

40TH PARLIAMENT



Report 41

STANDING COMMITTEE ON LEGISLATION

Ticket Scalping Bill 2018

Presented by
Hon Dr Sally Talbot MLC (Chair)
September 2019

Standing Committee on Legislation

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EXECUTIVE SUMMARY

- 1 The Legislative Council referred the Ticket Scalping Bill 2018 (Bill) to the Standing Committee on Legislation (Committee) with the power to inquire into policy.
- 2 The Bill implements an election commitment to introduce new laws to crack down on ticket scalping, the prevalence of which is contested and probably under-reported in Western Australia.
- 3 The policy of the Bill is to address ticket scalping practices that are adversely impacting consumers. The Committee is of the view that the first three of four policy objectives listed in paragraph 3.3 have been addressed. Consistent with policy, the Bill provides a legitimate, secondary ticket reselling marketplace and creates the offence of selling a ticket for an amount which exceeds the original ticket price by more than 10 percent.
- 4 The 10 percent price cap is contentious. It may be viewed as anti-competitive, a restraint on trade and Government price setting in the marketplace. Both international and Australian inquiries have commented on how the history of price caps in other spheres is not favourable and of limited effect. Publicly available, empirical evidence that price caps minimise scalping is sparse.
- 5 The contingent sales prohibition in the Bill may have a deleterious impact on the ticket broking industry.
- 6 The Bill prohibits a person from using any software that enables or assists a person to circumvent the security measures of a website to purchase tickets. Colloquially known as 'bots', robotic software automates the execution of a pre-programmed set of instructions with lightning speed. There is some evidence in Australia that bots account for as much as 30 percent of ticket purchases. The consensus in the academic literature is that ticket buying bots reduce consumers' fair access to tickets.
- 7 The Bill provides for a five-year statutory review of the operation and effectiveness of the Act but the Committee has recommended three years. One reason for reducing the period is the uncertainty around whether the laws (especially clauses 6, 8 and 11) will in fact minimise scalping. Given predictable, rapid change in computer software technology to circumvent security measures, it is prudent to cause an earlier review.
- 8 The Committee made 15 findings, six statutory form recommendations and one narrative form recommendation.

Findings and recommendations

Findings and recommendations are grouped as they appear in the text at the page number indicated:

FINDING 1

Page 13

The prevalence of ticket scalping in Western Australia is contested and probably under-reported.

FINDING 2

Page 13

The distinction between a scalped ticket and a fraudulently sold, fake ticket is unclear.

FINDING 3

Page 17

In October 2018, Ministers of the Legislative and Governance Forum on Consumer Affairs endorsed Option 4 of the 2018 Commonwealth Treasury, Decision Regulation Impact Statement *Ticket Reselling in Australia*. Option 4 is 'improved information disclosure arrangements for ticket resellers'.

FINDING 4

Page 18

The Ticket Scalping Bill 2018 adopts a form of restricted selling. This is Option 3 in the 2018 Commonwealth Treasury, Decision Regulation Impact Statement *Ticket Reselling in Australia*.

FINDING 5

Page 19

Previous inquiries have concluded that if a price cap is applied, a black market will likely emerge. This will result in consumers losing access to protections under the Australian Consumer Law as the transaction will be rendered illegal.

FINDING 6

Page 24

Strong monitoring and enforcement actions are essential for reducing consumer detriment in the ticket reselling marketplace.

FINDING 7

Page 25

There is consumer benefit in a strong community education campaign on ticket scalping and how to minimise it.

FINDING 8

Page 25

National uniform laws for reselling event tickets are desirable.

FINDING 9

Page 25

There is consumer benefit in banning bots.

FINDING 10

Page 27

The reason advanced for leaving the commencement of the key operative clauses of the Ticket Scalping Bill 2018 to the Executive is justified.

RECOMMENDATION 1

Page 28

Clause 2(a) be amended as follows:

Page 2, line 6 — To insert after "Part 1":
and section 16

RECOMMENDATION 2

Page 30

Clause 3 be amended as follows:

Page 3, after line 30 — To insert:

ticket scalping means to sell a ticket for admission to an event for an amount which exceeds the original ticket price by more than 10%.

RECOMMENDATION 3

Page 33

Clause 3 be amended as follows:

Page 3, line 11 — To delete “declared” and insert:

prescribed

FINDING 11

Page 37

The clear words in clause 5 have effectively displaced the presumption against extraterritorial effect.

