TICKET SCALPING

Its Legal and Economic Effects on the Illusion of Perfect Innocence

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The scalping of tickets for major sporting events is controlled throughout much of the United States. Recently, in response to perceived public backlash against the scalping of tickets for the AFL Grand Final, Victoria introduced its own legislation, the *Sports Event Ticketing (Fair Access) Act 2002*. This legislation seeks to control the secondary market in the selling of tickets as well as controlling this activity in the physical vicinity of venues. From a consumer perspective, the issue is fundamental: does the anti-scalping legislation allow consumers to pocket the economic surplus from the under pricing (deliberate or otherwise) of tickets and, through this, paternalistically protect the consumer from the alleged price-gouging that can occur in the secondary market; or does it operate to harm consumers by inefficiently allocating a scarce resource? This article explores the economic arguments for and against scalping, as well as identifying what the author submits are the relevant principles behind consumer protection in anti-scalping legislation. Practical solutions will also be offered as a way of reaching a compromise between the economics of allowing a scarce resource to be allocated to the person prepared to pay the most, as against the inherent backlash by the traditional fan towards perceived extortionate prices charged in the secondary market.

Introduction

> Unlike any other business ... *sports must preserve an illusion of perfect innocence* ... It is the ceremony of innocence that the fans pay to see — not the game or the match or the bout, but the ritual portrayal of a world in which time stops and all hope remains plausible, in which everybody present can recover the blameless expectations of a child, where the forces of light always triumph over the powers of darkness.[1]

The role of sport in the Australian psyche has rarely been under-estimated. The tribal attachment to a football code and team, the insatiable appetite for information in respect of the players and the burgeoning coverage of domestic

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1 Lapham (1998).

and international sport in the all-pervading media clearly demonstrate that, for many Australians, this country would cease to resemble a civilised society if all sport ceased tomorrow.[2] However, this is not a recent phenomenon — recall the ancient civilisations and the sporting stadia that they produced, bearing a striking resemblance to the modern architecture of the MCG, Wembley, the New Orleans Superdome and Candlestick Park.[3]

Given sport's exalted status, organisers and sporting codes have an obligation to ensure that, if sport is to retain this position, it must be run efficiently and fairly[4] — otherwise the disillusionment of the fan base (the consumers supporting the infrastructure) will be self-evident and quickly dissipate any long-held goodwill. The illusion of perfect innocence will be forever lost. For this reason, ticket scalping (the practice of buying tickets for major sporting events at a low price and selling high) must balance the consumer-driven demand for tickets to be available in the secondary market against the palpably angry response to the long-suffering fan who is unable to attend the finale of a season due to the excess demand in the marketplace and the pricing of tickets beyond her or his reach. Despite ticket scalping arguably representing the quintessential essence of a capitalist free market economy,[5] it is generally regarded as abhorrent and as something to be controlled. As colourfully stated by Simon: 'Many people believe scalpers are the cockroaches of the entertainment industry. They were there at the beginning and they'll be there at the end, hawking front-row seats to the Apocalypse.'[6] In response to this public perception, we see recent Victorian legislation such as the *Sports Event Ticketing (Fair Access) Act 2002* seeking to control the secondary market in the selling of tickets as well as attempting to control scalping in the physical vicinity of venues. The practice of scalping has also been the subject of Full Federal Court comment.[7] Significant efforts have also

2 To borrow the phrase from Dabscheck and Opie (2003), who ask the question: 'For how long would Australia remain in a State resembling a civilized society if all sport ceased tomorrow? There will be some who would see the change as for the better, but most despair would be overwhelming and destructive.'

3 As noted by Smith and Westerbeek (2000), p 1: 'Throughout history, sport or "sport-like" rituals and activities have attracted spectators. Evidence of spectator sports dates as far back as the ancient Egyptians, where the spectators of wrestling and stick fighting recorded Ramses II in hieroglyphics praising him like a god of war ... Modern-day sporting arena architecture closely mirrors the first sporting stadia in ancient Greece (athletics) and Rome (horse racing and gladiatorial fights).'

4 As recognised by Cole (2001), p 1584.

5 Gittins (2000) describes it as a great capitalist tradition.

6 Simon (2004), p 1171. It should be noted that the thesis of the article by Simon is that scalping laws are not justifiable and that they are unnecessary and unconstitutional.

