket obtained from any other source ... *will be rendered invalid*, and all rights of entry into the Stadium will be nullified. Such tickets *will be cancelled* ...⁹¹

⁸⁶ Ibid.

⁸⁷ Ibid [80].

⁸⁸ Football Federation Australia, Hyundai A-League Terms of Admission, [1] <<http://www.a-league.com.au>>.

⁸⁹ Ray Gatt, 'Grand final needs to lift the game after season of disappointments', *The Australian* (online), 12 March 2011 <<http://www.theaustralian.com.au/news/sport/grand-final-needs-to-lift-the-game-after-season-of-disappointments/story-e6frg7mf-1226019941079>>.

⁹⁰ Football Federation Australia, above n 88, [3].

⁹¹ 2010 FIFA World Cup Ticket General Terms and Conditions, above n 39 (emphasis added).

FIFA conveyed through the FIFA Terms, in substance, the same representations as Creative, that is, it was legally entitled to and could detect if any ticket for any 2010 FIFA World Cup match in South Africa was obtained from a source other than FIFA or a FIFA approved agent, and if so, that ticket would invariably be cancelled.

Pursuant to the reasoning adopted in *eBay*, in order for an Australian court to consider that such a clause is not misleading or deceptive, the event organisers would have to show that they had the capacity to detect *in all circumstances* when a ticket in respect of a FIFA World Cup match, had been obtained from a source other than FIFA or a FIFA approved agent.

Tickets to a FIFA World Cup match purchased by the ticket applicant had the ticket applicant's name printed on the tickets. Therefore FIFA would have had the capacity to determine if the person entering the stadium for a match was actually the applicant as they could cross check the name on the ticket with identification documents. If the applicant resold his or her ticket it would be detectable.

However, could FIFA detect if a *guest's ticket* had been obtained from a source other than FIFA or a FIFA approved ticketing agent? It is the contention of this essay that it could not. At no stage during the ticket purchasing process was the ticket applicant required to give the names of guests. Only the ticket applicant's name was printed on the tickets, not the name of the applicant's guests.

This is a problem for FIFA as with only the applicant's name on the ticket, any subsequent bearer of the ticket could simply claim that he or she was a guest of the applicant. Therefore if a guest scalped their ticket, how would FIFA be able to detect this?

It follows that FIFA could not detect whether each ticket had been obtained legitimately from FIFA (or an approved FIFA agent) in accordance with the FIFA Regulations and FIFA Terms, or whether it had been obtained from an unauthorised source.

Even Cricket Australia's terms could be scrutinised unfavourably by an Australian Court. Recall that clause 4 of the CA Terms prohibited a patron from reselling to any third party who will or is likely to resell the ticket at a premium. It also stated that: 'If the ticket is sold or used in contravention of this condition, the bearer of the ticket will be denied admission to the Venue.'⁹²

⁹² Cricket Australia, 2010–11 Conditions of Entry to the Venue, above n 36.

By using the word ‘will’, Cricket Australia was essentially representing to the public that in all circumstances, if a ticket was used in contravention of clause 4, admission would be denied. Further the drafting conveys a representation that detection is inevitable. The reality is that Cricket Australia would be adopting a similar approach to that taken by Creative in *eBay* – ie, ‘if we catch you, we will deny admission’. However, to ensure there was no breach of the Australian Consumer Law, Cricket Australia would have to put measures in place to ensure the tracking of each contravention of clause 4 of the CA Terms and then ensure punishment in accordance with its terms.

Unfortunate as it is, event organisers must confront the reality that in their efforts to curtail ticket scalping, they can easily draft clauses which convey representations which could be held by an Australian court to be false and misleading. Such clauses would therefore be in breach of the misleading or deceptive conduct provisions of the *Competition and Consumer Act 2010* (Cth).