FINDING 12

Page 45

The prohibition in clause 6 against a person selling an event ticket by more than 10 percent may have a deleterious impact on the continued existence of a secondary market composed of scrupulous sellers or businesses adhering to a code of ethics.

FINDING 13

Page 45

International inquiries suggest a price cap may not work and may be unenforceable.

FINDING 14

Page 47

The Committee finds the evidence of the Ticket Brokers Association of Australia to be persuasive and that the contingent sales prohibition in clause 8 will have a significant, deleterious impact on ticket brokers’ livelihood. This can be ameliorated by amending clause 8 to better reflect the effects of the Victorian model where there is no contingent sales prohibition.

RECOMMENDATION 4

Page 51

Amend clause 10 as follows:

Page 6, after line 32 — To insert:

- (3) The defence provided for in subsection (2) is in addition to and does not affect the operation of *The Criminal Code* Chapter V.

Note for this subsection:

Section 13(1)(c) does not apply certain defences in the *Fair Trading Act 2010* Part 7.

FINDING 15

Page 56

It is a policy decision of Government that police officers are excluded from investigating offences under the Ticket Scalping Bill 2018.

RECOMMENDATION 5

Page 56

When the Ticket Scalping Bill 2018 is debated in the Legislative Council, clarification be sought on the decision of Government for police officers to be excluded from assisting the Commissioner for Consumer Protection with investigating offences.

RECOMMENDATION 6

Page 57

Amend clause 13 as follows:

Page 10, after line 3 — To insert:

Notes for this section:

1. Subsection (1) incorporates into this Act certain provisions of the *Fair Trading Act 2010* that provide for or in relation to —
 - (a) powers of the Commissioner;
 - (b) investigation and enforcement;
 - (c) criminal and civil proceedings;
 - (d) miscellaneous matters.
2. Subsection (2) makes certain modifications to those provisions in their application as part of this Act.

RECOMMENDATION 7

Page 60

Page 10, line 26 to page 11, line 3 — To delete the lines and insert after page 11, line 3:

16. Review of Act

- (1) An appropriate Standing Committee of the Legislative Council must review the operation and effectiveness of this Act, and prepare a report based on the review, as soon as practicable after the 3rd anniversary of the day on which section 6 comes into operation.
- (2) The review must address whether sections 6, 8 and 11 have been effective in reducing the practice of ticket scalping.
- (3) The Standing Committee must cause the report to be laid before the Legislative Council as soon as practicable after it is prepared, but not later than 12 months after the 3rd anniversary.

CHAPTER 1

Introduction

Referral and procedure

- 1.1 On 27 June 2019 the Legislative Council referred the Ticket Scalping Bill 2018 (Bill) to the Standing Committee on Legislation (Committee). The referral motion states:
 - (1) That the *Ticket Scalping Bill 2018* be discharged and referred to the Standing Committee on Legislation for consideration and report by no later than 5 September 2019.
 - (2) The Committee has the power to inquire into and report on the policy of the Bill.¹
- 1.2 Pursuant to Standing Order 163, Hon Aaron Stonehouse MLC substituted for Hon Simon O'Brien MLC for the duration of the inquiry. The President of the Legislative Council reported the substitution to the House on 7 August 2019.
- 1.3 The Committee called for submissions from those stakeholders listed in Appendix 1 and advertised the Inquiry in *The West Australian* receiving 22 submissions. Media statements were released for the Inquiry and its hearings. The Parliament's Facebook page was boosted to reach nearly 7 000 persons, receiving 38 comments.
- 1.4 Two public hearings were held. The first with the Department of Mines, Industry Regulation and Safety Consumer Protection Division (DMIRS) and personnel from VenuesWest. The second with the President and Western Australian Member of the Ticket Brokers Association of Australia. Notice of the hearings was advertised.
- 1.5 Two private hearings were held. The first with DMIRS, Consumer Protection (Retail and Sales Directorate). The second with the Western Australian Police Force Major Fraud Squad on the subject of fraudulently sold, fake tickets.²
- 1.6 The Committee extends its appreciation to those who made submissions and appeared at hearings.