7 In *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* [2001] FCA 1040 at [39] it was commented that: 'As to the ticket condition [a condition restricting resale], His Honour was of the view that the ARU had a legitimate commercial

been made to control the practice in the United States, with 29 states currently having legislation controlling the practice.[8] Table 1 illustrates the diverse approaches adopted in this jurisdiction. Furthermore, there is some evidence — though it is speculative at best — that the secondary ticket market in the United States has revenues between $20 and $38 billion a year.[9]

Table 1: United States Anti-Scalping Regulation

Form of regulation	*States adopting*
A limit on the resale price	Arkansas, California, Connecticut, Florida, Kentucky, Maryland, New York, Pennsylvania, Rhode Island, Tennessee, Wisconsin
Promoter authorised to resell	Arizona, Connecticut, Michigan, Minnesota, Missouri, North Carolina
Location restrictions on resale	Arizona, California
Ticket sales limited to printed price	Louisiana, Maryland
Scalping prohibited, particularly for certain events	Georgia, New Mexico, South Carolina
Licensing	Alabama, Illinois, Massachusetts, New Jersey
Providing local councils with the power to regulate	South Dakota, Virginia
An exception created for non-profit organisations	Louisiana, Virginia

interest to protect and a legitimate interest in ensuring that tickets were used as intended rather than being scalped.'

8 Twenty-nine states have regulations: Ala Code 40-12-167; Ariz Rev Stat 13-3718; Ark Code Ann 5-63-201; Cal Penal Code 346; Conn Gen Stat Ann 53-289; Del Code Ann Tit 11,918; Fla Stat Ann 817.36, 817.361; Ga Code Ann 10-1-310; Haw Rev Stat Ann 440-17; 720 Ill Comp Stat 375/1-4; Ind Code Ann 25-9-1-26; Ky Rev Stat Ann 518.070; La Rev Stat 4:1; Md Code Ann, Bus Reg 4-318; Mass Gen Laws Ann Ch. 140, 185A 185D; Mich Comp Laws Ann 750.465; Minn Stat Ann 609.805; Miss Code Ann 97-23-97; Mo Ann Stat 578.395; NJ Stat Ann 56:8-33, 56:8-38; N M Stat Ann 3-46-1; NY Arts & Cult Aff Law 25.03, 25.05; NC Gen Stat 14-344; Ohio Rev Code Ann 715.48; Pa stat Ann Tit 18,6910; RI Gen Laws 5-22-26; SC Code Ann 16-17-710; Va Code Ann 15.2-969; Wis Stat Ann 42.07. This legislation has survived challenges based on an impermissible burden on State commerce (*New Jersey Assoc of Ticket Brokers v Ticketron, Dev of Control Data Corp,* 226 NJ Super 155); that it violated equal protection grounds (*State v Leary* 217 Conn 404); that it violated state constitutions concerning special legislation (*People v Waisvisz* 211 Ill App 3d 667); and that it violated the due process clause (*State v Major* 243 GA 255, 253 SE2d 724).

9 Simon (2004), p 1171; estimate based on census data. Obviously, given the private nature of many secondary sales, it is difficult to verify the accuracy of this figure.

Legislative efforts of this nature beg a number of questions. Are they justified economically (after all, the welfare economist would tell us that scarce resources should be allocated to those who value them most highly; accordingly, the purchaser of a scalped ticket is simply a consumer buying a good from a willing seller at a mutually agreed price, and merely reflects that for major events in stadia with a given capacity, demand significantly outstrips supply)? Can they be legally supported? And, perhaps most significantly, should the practice be regulated at all, and if so, in what manner? The purpose of this paper is to address these questions.[10]

Consumer Impact

Scalping's impact on consumers can be placed into two camps.[11] There are those who merely see it is as a product of a market-driven economy — capitalism at its purest — whereas others see it as foreclosing for the genuine fan the capacity to attend the major games due to the extortionate rent harvesting undertaken by the scalper. It is the initial view that is supported by traditional economic analysis.

Neoclassical economic thinking would argue that the willing purchaser of a scalped ticket is merely maximising their utility on the information that is freely available to them. The consumer is rational and utilitarian, and decisions by the consumer will ensure that the economy is constantly self-correcting.[12] Those who purchase from the box office at a price less than the market will stand to receive the consumer surplus by this under-pricing. If the ticket is later on-sold, it is simply the case that the ticket will ultimately be placed in the hands of the person valuing the scarce resource the highest — the scalper operating as an intermediary to locate the willing sellers and buyers, with this entity taking part of the consumer surplus.[13] As Duggan notes:[14] 'From a libertarian perspective, a measure that subverts preferences is prima facie bad because it represents an unjustified intrusion on individual freedom. From an economic perspective, such a measure is prima facie bad because it threatens a misallocation of resources.' This sees the supply of tickets to an event such as the Australian Open Tennis Championships as being perfectly inelastic. In this

10 Scalping as an activity can be divided into two major categories. The first is *opportunistic* scalping, where tickets are purchased by individuals with the intent of personal use, but some intervening cause will prevent that person attending — that individual then seeks to sell at the prevailing market price. The second category is *organised or corporate* scalping, where tickets are purchased solely for the intent of reselling at well above face value for a windfall profit. Often the sale of the tickets will be combined with hospitality packages. It is the latter category that is seen as particularly pernicious, and which is generally the focus of legislative intervention. See Sport and Recreation Victoria (2001), p 8.