For those readers that consider such analysis far-fetched it is worth considering the comments of Rares J who conceded that the Australian position on scalping was ‘unfortunate’ given that event organisers are simply trying ‘to protect the market from cynical exploitation by scalpers who created an artificial scarcity of tickets.’⁹³

Practical Solutions for Event Organisers

In order to circumvent these issues the author of this paper contends that event organisers could do either of the following:

- (i) ensure the detection of all ticket scalping by:
 - (a) requiring ticket applicants to name each of their guests in the ticket application process and ensuring each ticket printed has an individual’s name on it; and
 - (b) having staff at each stadium check the names on each ticket with ID documents; or
- (ii) change the wording of the limitation of resale condition so that:
 - (a) it applies only to ticket purchasers, not all ticket holders; and
 - (b) it uses less definitive language.

There are, however, problems with each of these options. Implementing the comprehensive detection mechanisms described in option (i) above is, for many event organisers, unreasonable, unworkable and unrealistic. Its implementation

⁹³ (2006) FCA 1768, [76].

would involve significant human resources and cost. Event organisers would need to have sufficient numbers of staff to ensure that every entrant to the venue was checked for identification. Moreover, the extra time it would take to check tickets could result in extreme spectator dissatisfaction.

Event organisers may also be unwilling to change the wording of the limitation of resale condition to be less definitive. Recall that event organisers are attempting to deter and prevent ticket scalping practices. By softening the wording of the limitation of resale condition, event organisers could be perceived as softening the message to scalpers, and its stance on scalping.

However, if an event organiser were open to amending the wording of the limitation of resale condition, it could look to the ticketing conditions of sale drafted for the 2011 Formula 1 Australian Grand Prix held in Melbourne. These conditions only apply to ticket purchasers and clause 8 of the conditions of sale to the 2011 Formula 1 Australian Grand Prix reads:

Tickets may not be sold, on-sold, exchanged for fee or reward or other valuable consideration or otherwise commercially dealt with without the prior written consent of AGPC ... If a ticket has been dealt with in contravention of this condition, the bearer of the ticket *may* be denied admission or *may* be directed to leave the Event.⁹⁴

As such, it is the contention of this paper that strict contractual terms and conditions can only play a limited role in preventing scalpers from scalping tickets in Australia. It is also contended that a full appreciation of these issues was a relevant factor for the CCAAC to consider when deciding whether to recommend the introduction of a uniform national legislative scheme against ticket scalping. This is because, as will be demonstrated in the next part of this paper, the existing state based statutory law does not resolve these issues for the event organiser.

Legislation

A range of legislation designed to apply to sporting events already exists in a number of states in Australia. For example, in Victoria, the Victorian Parliament enacted the *Major Sporting Events Act 2009* (Vic) ('Victorian Act'). In NSW, the NSW Parliament enacted the *Major Events Act 2009* (NSW) ('NSW Act') and in Queensland the *Major Sports Facilities Act 2001* (Qld) ('Qld Act') deals with a number of issues regarding sporting events. These Acts illustrate the emphasis given to preventing ticket scalping in the different states and the different approaches adopted, if any, to prevent ticket scalping in Australia.

⁹⁴ Formula 1 Australian Grand Prix Conditions of Sale, [8] (emphasis added).

The NSW Approach

The NSW Act does not deal with the issue of ticket scalping. However, New South Wales does have venue specific legislation which prevents ticket scalping including the *Sydney Cricket Ground and Sydney Football Stadium By Laws 2009 (NSW)* and *Sydney Olympic Park Regulation 2001 (NSW)*. These laws only make it an offence to scalp tickets within a certain proximity of the specific stadiums.

With the proliferation of internet based auction sites, scalpers have become more sophisticated than ever. The NSW approach focuses on, and legislates against, the traditional style of ticket scalper, the isolated scalper who loiters outside stadiums trying to resell tickets at a profit. However, as the bulk of unauthorised sales are now made on the internet, it is contended that this approach is largely redundant, and that in essence, in NSW most ticket scalping transactions would be governed by the common law.

The Victorian Approach

In Victoria, the *Sports Event Ticketing (Fair Access) Act 2002 (Vic)* was the first piece of legislation which dealt specifically with the issue of ticket scalping. However it has been superseded by the Victorian Act which reinstated the provisions of the earlier Act with some amendments. The Victorian Act makes ticket scalping illegal in certain circumstances.