Committee approach to the Inquiry

- 1.7 As with previous inquiries, the Committee's method for scrutinising the Bill included an assessment as to whether its provisions are consistent with fundamental legislative principles (FLPs). Sixteen FLPs are set out in Appendix 2.
- 1.8 FLPs are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.³ They fall under two broad headings:
 - Does the Bill have sufficient regard to the rights and liberties of individuals? (FLPs 1-11).
 - Does the Bill have sufficient regard to the institution of Parliament? (FLPs 12-16).
- 1.9 The Committee has routinely used FLPs as a convenient and informal framework for scrutinising proposed legislation since 2004. They are not enshrined in Western Australian

¹ Hon Alannah MacTiernan MLC, Minister representing the Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2019, pp 4782b-4783a.

² In this report a 'fake' ticket is a fraudulently sold ticket.

³ The fundamental legislative principles are based on principles set out in Queensland's *Legislative Standards Act 1992*, though other Parliaments often rely on similar principles.

law, and for some bills, many FLPs do not apply. The question the Committee asks is not whether there is strict compliance with FLPs, but whether a bill has sufficient regard to them.

- 1.10 The Committee has scrutinised and reported on selected clauses of the Bill in Chapter 5.
- 1.11 The Committee's approach gave consideration to Minister MacTiernan's reason for referring the Bill. The Minister said:

The [responsible] Minister is aware that Members present may have different proposals they want examined as we work to protect consumers from unscrupulous ticket re-sellers, hence I will be moving that the matter be referred to the Standing Committee on Legislation.⁴

- 1.12 The Committee's examination of different proposals is in Chapter 4.

Purpose of the Bill

- 1.13 The Bill implements an election commitment to 'introduce new laws to crack down on ticket scalping'.⁵ During the Second Reading Speech, Minister MacTiernan said:

The primary purpose of the Bill is to provide strong mechanisms to address the consumer detriment that occurs as a result of ticket scalping for popular public entertainment events hosted in Western Australia.

It delivers on longstanding commitments by the Government to address serious and growing consumer concerns in this area.⁶

Background of the Bill

- 1.14 The Bill is modelled on NSW and South Australian legislation but Western Australia has constructed a stand-alone enactment outside our *Fair Trading Act 2010*. In comparison, NSW and South Australia preferred to amend their 1987 Fair Trading Acts, each headed 'Part 4A Regulation of event ticket transactions'.
- 1.15 Victoria, Queensland, NSW, the ACT and South Australia have previously enacted 'major event' type legislation which provide for example, ministerial declarations about certain, high profile sporting and entertainment events. Subject matters include crowd control, vehicle and emergency management as well as provisions about ticket re-selling.
- 1.16 The disadvantage of 'major event' legislation is that the ticket reselling provisions first require the making of a ministerial declaration, order, recommendation or the prescribing of a regulation that a particular sport or live concert is 'a major event'. Once made, ticket reselling provisions crystallise. It is a convoluted and protracted process which does not cover all events or capture the use of computer robotic software (bots).
- 1.17 DMIRS advised that originally:
- It was intended that in Western Australia ticket resale price restrictions and prohibitions on the use of bots would be included in major events legislation which was under development in 2017.

⁴ Hon Alannah MacTiernan MLC, Minister for Regional Development representing the Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2019, pp 4782b-4783a.

⁵ This was Fresh Idea Number 173 of the '200 Fresh Ideas for WA' advertisement during the last state election campaign for the WA Labor Party.

⁶ Hon Alannah MacTiernan MLC, Minister for Regional Development representing the Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2019, pp 4782b-4783a.

Resale price restrictions were to be modelled on the provisions in effect in Queensland which, at that time, were the most modern in operation in Australia.⁷

- 1.18 However, it was later settled to apply resale price restrictions on 'all events' without declarations and include provisions about bots.⁸