11 See Simon (2004), p 1207.

12 See Goodman and Cohen (2004).

13 See generally, Tishler (1993).

14 Duggan (1991), p 254.

situation, traditional economics tells us that demand, and demand alone, should set the price.

Given this, why is there such public reaction or perception against scalping? After all, it exists because of consumer and fan demand — 'it wouldn't be here if people didn't want it, so there [must be] a need for it.'[15] On this view, it may be seen as distasteful, but on the whole innocuous. However, this observation has been challenged. A report of the New York State Attorney General[16] indicated that, in many instances, ticket scalping occurs on an organised basis and, whilst not unlawful, is ultimately deceptive and unfair to the sporting and entertainment masses. In addition, it is possible to view the scalper as engaging in quasi monopolist behaviour — distorting the market by buying bulk supplies of the tickets before the majority of buyers enter the fray. By this, the scalper is able to profit by intensifying residual scarcity amongst remaining tickets. Because of these diverse viewpoints, is there a practical compromise that is not only economically sound, but which also balances the different constituent interests of all stakeholders — stakeholders such as the consumers who are willing to stand in line for lengthy periods to purchase tickets?

> They trade their time in line for the money saved from having to pay a higher price. Further they may even derive utility from the queue itself. There can be a crowd effect from waiting with a certain group of people, and anticipation may be heightened from the time spent in line. Lines seem perfectly rational to such consumers, and they detest the thought of paying any amount above the printed face value.[17]

This line of thought also recognises that in many instances, the expected audience can fuel demand by the individual consumer, rather than just the event itself. In essence, group action influences individual choice.[18] It is this crowd effect which can make the event unique — the 'ambience exists at the moment'.[19] It is this emotion, this passion within the fan that may lead to a conclusion that to allocate tickets on a basis other than simple standing in line is inherently unfair and unconscionable.

The Response to Traditional Economic Thinking

The first response to traditional economic thinking is to ask why the initial issue price for tickets is set at a level lower than what the market would stand. Three reasons are posited by Tishler:[20]

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15 Yang (2004), p 111.

16 Office of the New York State Attorney General (1999).

17 As described by Happel and Jennings (1995).

18 This line of thinking can be traced back to the work of Leibenstein (1950), who described it prosaically as the bandwagon effect.

19 Happel and Jennings (1995).

20 Tishler (1993), pp 98–100.

> First, as tickets are sold in advance, prices may be set lower than the market clearing price due to the promoter's mistaken assumptions as to likely demand. Alternatively, it may be the case that ticket demand is uncertain, with prices being set low so as to stimulate demand.
>
> Promoters are unable to price differentiate in a beneficial way. This sees high quality seats being sold for the same or similar price as the seats in the bleachers. Due to the difficulty in estimating consumer demand, sports organisers will not have sufficient information to enable them to determine with any accuracy the different pricing structures. Furthermore, and even if this information was available, the cost of having a differential pricing structure may not warrant the benefits obtained from the practice.
>
> Promoters themselves retain tickets to distribute above face value, or to provide to favoured parties (eg corporate sponsors, media invitees, politicians).

In addition to these reasons, an intuitive response may be that promoters sell tickets more cheaply than traditional economics would dictate to create a heightened sense of demand and excitement. This views the television audience as the primary driver of revenue, with the crowd existing to create an atmosphere, not only at the ground, but also for the broadcast viewers.

Despite these reasons (which are no doubt applicable in individual cases), the generally accepted view is that tickets are under-priced to maximise long-term revenues.[21] Promoters and sports organisers do not want to alienate traditional fans by charging extortionate (or, as some would say, economic) prices for high-demand events such as a final. In addition, behavioural economics, with its connection of psychology and economics, suggests that it is possible to superimpose the time-honoured position, and intermix this with the culture and identity that many Australians associate with sport — thus dictating that all spectators, irrespective of wealth, should have an equal opportunity to attend. What this means is that consumer decisions are not to be judged by reference to some absolute goal — but by way of a two-stage process. First the reference point must be established, and from this the consumer acts according to that reference.[22] In this context, it requires that there be an egalitarian element of fairness, a moral judgment, imposed on the value-free models adopted by the customary economist. 'By doing this, the current frustration of consumer protection policy in its use of the old-fashioned view of economics can be significantly ameliorated. Consumers simply do not act as rational agents.'[23] Consumers will take into account, for any number of reasons, a limited range of information, or will act in a way that does not serve

21 See generally Happel and Jennings (1989).

22 As an example this is why it is more common to see restaurants provide 'early-bird' discounts, rather than applying a surcharge for those seeking to dine at prime time. See generally, Kahneman et al (1990).