Under the Victorian Act, the Minister may make a sports ticketing event declaration in respect of a sports event. The effect of the Minister making a sports event ticketing declaration in relation to a sports event is that within 60 days of receiving notice that the Minister has made the declaration, a sports event organiser must give the Minister a ticket scheme proposal.⁹⁵ A ticket scheme proposal sets out details concerning the sale and distribution of tickets to the event. Essentially, it requires the event organiser to publicly declare how tickets are distributed and to whom and in what quantity.

If the sports event has been declared a sports ticketing event and there is a condition of sale that prohibits the sale or distribution of the ticket by a person who is not authorised in writing to sell or distribute tickets on behalf of the sports event organiser, a person is prohibited from contravening that condition.⁹⁶ Under the Victorian Act, the condition that prohibits or restricts the sale of the ticket must also be printed on the ticket. Essentially, the Victorian Act prohibits the resale of tickets to sporting events if there is a term of the ticketing contract printed on the ticket, prohibiting a person from reselling tickets to the event.

⁹⁵ *Major Sporting Events Act 2009 (Vic)* s 154.

⁹⁶ *Ibid* s 166.

A person who contravenes section 166 is guilty of an offence and subject to a fine.⁹⁷

The Victorian anti-ticket scalping provisions have been applied to AFL Grand Finals, the 2006 Melbourne Commonwealth Games, the 2007 World Swimming Championships and the 2009 JBWere Masters Golf Tournament.⁹⁸

For the 2010 JBWere Masters, a press release was issued in which the Minister for Sports and Recreation stated:

The 2010 JBWere Masters is classed as a 'declared event' under the Major Sporting Events Act and scalpers on-selling tickets ... trying to make a quick buck off the event face sanctions of more than \$6000, while companies face tough fines of more than \$30,000.⁹⁹

These fines can apply indiscriminately if a limitation of resale condition is part of the ticketing terms and conditions. For example, the 2006 Commonwealth Games held in Melbourne was declared a sports ticketing event.¹⁰⁰ Any ticket to the Commonwealth Games was subject to the M2006 conditions of attendance.¹⁰¹ Clause 9(a) of the M2006 Conditions of attendance read:

you and each subsequent holder of the ticket agree with M2006 not to sell or distribute the ticket above face value unless you are authorised in writing to sell or distribute it on behalf of M2006.¹⁰²

A definitive clause like this is acceptable because once an event is declared, as long as this clause appears on the ticket it would not matter how a person was assigned their ticket. Any sale, resale or transfer of their ticket, could attract penalties under the Victorian Act. A person could be penalised under the Victorian Act irrespective of how the ticket was obtained, including if a person was assigned a ticket as a guest and never entered into a contract with the event organiser. It is argued that the indiscriminate imposition of serious fines for a breach of a limitation of resale condition would have the greatest impact on reducing ticket scalping.

It is worth noting, however, that if an event has not been so declared in Victoria, as in NSW, the common law would apply to the ticket transaction. Further,

⁹⁷ *Ibid.*

⁹⁸ Aaron Langmaid, 'Scalpers face wrath of law for selling AFL grand final tickets', *Herald Sun* (online), 20 September 2010 <<http://www.heraldsun.com.au/sport/afl/scalpers-face-wrath-of-law-for-selling-afl-grand-final-tickets/story-e6frf9jf-1225926445603>>.

⁹⁹ James Merlino, 'Tickets for 2010 JBWere Masters to go on sale this week' (Media Release, 7 June 2010) <<http://www.premier.vic.gov.au/>>.

¹⁰⁰ 2006 Commonwealth Games website <<http://www.melbourne2006.com.au/>>.

¹⁰¹ Melbourne 2006 Commonwealth Games Conditions of Attendance, [1].