Consultation on the Bill

- 1.19 The Committee notes the paucity of general public consultation during the drafting stage of the Bill.
- 1.20 The Regulatory Impact Assessment (RIA) process for any legislative proposal requires a preliminary impact assessment (PIA) and if a significant negative impact is identified, then a regulatory impact statement (RIS) must be undertaken. The RIA process allows for a Treasurer's exemption in exceptional circumstances, one example of which is an election commitment.
- 1.21 DMIRS advised that initial consultation had been undertaken by VenuesWest and Tourism WA 'with a range of government agencies and industry associations as part of a broader proposal to regulate the conduct of major events in Western Australia'.⁹ No formal public consultation appears to have been undertaken at that stage and was not undertaken during the Bill's drafting process because when the Commonwealth Treasury canvassed proposals through national consultation in late 2017 for its Consultation Regulation Impact Statement, *Ticket Reselling in Australia* report,¹⁰ there were no submissions from Western Australian stakeholders.¹¹ DMIRS formed the view that further invitations to comment on the same subject would be unlikely to elicit any additional responses and it was not necessary to duplicate the Department of Treasury RIS process already undertaken by the Commonwealth.
- 1.22 The Committee noted that section 3 of the PIA template requires an agency to:
- List the stakeholder groups (business, community and government) likely to be affected, directly or indirectly, and details of any preliminary consultation undertaken.
 - Outline any concerns raised by stakeholders and how they might be addressed.
 - Confirm whether the Small Business Development Corporation had been consulted regarding possible small business impacts.

⁷ Submission 2 from the Department of Mines, Industry Regulation and Safety (Consumer Protection), 22 July 2019, paragraph 3.1.

⁸ *ibid.*

⁹ *ibid.*, paragraph 6.1.

¹⁰ The Australian Government the Treasury, Consultation Regulation Impact Statement, *Ticket Reselling in Australia*, November 2017. See: https://consult.treasury.gov.au/small-business-and-consumer-division/ticket-reselling-in-australia/supporting_documents/cs2017t234743.pdf. Viewed 3 July 2019.

¹¹ Submission 2 from the Department of Mines, Industry Regulation and Safety (Consumer Protection), 22 July 2019, paragraph 6.1.

- 1.23 A full RIA process would have involved comprehensive general public consultation. Its absence is worth noting in light of a Department of Treasury publication, which states 'consultation enables stakeholders to better understand the processes of policy development and encourages participation in deliberative processes. It also 'allows Government to understand various perspectives and refine potential solutions to improve the quality of its decisions'.¹²

¹² Government of Western Australia, Department of Treasury, *Consultation: Collaboration is key*, August 2018. See: https://www.treasury.wa.gov.au/uploadedFiles/Site-content/Economic_Policy/Better_Regulation_Unit/Consultation.pdf. Viewed 16 August 2019.

CHAPTER 2

Ticket scalping

Historical origins of ticket scalping

- 2.1 The term 'scalper' originated in the 1800s from the practice of some native American tribes who scalped defeated foes. Over time, scalping became financially motivated with individuals receiving payment for each scalp procured.
- 2.2 As settlement on the American frontier continued, rail travel grew in popularity with people seeing an opportunity from purchasing unused portions of railroad tickets to resell for profit. These ticket traders came to be compared with scalp collectors and soon the term *scalper* was extended to include those traders as well.
- 2.3 American scalpers eventually expanded their resale domain beyond railroad tickets to the point that scalping now occurs at almost every major entertainment event.¹³ American legislative attempts to deal with scalping date from 1905 but have been unsuccessful on constitutional grounds (the unconstitutional interference with an owner's property rights) and enforcement difficulties. Certainly in America, scalping has become 'engrained in the live entertainment industry'.¹⁴

Modern ticket scalping

- 2.4 Modern era ticket scalping has little in common with the pre-internet era when 'men in coats sold paper tickets outside stadiums'.¹⁵ Some scalpers have turned to internet, robotic software 'bots' to purchase multiple tickets and then on-sell through website platforms.
- 2.5 Software 'bots' were reportedly invented by Kenneth Lowson, part-owner and co-founder of Wiseguys Tickets Inc. An FBI indictment in 2010 described a period between late 2002 and January 2009 when:

A nation-wide computer network opened thousands of simultaneous internet connections from across the United States ... making the owners more than \$20 million in profits while purchasing more than one million tickets to events nationwide'.^{16 17}
- 2.6 For those scalpers not using robotic software, a 2018 study of baseball scalping outside the grounds of Chase Field in Phoenix, Arizona, reveals that scalpers are successfully combining the street vending of physical tickets with internet sales using mobile phones and other portable devices outside venues. This is a form of what is known as 'm-commerce'— 'mobile' commerce.
- 2.7 The authors of the study found that baseball scalpers are 'actually using internet markets like StubHub and bring their excess to the ballpark for street vending'. During conversations with

¹³ Robert McFadden, *The BOTS Act: A Small Step for Fankind When a Giant Leap is Needed*, Washburn Law Journal 2016, p 434.