23 Kell (2005), p 28.

their own interest.[24] This proposition is supported by empirical evidence of the behaviour of consumers when shopping for credit. It is clear that, despite mandated disclosure, consumers will still often ignore that information or under-value its significance.[25]

This reasoning is supported by analogy, through the analysis of Kahneman, Knetsch and Thaler.[26] The authors found that 82 per cent of individuals considered that it was unfair or extremely unfair for a hardware store to raise shovel prices by $5 after a snowstorm, with their conclusion being that consumers accept increases on the basis of economic cost, but not on market value. A similar distaste is seen by the community in the increasing of prices following a natural disaster. 'Charging what the market will bear in the short run generates extremely adverse "moral effects" or "reputation effects".'[27] Applying this to the instant matter, sports fans view the issue price of the ticket as equivalent to the economic cost. A promoter charging the market value would invoke the wrath of the scorned fan, with this leading to long-term financial pain — the consumers switching to rival products. After all, one suspects that it can safely be assumed that in setting the ticket prices for the AFL Grand Final, the organisers do not consistently under-estimate demand. Rather, with complementary revenues such as television rights and merchandise critical, the live gate is less significant, and the producers of an event such as the Grand Final are mindful of adverse publicity resulting from allegations of ticket gouging from the traditional 'blue-collar' fan.[28] This, however, should not be seen as some charitable act by the administrators of the League; rather, it involves an implied assumption about the need to consider the long-term image and profitability of the game. As remarked by Happel and Jennings in the context of the American sporting leagues (but which is equally applicable to Australia):[29]

> major sport associations like the National Basketball Association (NBA) or Major League Baseball specify limits on the prices that home teams can charge for the NBA finals or the World Series so that the proper image of the league can be maintained — and so that future sales are not hurt ... Finally, less than market clearing prices may be charged

24 On this topic, see generally Simon (1955); Kahneman et al (1982); Kahneman and Tversky (1979); Quinones et al (2000).

25 On this topic, see Malbon (2001); O'Shea and Finn (2005). An alternate argument to this (and outside that of consumer rationality) may be that the producer of the sport is merely ensuring the long-term profitability by making sure that the television viewers do not merely see the spectators as being amongst the more privileged within society. If this was the case, the market value of the product may well suffer a long, slow decline, and lose its 'blue-collar' or working-class heritage.

26 Kahneman et al (1986).

27 Happel and Jennings (1995), quoting from Akerlof (1984) and Klein and Leffler (1981).

28 See generally Happel and Jennings (1989), pp 8–9.

29 Happel and Jennings (1989), p 8.

> by owners or promoters because they want to be 'fair' to their customers, the fans ... this may be tied to long-run profit maximization.

Jolls, Sunstein and Thaler[30] support this analysis by defining the reference point for what is conscionable as the face value of the ticket. This is the value at which the consumer and the firm would normally seek to transact, and deviating from the reasonable expectations of the community will lead to pressure to ban such trades.[31] In this sense, anti-scalping laws respond to the public belief that tickets should be allocated to those who wait in line the longest (queues are generally anathema to the economist, who would expect price movements to adjust the laws of supply and demand), rather than those willing to pay the highest value. Indeed, there is survey evidence that most people consider — and intuitively this is the response one would expect — that tickets should be allocated to those who are prepared to line up (be this a physical line or a virtual line, as in internet-based transactions), rather than those willing to pay the most.[32] This is obviously contrary to normal economic thinking and counter to a society where economic rationalism is rampant. As noted:[33]

> Conventional economic analyses assume as a matter of course that the excess demand for a good creates an opportunity for suppliers to raise prices and that the profit-seeking adjustments that clear the market are ... as natural as water finding its level — and as ethically neutral, but the [sporting fan — the consumer] does not share this indifference.

Accordingly, the theoretical justification for anti-scalping laws (a particular form of consumer protection) is equity considerations. Whereas welfare economics tells us that the only externally valid indication of a consumer's preference is their willingness to pay, and therefore the prevailing distribution is a given, equity (in the sense of serving as a foundation for state-based consumer regulatory intervention) seeks to ensure a fair distribution of what is available.[34] In this context, the goal is sharing and implies a notion about prior entitlements. The distribution should not be an iterative process between individuals but built upon an infrastructure of normative community perceptions as to what is fair:

> Equity considerations focus not on the acquisition of wealth, but on sharing. The goal is a fair distribution. The reference to fairness implies a theory about prior entitlements that is lacking from welfare considerations ... The underlying notion is that any redistribution of wealth that is desired in the name of distributive justice should be carried out systematically in accordance with prevailing community

30 For example, see Jolls et al (1998).

31 See also Yang (2004), p 120.

32 See Yang (2004), p 120.

33 Jolls et al (1998), p 1512.

34 See generally Duggan (1991), pp 254–57.

> perceptions of what is fair. Redistribution should not be allowed to occur *ad hoc* as a result of interactions between parties. In other words, no one should be allowed to gain at another's expense.[35]

A further argument for rejecting a traditional economic analysis is that tickets, unlike many other retail goods, are heterogeneous. Demand will vary according to location, teams playing, weather and the date of the event.