¹⁰² *Ibid* [9].

the anecdotal evidence from within the sports industry is that complying with the Victorian Act provisions, including the creation of a ticketing scheme, is an onerous task, and requires a disproportionate amount of preparation work to achieve the desired outcome of preventing and deterring ticket scalping.¹⁰³

The Queensland Approach

The Qld Act took effect on 8 December 2006 and made ticket scalping an offence at certain event venues. Under the Qld Act, a person must not resell or purchase tickets to events at a *major sports facility* at a price greater than 10 per cent above the original ticket price.¹⁰⁴ The provisions apply to sales and purchases of tickets both within and outside Queensland.

Under the *Major Sports Facilities Regulation 2002* (Qld), the Queensland Government may declare a venue a *major sports facility*. It has declared each of the following to be a major sports facility: Brisbane Cricket Ground, Brisbane Entertainment Centre, the Gabba, Queen Elizabeth II Complex, Sleeman Sports Centre, Suncorp Stadium, the Queensland Tennis Centre, Dairy Farmers Stadium and Willows Sports Complex.¹⁰⁵

The provisions relating to ticket scalping in the Qld Act apply to national and international sporting events as well as recreational or entertainment events and special events like major events and religious events held at these venues.¹⁰⁶

Ticket holders are permitted to sell their tickets provided the cost of the ticket is no more than 10 per cent above the original ticket price. However, the Qld Act expressly states that it is not authorising the resale of tickets.¹⁰⁷ Therefore it is arguable that if the original conditions of sale for tickets to an event prohibit resale, the Qld Act would not apply.

The provisions within the Qld Act are designed to allow genuine fans a fair and equitable opportunity to purchase tickets to events at *major sports facilities*. It also aims not to restrict people's ability to resell tickets where they have a genuine need to do so. The 10 per cent margin enables people who are unable to attend an event to recoup the ticket price and any costs associated with the ticket resale.

The sporting bodies that made submissions to the CCAAC for the Final Report generally condoned opportunistic on-selling, and were largely supportive of the

¹⁰³ Interviewees asked not to be named in the paper.

¹⁰⁴ *Major Sports Facilities Act 2001* (Qld) s 30C(1)–30C(2).

¹⁰⁵ *Major Sports Facilities Regulation 2002* (Qld) s 2.

¹⁰⁶ *Major Sports Facilities Act 2001* (Qld) sch 2.

¹⁰⁷ *Major Sports Facilities Act 2001* (Qld) s 30C(4).

approach adopted by Queensland. For example, Tennis Australia stated that it supported on-selling by purchasers unable to attend an event due to a change in circumstances.¹⁰⁸

It is worth noting that the Qld Act may not be an appropriate model for event organisers with a comprehensive ticket transfer policy already set up.¹⁰⁹ For the 2010 FIFA World Cup in South Africa FIFA established procedures and mechanisms for ticket resales and ticket transfers. The key point is that any applicant wishing to (a) resell tickets they no longer required; or (b) transfer tickets from one guest to another had to make a request to FIFA.¹¹⁰ The transfer of tickets by an applicant via any other channel (for example, not using FIFA's ticket resale and transfer platform) would result in an invalid resale or transfer.¹¹¹ Therefore, for an event which has a comprehensive ticket transfer policy, legislation which prohibits all resale may be more appropriate.

Problems with the Australian Approach

It is contended that one of the primary problems with the Australian regulatory approach to ticket scalping relates to enforcement. Take this hypothetical – an individual in Western Australia is scalping tickets to an AFL Final (a declared event under the Victorian Act). The AFL hears of this and wants to take action. Victorian law is not enforceable in Western Australia. If the AFL wanted to prosecute, it would need the individual to be extradited to Victoria. This would of course complicate the matter in a number of ways. Primarily, the problem the AFL would face is that the interstate extradition process is generally discretionary.¹¹² In Victoria, one of the criteria to consider in an extradition matter is ‘whether the offence in question is sufficiently serious to justify extradition proceedings being undertaken.’¹¹³ Query whether a breach of the anti-scalping laws would be considered sufficiently serious and whether the penalties that may be imposed justify the costs associated with extraditing the offender and the actual proceedings.¹¹⁴ There is unofficial anecdotal evidence to suggest that sporting event organisers have encountered this issue before, with scalpers being able to avoid prosecution as a result.