¹⁴ *ibid*, p 446. New York's earliest scalping laws were in 1920 but ignored. They were repealed in 2007 after a 1999 earlier report recommended repeal.

¹⁵ James Purtill, Triple j Hack, 'The man who invented ticket bots explains why you can't get that gig ticket', 16 October 2017. See: <https://www.abc.net.au/triplej/programs/hack/ticketbot-inventor-ken-lowson-explains-scalping/9055238>. Viewed 3 July 2019.

¹⁶ Kenneth Lowson, part-owner and co-founder of Wiseguys Tickets Inc. The period of the indictment was between late 2002 and January 2009.

¹⁷ See: <https://www.scribd.com/document/338935960/Wiseguy-Indictment>. Viewed 9 July 2019.

scalpers, it was observed that ‘a few of them, but not the majority, consult StubHub on a real-time basis to help them determine their spot market ticket prices.¹⁸ The authors concluded that the rise of internet, secondary markets for tickets ‘may ultimately have adverse consequences for street vendors, but at present, it seems more advantageous than disadvantageous’.¹⁹ What this research shows is that scalpers are adaptive and explains Live Performance Australia’s conclusion that scalping can only be ‘minimised’²⁰ not eradicated.

Scalper activity

2.8 Scalpers purchase from the primary ticket market with the deliberate intention of making a profit.²¹ They may charge different prices for each individual seat depending on its desirability in the venue but ultimately, they exploit a consumer’s willingness to pay with those consumers who are unwilling to pay a premium, missing out on the most attractive tickets. This is why ticket scalping is often labelled as deceptive, unfair or unethical; while scalpers are described as ‘unscrupulous’ and demonised in the media.

2.9 In December 2017, CHOICE published the following examples of scalpers’ resale value percentage mark-ups.²²

Event	Face value	Resale value	% mark up
Geelong v West Coast (AFL)	\$7	\$70	900%
DFB-Pokalfinale	\$70	\$650	829%
Crusaders v Hurricanes	\$7.50	\$60	700%
Cricket World Cup	£45	£350	678%
Adele	£120	£928	673%
Ed Sheeran	\$70	\$530	657%
Maori All Blacks v Lions	\$37.99	\$251	561%
Ed Sheeran	\$80	\$512	540%
Tom Segura	\$60	\$383.33	539%
Elton John	\$129	\$800	520%

Source: CHOICE, *Ticket reselling in Australia, Submission to the Treasury's Consultation regulation impact statement on ticket resale*, 15 December 2017, pp 14-15.

¹⁸ Barry Bozeman and Gabel Taggart, ‘Markets, Clans, and Arbitrage: A Participant-Observation Study of “Coopetition” Among Baseball Tickets Scalpers’, *Sociological Inquiry*, 2018, vol. 88, No.3, p 549-550.

¹⁹ *ibid*, p 550.

²⁰ Submission 18 from Live Performance Australia, 31 July 2019, p 4.

²¹ Commonwealth Parliament, Senate, Economics References Committee, report, *Ticket Scalping in Australia*, 24 March 2014, p.1.

²² The survey was conducted from April to June 2017 by Which? (United Kingdom), CHOICE (Australia) and Consumer NZ (New Zealand) with 1051 participants recruited through social media posts, links from articles in traditional media and by engaging with members and supporters of these organisations. See: CHOICE: *Ticket reselling in Australia, Submission to the Treasury's Consultation regulation impact statement on ticket resale*, 15 December 2017, p 5.