In addition to these factors, and in support of the behavioural economists, sociologists would also contend that the economist's ritualistic assumptions[36] about the rational consumer are over-stated, and that the purchaser of a scalped ticket is not so much rational as engaging in rationalising behaviour, with the preponderance of research in this area indicating that: 'Most of our [consumer] behaviour is spontaneous and somewhat impulsive — not a deliberate and well-reasoned cognitive reaction to problem situations, but dictated more by passion, emotion and sensation.'[37] The consumer is an emotional problem-solver[38] and, given limitations on time, information and opportunity, will seek to rationalise the many conflicting and contrasting reasons as to why they would seek to purchase a scalped ticket. Given this, a model simply based on neo-classical economics may be inappropriate. Rational consumers, so beloved by the welfare economist, do not exist for the purchase of 'normal' retail goods. Their existence is even more questionable when the purchase is inexorably connected to the emotion and passion behind the purchase of a grand final ticket by long suffering fans.

Who Benefits from Anti-scalping Legislation?

In addition to the preceding, there is some argument that anti-scalping laws do result in an economic benefit to the consumer (be it the original purchaser by way of under-priced tickets, or the opportunistic scalper purchasing to later resell). This point is made by Williams[39] following a rare empirical study of ticketing practices and anti-scalping legislation in the American National

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35 Duggan (1991), pp 254–57.

36 As noted by Markin (1979), p 316: 'Consumer Behaviour theory, evolving from the mother science discipline of economics with its rigid adherence to marginal utility theory and the ritualistic assumptions pertaining to the rational consumer, has proposed a rational consumer who strives to maximize utility or satisfaction by the careful rationing of his resources. This rational consumer model is a kind of roving, prowling computer, ever alert to the sound of falling prices, infinitely familiar with all options and alternatives, seeking, and processing vast amounts of information — all for the purpose of making rational decisions, i.e. those which lead to utility maximization via high level cognitive reasoning processes.'

37 Markin (1979), p 322.

38 Schiffman et al (2005), pp 468–70 provide four views of consumer decision-making: economic (dominated by rational decisions); cognitive (consumers make decisions based on the external and internal limitations relevant to them); passive (the consumer is submissive to self-serving interests such as the interests of marketers) and emotional (the consumer is impulse-driven).

39 Williams (1994).

Football League. Whilst he recognises that promoters of sports will generally attempt to value the relative attractiveness of their entertainment in setting the ticket price, they have two major incentives to set it below market-clearing price. First, in many sports, live television coverage is not guaranteed unless the game is sold out (and television revenue is critical),[40] and second, filling the stadium acts as a validation of the worth of attendance.[41] By then adopting a regression model incorporating team-specific variables such as salary, team performance and stadium capacity with economic variables such as population, income and competition, Williams concludes that ticket prices would be lower where there are anti-scalping laws in place. For example, at the time of his study, California permitted off-site ticket scalping. The conclusion he drew was that the restricted capacity of Candlestick Park (home of the San Francisco 49ers), and the policy of setting the same price for all seats, allowed the 49ers to charge US$1.95 more than would have been the case if scalping had been outlawed. Figure 1 may assist in understanding this point.[42]

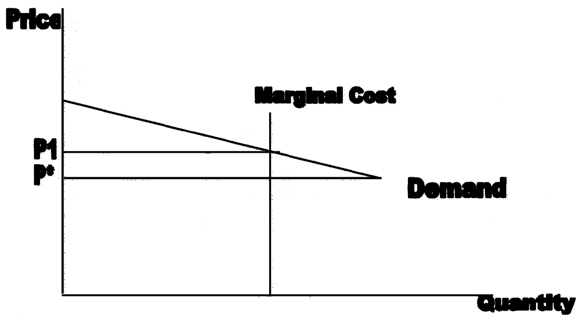

Figure 1

In the scenario shown in Figure 1, the profit-maximising sports organiser will charge P^1. The cost of producing the event (including the profit margin) intersects with the demand curve at this price. At this point, all available seats are sold. However, for reasons of access to all its blue-collar fans, television rights and ensuring a sold-out gate, the tickets are sold at P*. In this scenario, scalping (unless prevented) will occur. There is a greater demand for the tickets at that price; however, the capacity of the stadium limits the number that can be sold. Assuming that anti-scalping laws are in place and perfectly enforced (with this being critical), then lines will develop to ration the tickets when sold at P*. By contrast, if information is available to the sports producer

40 Though it is not clear as to whether the promoter of the sport proscribes live television unless it is sold out (thus encouraging the purchase of tickets), or the television producer wants a packed stadium so as to create a more spectacular viewing spectacle.

41 Williams (1994), p 505.

42 Adapted from Williams (1994), p 504.

as to the price that can be obtained on the scalped market, then the 'availability of this information can ... be used to support an argument for higher ticket prices'.[43] A scalping market provides a team with better information about the true market-clearing price. If this occurs, then the promoters will originally set a higher price, and pocket the surplus themselves. Accordingly, not only does behavioural economics support anti-scalping laws, but a strict welfare analysis may also do so as well. 'When tickets can be scalped, ticket prices are higher. When scalping is forbidden, they are lower.'[44] The case for legislative intervention, if examining the matter from a perspective of narrow consumer welfare as against a broader total welfare analysis, is only made stronger.