Another issue for sporting event organisers relates to multi-jurisdictional events. Australia is continuing to bid to host sporting events of international

¹⁰⁸ Tennis Australia, above n 10.

¹⁰⁹ FIFA Ticket Transfer Policy, <<http://www.fifa.com/worldcup/organisation/ticketing/tickettransferpolicy.html>>.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² See, eg, *Service and Execution of Process Act 1992* (Vic) s 81–90.

¹¹³ Office of Public Prosecutions of Victoria, ‘Interstate Extraditions: Policies and Guidelines’, 4.4.

¹¹⁴ *Ibid.* 4.5.

significance.¹¹⁵ In particular events like the Asian Cup and the Cricket World Cup are multi-city events, with action taking place all over the host country. As a number of states take a different approach to scalping, event organisers could confront the curious set of circumstances whereby the same ticketing transaction is an offence in one state and legal in another. This is obviously not desirable for a sporting event organiser aiming to prevent scalping at its events. Also, in order to effectively enforce ticket scalping legislation for such events a uniform national scheme would save the time and cost of having to continually draft one off anti-scalping provisions which apply only to the individual event.

It is also worth noting that none of the state legislation makes specific reference to internet auction sites, where the bulk of scalping transactions are now taking place. This is contrary to the approach adopted in the UK.

In the UK ticket scalping is dealt with under section 166 of the *Criminal Justice and Public Order Act 1994* (UK) ('CJPOA'). The anti-scalping provisions in the CJPOA were amended and bolstered by the enactment of the *Violent Crime Reduction Act 2006* (UK) ('VCRA').

Prior to the amendments, it was an offence, in relation to professional football matches, for an unauthorised person to 'sell, or offer or expose for sale, a ticket ... in any public place or place to which the public has access or, in the course of trade or business, in any other place.'¹¹⁶ It was not clear whether the provision would catch unauthorised sales made on the internet, since that depends on whether the internet is a 'public place' or (for commercial sales) 'any other place'.¹¹⁷

Under the VCRA, section 166 still had the original protections against scalping. However the requirement of a public place was removed. Also, through the enactment of the VCRA, section 166A provides that online information service providers (which include eBay) will commit an offence if: (a) at the time the ticket is advertised, the ISP has knowledge that tickets are being sold illegally, or; (b) the ISP becomes aware that tickets are being sold illegally but does not take immediate steps to remove the advertisements.¹¹⁸ There is however, no general duty for ISPs to monitor their sites for illegal tickets – the onus is on the event organiser to notify the ISP of each infringement.¹¹⁹

¹¹⁵ For example, the 2014 FIBA Basketball World Championships, the 2015 Asian Cup (Football) and the 2015 World Netball Championships.

¹¹⁶ *Criminal Justice and Public Order Act 1994* (UK) s 166.

¹¹⁷ Laura Acreman, 'Ticket Touting: Use of Criminal Legislation against online ticket fraud', (2009) 7(2) *World Sports Law Report PINPOINT*.

¹¹⁸ *Criminal Justice and Public Order Act 1994* (UK) s 166A.

¹¹⁹ Max Duthie, 'Ticket Touting: The battle against ticket-touting: new legislation', (2006) 4(12) *World Sports Law Report PINPOINT*.

The UK approach transfers some responsibility for preventing ticket scalping onto the internet auction sites. The application of the UK legislation would simply be that if an event organiser informed the internet auction site of unauthorised ticket sales occurring, then the internet auction site would be legally obliged to take action. This collaborative approach would assist in the fight to prevent ticket scalping in Australia. Whilst it is conceded that internet auction sites could set up their domain outside of the relevant jurisdiction to avoid compliance, this paper contends that this eventuality is highly unlikely.

National legislation?