- 2.10 At first glance, these CHOICE examples are high but the Australian Taxpayers' Alliance argue that 'consumers who are willing to pay even exorbitant sums to see certain artists or performers are not necessarily being 'ripped off' by the significantly increased ticket prices in these cases, but may rather be paying for the value which they personally ascribe to the products'.²³
- 2.11 Economists too, think differently. They argue that from an economic perspective, 'onselling allocates tickets to those with the greatest willingness to pay and provides efficiency gains'.²⁴ Further, the existence of a secondary market is a sign of undersupply, underpricing or a combination of the two.²⁵
- Event promoters, for example, are incentivised to sell as many tickets as possible so they can profit from sales of food, drinks and merchandise. This leads them to price tickets low.
 - Some musicians and sports teams keep their ticket prices below-market as a sign of appreciation for their fans' loyalty but in setting prices below what the market will bear, a market environment is created characterized by sell outs, excess demand, and frenzied customers willing to pay premiums to obtain tickets.
- 2.12 One scalper's view is that 'if tickets were really easy to come by, then the industry would not exist'.²⁶
- 2.13 Scalpers thrive off such conditions as it presents them with the chance to make a profit from buying and selling the same item that would never have existed in a world where tickets were plentiful and priced in line with demand.²⁷ This is known as an *arbitrage* opportunity. Arbitrage opportunities exist as a result of market inefficiencies, which allow scalpers to exploit price differences. The 'arbitrage agent seeks to profit by exploiting fluctuations in markets and prices for an asset and sometimes seeks to affect those fluctuations'.²⁸

Underpricing tickets

- 2.14 Underpricing occurs for many reasons 'in the interest of balancing a commercial return with affordability to consumers'²⁹ but ultimately it leads to the inefficient allocation of tickets in the primary ticket market and creates gains that can be realised in the secondary market.³⁰

²³ Submission 5 from the Australian Taxpayers' Alliance, 25 July 2019, p 5, paragraph 17.

²⁴ Commonwealth Consumers Affairs Advisory Council Inquiry, *Consumers and the ticket market: Ticket onselling in the Australian market*, Final Report, Australian Government, Barton ACT, November 2010. See: <http://ccaac.gov.au/2010/12/03/ticket-onselling-in-the-australian-market/>, p vi.

²⁵ Keith Parry, *The Economics of ticket scalping*, The Conversation, 11 September 2017. Also Art Carden, Associate Professor of Economics, Samford University, Birmingham, Alabama (Blogs on the subject matter). Also Philippe Cyrenne, Department of Economics, The University of Winnipeg, Manitoba, Canada, 'Anti scalping laws and the selling of season tickets by professional sports teams', *Wiley online journal*, 19 March 2019.

²⁶ James Purtill, Triple j Hack, 'How big acts got so expensive: A ticket scalper explains the rip-off', 10 March 2017. See: <https://www.abc.net.au/triplej/programs/hack/a-ticket-scalper-explains-the-rip-off/8344484> Viewed 3 July 2019.

²⁷ Professor Waterson in his *Independent Review of Consumer Protection Measures Concerning Online Secondary Ticketing Facilities*, 2016 said: 'In a market economy profit is clearly intrinsic to the efficiency of the system and all parties to the sale of tickets will be seeking to make a profit', p 147.

²⁸ Barry Bozeman and Gabel Taggart, 'Markets, Clans and Arbitrage: A Participant-Observation Study of "Coopetition" Among Baseball Ticket Scalpers', *Sociological Inquiry*, 2018, vol. 88, No.3, p 537.

²⁹ The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>, Chapter 1. Viewed 3 July 2019.

³⁰ *ibid.*

- 2.15 The Australian Taxpayers Alliance said underpricing is sometimes deliberate 'in order to prompt a rapid sell-out which attracts publicity for the event and/or enables subsequently staggered allocations of tickets to be sold at a much higher price'.³¹ However the Alliance acknowledges that underpricing may also be motivated by a 'bonafide desire to ensure that genuine fans who cannot afford exorbitant prices are able to attend'.³²
- 2.16 In 2014, a NSW Legislative Council committee report quoted eBay stating that 'organisers deliberately under-price to achieve a sell-out event and secure the performer's commitment to performing'.³³ In 2017 the United Kingdom's Government response to the *Waterson Inquiry* into online secondary ticketing facilities warned about underpricing stating:
- If prices for various reasons are set at a below market clearing level, then the event organiser's ticketing and venue control strategies need to take this into account, as otherwise there is an opportunity for operators in the secondary market to seek to capture the value added that the event organiser has effectively forgone.³⁴
- 2.17 In a Blog, the American Economist, Associate Professor Art Carden, explains what occurs when event tickets are under-priced:
- The price is set below that which will equate quantity *supplied* with quantity *demand*ed. So a secondary market develops where the people who originally bought the tickets resell them for a *much* higher price. That prompts those without tickets to howl with outrage that *scalpers* are *over-charging people* for tickets to the event.
- If people are going to be mad, though, it's not clear they should be mad at the people who are asking high prices for tickets ... they should be mad at the people who are *competing with them* for tickets and driving up the price.
- The simple fact of the matter is that when more people want seats than there are seats available, prices will rise—and if prices aren't allowed to rise, people will find other ways to "pay", like standing in long lines for underpriced tickets.
- With respect to the people setting the prices initially, it's not as if they don't know what they're doing: perhaps being a tough ticket will give the show staying power and improve box office receipts later, when the show eventually goes on tour.³⁵
- 2.18 Associate Professor Carden commented on the hysteria around the ticket sales process; that the 'buzz created by underpriced tickets is also a kind of advertising'. Thus, 'if anyone is to