The argument by Williams is questioned, but not countered by Courty[45] in an economic examination of the case of a monopoly ticket agency selling tickets to consumers. Courty, in working from an assumption of seeking to maximise the use of resources within society (ie a classical economic welfare analysis), reaches two conclusions. First, the agency can sell to fully informed consumers (fully informed as to capacity and desire to attend) either close to the event date, or alternately early, but also allow resale. The second option is to allow the selling of tickets to uninformed consumers well in advance of the event date — this is likely to occur if the event is highly popular and no new information is likely to be learnt in the interim. In this scenario, the monopoly ticket agency, in seeking to avoid consumers waiting for the secondary resale market, must prohibit resale.[46] Accordingly, for the monopolist to ensure the channelling of the tickets to the consumers who value them the most, aspects such as the 'selling date, ticket supply, ticket price and decision to allow resale are complementary pricing instruments that should be chosen jointly as part of a coherent ticketing strategy'.[47] Courty considers that Williams's results neither confirm nor reject his theory[48] — with the later publication not examining the impact of scalping legislation. However, it is possible to surmise that, if the tickets for high-demand events are put on sale as early as feasible, then this second option supports the necessity for legislative intrusion. Scalping must be prohibited to avoid consumers waiting for the secondary market.

The Victorian legislation

Victoria is the only Australian jurisdiction that has generic, rather than just event-specific[49] legislation dealing with the problem of ticket scalping. Section 20 of the *Sports Event Ticketing (Fair Access) Act 2002* provides that:

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43 Williams (1994), p 507.

44 Williams (1994), p 507.

45 Courty (2003).

46 Courty (2003), pp 650–51.

47 Courty (2003), pp 651.

48 Courty (2003), fn 36.

49 For example, Queensland legislation such as the *Gold Coast Motor Racing Events Act* 1990, s 30 provides that the holder of an occupant's pass or a ticket must not sell the pass or ticket. The maximum penalty is 20 penalty units.

(1) A person is guilty of an offence if —

(a) without reasonable excuse, the person knowingly contravenes a condition that —

– is printed on a ticket to a declared event; and

– prohibits or restricts 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 event organiser; and

(b) the approved ticket scheme for the event requires the condition to be printed on the ticket.

(2) A person who is guilty of an offence against subsection (1) is liable to a fine not exceeding —

– 60 penalty units in the case of a natural person; or

– 300 penalty units in the case of a body corporate.

(3) However, if the person is guilty of more than one offence against sub-section (1) in respect of a particular declared event held on a particular day, the total fine payable by the person for those offences is not to exceed —

(a) 600 penalty units in the case of a natural person; or

(b) 3000 penalty units in the case of a body corporate.

In addition to this, subordinate legislation exists,[50] which is designed to prevent scalpers operating in and near certain venues. An example is clause 18 of the *Australian Grands Prix (Formula One) Regulations 1996*. This provides:

> During the race period in respect of a year, a person must not, without the written authorisation of the Corporation, within the declared area in respect of that year or a designated access area —
>
> (b) sell, offer or make available for sale, or give away any ticket to the Grand Prix whether valid, an imitation or forged. Penalty: 20 penalty units.

Can Anti-scalping Legislation Work?

The difficulties of legislation such as the *Sports Event Ticketing (Fair Access) Act* 2002 working are immediately obvious. Given the pervasiveness of non-venue-based selling options, and the complexity in controlling the behaviour of a large group of people with different constituent interests, any attempt to regulate is likely to be ad hoc, possibly arbitrary in application (particularly in

[50] See also the by-laws of the Melbourne City Council *Activities Local Laws (MCC) — Part 5 Street Trading*. Another example is the *Sydney Olympic Park Regulation* 2001 at s 3.

respect of corporate scalping), and unlikely to serve as a workable deterrent — the profits too great and the possibility of detection too low. Obviously, those who purchase from scalpers are understandably reluctant to testify.