Given the above analysis, the author of this paper advocates the introduction of a national legislative scheme modelled on the Queensland approach but bolstered by the addition of the tough penalties that exist in Victoria.

In the Final Report, the main reasons given for not recommending a regulatory response to ticket scalping were the following:

- (i) the level of unauthorised on-selling in Australia was categorised as low;
- (ii) the generic consumer protection laws were considered adequate;
- (iii) there are positive impacts from ticket on-selling; and
- (iv) scalping laws are difficult to enforce and complex to administer.¹²⁰

The author of this essay does not directly dispute any of these arguments. The question posed is would the recommended legislative response undermine any of these points?

It is difficult to directly dispute the first argument, other than by saying that the sporting event organisers directly oppose this argument, claiming that scalping exists and it is a problem. But, even if it is conceded that the level of scalping is low, a national scheme could potentially reduce consumer dissatisfaction and consumer detriment even further.

In relation to the second argument, hopefully this paper has illustrated how the existing laws are inadequate from an event organiser's perspective. Also, given that the practice is not prohibited, it is argued that the existing law does not truly protect consumers. It is hoped the problems highlighted in this paper could provide the impetus to introduce a national scheme.

Moreover, if the Queensland model was adopted as recommended, the benefits of ticket on-selling would not be negated. This is because the Queensland

¹²⁰ Commonwealth Consumer Affairs Advisory Council, above n 2, 47.

model prevents ticket scalping, not ticket on-selling. Therefore opportunistic on-selling, which the sporting organisations largely support, could still occur if required by the ticket purchaser.

And whilst scalping laws may be difficult to enforce in all circumstances and complex to administer, this argument fails to appreciate the value that a national law would have from a deterrence perspective. It is obviously much easier for event organisers to deter scalpers by threatening criminal sanction, as opposed to having to rely on flimsy arguments in relation to breach of contract.

The author of this article agrees with the CCAAC that industry is in the best position to address a number of the consumer concerns in relation to the operation of the secondary ticket market.¹²¹ Any regulatory response to scalping would need to be supported by an equally comprehensive industry response. There are a number of practices which occur in both the primary and secondary market which cause consumer concern that do not relate to scalping. The Final Report highlights a myriad of potential industry courses of action. This is not disputed. It is simply contended that the introduction of national anti-scalping legislation would complement these initiatives. Perhaps dangling the carrot of introducing national anti-scalping legislation in front of industry could have been the mechanism used to encourage and precipitate a genuine, joint initiative between government and industry to clean up the ticket market for good.

Conclusion

The issue of ticket scalping is debated with vigour in Australia. The CCAAC recently recommended no regulatory response to ticket scalping in Australia. This is interesting because as was illustrated, the common law position on ticket scalping is somewhat deficient. Not only is there no legal recourse against scalpers in certain instances, but in trying to prevent the practice it is quite possible that event organisers in Australia have fallen foul of the Australian Consumer Law. Even Rares J in the *eBay* case conceded that the Australian position on scalping was 'unfortunate' given that event organisers are simply trying 'to protect the market from cynical exploitation by scalpers who created an artificial scarcity of tickets.'¹²²

In Australia, Victoria and Queensland have gone some way to rectifying the common law position by boosting the protection available to an event organiser through enacting anti-scalping legislation. However, the schemes introduced in these states are not comprehensive, do not apply to all events and do not put any onus on the internet auction sites to assist in preventing the practice. The

¹²¹ Ibid 48.

¹²² (2006) FCA 1768, [76].

lack of a national uniform legislative response to scalping leads to problems regarding the enforcement of anti-scalping provisions and their application to multi-jurisdictional events.

The author is not naïve enough to contend that national uniform legislation would entirely resolve the scalping dilemma in Australia. However, event organisers put on events, they are anti-scalping, they are trying to prevent the practice and in light of the current legislative framework, they sought the assistance of the CCAAC to do this. Given that there are holes in the existing legal framework, if no-one other than scalpers would really suffer from a uniform regime against the practice, shouldn't the event organisers' desire to prevent scalping be reason enough to introduce such legislation?