³¹ Submission 5 from the Australian Taxpayers' Alliance, 25 July 2019, p 3, paragraph 11.

³² *ibid.*

³³ NSW, Legislative Council, General Purpose Standing Committee, No. 4, Report 30, *Fair Trading Amendment (Ticket Reselling Bill) 2014*, 19 February 2015, p 5. See: [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20\(Ticket.pdf\)](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20(Ticket.pdf)).

³⁴ HM Government, *Government response to Professor Waterson's Independent Review, Consumer Protection Measures concerning Online Secondary Ticketing Facilities*, report prepared by the Secretary of State for Business, Energy and Industrial Strategy; and the Secretary of State for Culture, Media and Sport, London, March 2017, p 4. See: <https://www.gov.uk/government/publications/consumer-protection-measures-applying-to-ticket-resale-waterson-review>. Viewed 16 July 2019.

³⁵ Art Carden is an Associate Professor of Economics at Samford University in Birmingham, Alabama. See Blog at: <https://www.learnliberty.org/blog/heres-who-im-blaming-for-hamiltons-exorbitant-ticket-prices/>. Viewed 11 July 2019.

blame when tickets are expensive and hard to come by, 'it isn't the producers. It's the guy who's willing to pay \$850 for the seats'.³⁶

- 2.19 In light of the above discourse and in the following exchange, the Committee considered whether the caveat emptor principle should apply to purchasers willing to pay more than the face value of a ticket in the secondary market.³⁷ Appealing to consumers to 'use their better judgment' only goes so far given that the advent of robotic software has significantly altered the secondary market landscape and in doing so, denied consumers' fair access to tickets.

Ms LIPSCOMBE: One of the issues that we have with the introduction of robotic software, which can go to the primary site and purchase bulk tickets far faster than any person can, is that it has distorted the market. The ordinary consumer does not have the fair access that might otherwise prevail. In that case, it is a bit hard to simply rely on caveat emptor. I think that is why the government made a commitment to do something about scalping and addressing the inflated prices that those who use the software are then capable of charging.

The CHAIR: So it is the market disruptor.

Ms LIPSCOMBE: Yes.

The CHAIR: My other question on this subject was why can we not just treat tickets as a good, as a commodity? Is the scalper not just an honest businessperson making a profit on the supply and demand principle?

Ms LIPSCOMBE: As I said, if there was not the advent of robotic software and if scalpers had to compete on much the same basis as any other consumer to obtain tickets, I think that would be a reasonable proposition. But with the advent of that technology and the control of that, it does distort the market.³⁸

- 2.20 The Committee is of the view that the advent of robotic software to purchase event tickets creates a significant distortion in the ticket market and limits the effectiveness of the caveat emptor principle. Such distortion highlights the importance of the caveat emptor principle and the need for a high level of community awareness.

Unavailability of tickets for the general public

- 2.21 In 2016, the New York State Attorney conducted an investigation into what was 'blocking New Yorkers from getting tickets' to events, finding:

That the majority of tickets for the most popular concerts are not reserved for the general public at least in the first instance ... Over half of the available tickets are either 'put on hold' and reserved for a variety of industry insiders including the venues, artist or promoters or are reserved for 'pre-sale' events and made available to non-public groups, such as those who carry particular credit cards.³⁹

- 2.22 Attorney Schneiderman reported that:

³⁶ See Blog at: <https://www.learnliberty.org/blog/heres-who-im-blaming-for-hamiltons-exorbitant-ticket-prices/>. Viewed 11 July 2019.

³⁷ 'Let the buyer beware'. It is a principle of contract law in many jurisdictions that places the onus on the buyer to perform due diligence before making a purchase.