Even if the arbitrariness of enforcement was not a critical regulatory problem, other concerns that might be raised include:[51]

- how to legislate to deal with the different forms of scalping activity — the opportunistic scalper who was intending to attend the event but is no longer able to, as against the organised corporate scalper, who has deliberately purchased low with the intent of selling high (often artificially inflating the price through added extras such as hospitality or accommodation);[52]
- the recognition that, for some individuals, the opportunity cost of lining up to buy tickets exceeds the premium placed by a scalper on the face value of the ticket. With individuals of this ilk, scalping results in a redistribution of tickets with the product being put to its highest value use, marginal utility being enhanced, and presumably, welfare in society being increased;
- the possibility that this legislation will simply alter the dynamics of the problem. Instead of scalpers advertising their wares, buyers will find ways to notify scalpers that they need tickets. This point was made in the lead-up to the 2003 AFL Grand Final between Brisbane and Collingwood. As noted by Dubecki:[53]

> Ads placed by scalpers have disappeared. In their place are columns of ads placed by ticketless footy fans — most of them Collingwood supporters.
>
> Many were unwilling yesterday to talk for fear of being caught in a sting. But more than 10 hopeful buyers called by the *Age* said they had been contacted by several scalpers, each asking for many times the official $127 adult price.
>
> Most said they were expecting to pay up to $500 a ticket, but some scalpers were reportedly asking $1500 …
>
> [One fan commented] 'The Government might find [this legislation] is about as effective as legislating for a Collingwood win.'

Furthermore, subordinate legislation that prevents a sale in or around the locale of major sporting events is of little use today — particularly given the pervasiveness of modern technology such as mobile phones and on-line auction sites. All that does is prevent the nuisance value of street vendors near the sporting event.

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51 Happel and Jennings (1989), pp 10–11.

52 One of the most notable of scalping activities concerned the 1985 'Purple Rain' tour by Prince, where tickets originally sold for $17.50 were scalped for US$5000. Noted in Happel and Jennings (1989), p 1.

53 Dubecki (2003).

Despite these criticisms about anti-scalping legislation, there is no doubt that it responds to a public perception. As Yang explains:[54]

> In maintaining prices below the amount that can be obtained on the market, promoters foster goodwill amongst their consumers, generating greater profits in the long run. Put another way, 'charging what the market will bear in the short run generates extremely adverse moral effects or reputation effects in the long run. Because of consumer perceptions about fairness and moral treatment, below-market pricing [and presumably ticket-scalping regulation] continues.'[55]

The Principles to Guide Possible Solutions

Given that legislation will only have a minimal effect, what are the principles behind any options that exist to regulate or control this secondary market? After all, there is no doubt that while tickets are sold in advance, the scalping of tickets will continue. The conclusion will be that no one solution will solve the conundrum: a complex, multi-textured response is needed which can balance the public concern and the interests of different stakeholders, and ensure a regulatory solution that is not overwhelming, unnecessarily bureaucratic or overly burdensome — a single instrument unlikely to both appeal to the fairness aspect of anti-scalping legislation, yet meet the need for a secondary market to ensure allocation of resources in their most optimum way. The following suggestions for principled development are made:[56]

- Legislation is necessary if only to respond to the public's perception of the inherent unfairness of ticket scalping, though there may be economic benefits (as previously noted by Williams)[57] in anti-scalping laws. To this end, the Victorian government is to be applauded for its initiative in introducing the *Sports Event Ticketing (Fair Access) Act 2002*. However, it is appreciated that there are considerable difficulties in enforcement and that the legislation may well be largely seen as symbolic.
- An education campaign should be undertaken at the time of major sporting events, explaining the legislation and the penalties that apply (the penalties should be sufficiently punitive to act as a deterrent to the opportunistic scalper, but also recognise the more iniquitous nature of the corporate or organised scalper).
- Legislation should prohibit the secondary sale of tickets at anything above face value — thus still permitting the resale of tickets, but without any perception of ticket gouging. As noted below, this may not be applicable if a licensed secondhand market were put in place.
- Whilst it is recognised that enforcement of legislation is problematic at best, funding must be put in place, particularly at times of heightened

54 Yang (2004), p 121.

55 Yang (2004), p 121.

56 See generally, Sport and Recreation Victoria (2001), pp 28–29.

57 Williams (1994).

activity, to promote the legislation, implement it and police against droids and diggers (people employed to stand in line to purchase a large number of tickets).[58]

- Ticketing distribution practices and packages must be transparent and accountable — thus ameliorating any concern that ticket gouging is hidden behind the facade of hospitality and accommodation benefits, or that clubs and other entities involved in the process are sequestering tickets to be later sold on the secondary market.
- Codes of conduct could be mandated for those involved in the industry.
- Recognising that legislation is costly, and that it may further drive secondary sales underground, a number of practical options may also be introduced alongside the policy development to further redress the concern felt by the vast majority as to the practice of scalping.

The Practical Options

One possibility would, of course, be to restrict sales to the day of the event — thus preventing, or at least significantly limiting, any potential for a secondary resale market to be established. For example, the Chicago Cubs baseball club has deliberately retained a number of tickets for sale on the day of the game. This, however, was not seen to be economically sound — with the Club being forced to take the risk that the seats would remain unsold.[59]

Another possibility is to create a ticket-pricing scheme that would use an internet real-time auction to dictate the price of admission. Such a scheme was tested by the Seattle Mariners baseball team.[60] By this method, the internet site would show current market price — fans could purchase at this price or reserve a lower price should the admission fee reduce:

> In being open with consumers about the nature of ticket pricing and transparently allowing them to determine the prices of ticket, the perceived fairness concerns [expressed by the behavioural economists] are no longer an impediment ... In the auction situation there is no reference transaction or face value on which to base perceived notions of fairness; instead the consumers themselves determine the value of the ticket.[61]

Whilst this possibility may respond to the fairness concern of the 'blue-collar' fan, it may still result in allowing those willing to pay more to obtain the tickets. It also does nothing to prevent the secondary market occurring, though arguably it may be less likely.

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58 There was one example where an individual employed 1600 high school students to purchase 12 800 tickets to a 1984 Prince concert (each individual was only allowed to purchase eight tickets). The profit made by the individual was apparently US$120 000. See Nager (1985), pp 9–10.

59 See Yang (2004), p 123.

60 Noted in Yang (2004), pp 123–24.

61 Yang (2004), p 124.

One further option which is possible, and which has a uniquely Australian feel, is the establishment of licensed brokers to resell on the secondary market — operating in much the same way as on-course bookmakers. With on-course bookmakers, punters are able to bet at set odds, rather than relying on the dividend from the pool of monies within the centralised system. In effect, there is an arbitrage existing[62] between the individual bookmakers and the central system. Competition will be the purifying agent.[63] Applying this to the secondary sale of sporting events, this would see those licensed operators purchasing tickets for resale on the day. The operators then take the risk of the tickets not selling, poor weather, or any of the other myriad reasons as to why the fans would not turn up. The brokers would also be competing with each other as to the best price possible for sale to the public. Being licensed, it could also limit the dangers of counterfeit tickets being manufactured and sold (the purchaser taking the risk of buying from an unlicensed broker, which would limit the unregulated market),[64] and competition between the brokers would likely reduce the profits made by the scalpers. To be successful, this process would require all brokers having access to the same information and the same quality of tickets (that is, the best seats are not somehow restricted). Licensing requirements could include features such as registration (with a security check required); the adoption of consumer protection guidelines; legislative compliance mechanisms; and the adoption of a code of conduct for the industry.

Other practical solutions could include a random ballot for tickets, limiting how many tickets can be purchased, the introduction of a limited number of seats for sale on the day of the game, and restricting the number of tickets that can be purchased on the one credit card.

Conclusion

> The price that tickets to popular events command in the marketplace belongs to the performers, producers and investors who create the events, not the speculators, who through illegality and deception take advantage of the excess demand in the system. Ticket scalping is sometimes referred to as a 'victimless' crime. To the contrary, the victims of the current distribution system are the fans [the consumers], the producers and investors who create the events and the State of New York, which loses both tax revenues and credibility as the entertainment

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62 As noted by Happel and Jennings (1995).

63 See Dickey and Ward (1979), p 136.

64 A point noted by Sport and Recreation Victoria (2001), p 16: 'Looked in the paper for Grand Final tickets, rang a mobile number, met him in the city. Paid $1400 for them and don't think they are legit. They look like just paper, the three tickets have the same barcode ... (Caller No 81— Scalping Survey Line — August 2000).' See also the comments by Happel and Jennings (1995).

> center of the world. (Office of the New York State Attorney General, May 1999)[65]

The anti-scalping legislation of the type that has been invoked in Victoria and the United States is only ever likely to be moderately successful. Nevertheless, this is not to suggest that it fails to serve its purpose. Intrinsically, it sends a message about the egalitarian, democratic nature of sports that every fan, irrespective of wealth, shall be entitled to attend the finale of any season. It is about maintaining accessibility — a goal which is particularly enduring because of the association of sport with the Australian people.[66] In achieving some control over ticket scalping, the regulation must be light-handed but firm, as well as fulfilling the community expectations of striving to maintain right of entry to the games for all. A holistic approach is needed — encompassing the principles outlined and the adoption of some, if not all, of the practical solutions. In undertaking this, it must also be recognised that, when the examination is done from the perspective of the consumer, in some instances the sports fan is the beneficiary of the practice. Given this, no resolution will be perfect but a combination of a licensed brokerage, enforcement of punitive legislation and creative solutions to destroy the illicit secondhand market can only serve to benefit the vast majority of fans and maintain sport as the illusion of perfect innocence. In times of change, globalisation and uncertainty, it is an illusion worth preserving.

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65 Sport and Recreation Victoria (2001), p 7.

66 A similar perspective is presented by Yang (2004), p 111 in the context of the American association with baseball: 'Ticket scalping and baseball, America's "national pastime", have had a thorny relationship. On the one hand, baseball's history and cultural relevance lead many to believe that the sport should be democratically accessible. On the other hand, ticket scalpers and brokers have been able to capitalize immensely on fans' devotion by selling tickets in excess of their face value. Ticket scalpers and fans have a somewhat circular relationship. Opponents of scalping charge that the practice is exploitative and seek regulation or prohibition. Scalpers and brokers counter that they operate within the free market and exist as a result of fans' desire to attend games.'

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