³⁸ Exchange between Hon Dr Sally Talbot MLC, Chair and Penny Lipscombe, Director, Legislation and Policy, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, pp 7-8.

³⁹ Office of the New York State Attorney, Eric T Schneiderman, *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, p 4. See: https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf. Viewed 16 July 2019.

On average, only about 46 percent of tickets are reserved for the public. The remaining inventory is divided between 16 percent for industry holds (described as artists, agents, venues, promoters, marketing departments, record labels, and sponsors) and 38 per cent for pre-sales.⁴⁰

2.23 Australia, in comparison lacks definitive statistics. In 2018, the Commonwealth Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia* (2018 Commonwealth Decision RIS) stated that because its stakeholders held such divergent views, 'it cannot be conclusively determined what proportion of tickets for events in Australia make it to general public sale.'⁴¹

2.24 The scale of the under-supply or restriction of tickets to the general public in Western Australia is also unknown. However, the extent of ticket unavailability for the general public was revealed in 2014 when the Senate's Economics References Committee report quoted an eBay submission alleging that:

With a Justin Bieber concert in February 2013, 93 per cent of tickets had been set aside for other partners leaving only 7 per cent of tickets available for purchase by the public.⁴²

2.25 In the following exchange, the Committee questioned VenuesWest about whether such a scenario would occur in Western Australia.

Mrs CARREN: No.

The CHAIR: Why could it not happen?

Mrs CARREN: Because of the on-sale strategy. For example, for Optus Stadium there is a guarantee that we have a number of walk-ups, there is a fan-first commitment, there is a commitment to tourism outcomes and then there is a commitment to servicing members and things like that.

The CHAIR: Okay, so there are a set of expectations and requirements?

Mrs CARREN: Yes, absolutely.

Hon AARON STONEHOUSE: I suppose it changes from venue to venue, but can you give us an idea of what percentage of tickets for VenuesWest venues are sold to the general public and what are set aside for partners, people in the industry, reserved for VIPs and that kind of thing?

Mrs CARREN: Again, it would vary for every event and for the promoters. So the promoter negotiates an on-sale strategy and determines what level of inventory they would like to retain as theirs, which would be the VIP; that is usually a very conservative number.

The venue typically has another, I guess, set of house seats, and it would determine whether it wants to put that into the general pool or reserve that for VIP

⁴⁰ Office of the New York State Attorney, Eric T Schneiderman, *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, p 11. See: https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf. Viewed 16 July 2019.

⁴¹ The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia* 2018. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 3 July 2019.

⁴² Commonwealth Parliament, Senate, Economics References Committee, Report, *Ticket Scalping in Australia*, 24 March 2014, p 24. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Ticket_scalping_2013. Viewed 2 July 2019.

use, and then the rest is available for general public through different marketing strategies.⁴³

- 2.26 Evidence provided by VenuesWest reassured the Committee that a Justin Bieber scenario would not occur at a VenuesWest event. However, the potential for such a scenario remains and should be monitored by DMIRS into the future. It is not evident that a problem currently exists in Western Australia, but future monitoring will assure confidence.

The prevalence of scalping

- 2.27 The prevalence of scalping is contested. For example, in 2015, a NSW Legislative Council, General Purpose Committee inquiry into its (then) *Fair Trading Amendment (Ticket Reselling) Bill 2014* heard 'varying degrees on the prevalence of scalpers' and the low level of scalping complaints.⁴⁴ This suggests the prevalence may be greater because, according to VenuesWest, 'scalping is under-reported'.⁴⁵ DMIRS was unable to assist with prevalence rates because it does not receive complaints for actioning in relation to inflated prices. Scalping is currently not an offence.
- 2.28 Scalping certainly features in the media. During this Inquiry, the Western Australian Parliamentary Library Service selected 51 media articles on scalping between 2006 and 2019 that demonstrate the anecdotal prevalence of scalping. The vast majority of complaints in these articles relate to inflated prices.⁴⁶
- 2.29 VenuesWest quoted a prevalence rate of 'less than five percent at each event' based on responding to customer complaints at venues, rather than sampling or undertaking surveys. However, the following exchange highlights problems at VenuesWest venues with fraudulently sold, fake tickets, not scalped tickets.

Mrs CARREN: At VenuesWest venues, we would have a considerable number of upset consumers at our box offices at any given event. They have varied from up to 300 at an event, but usually less than five per cent at each event. But we will have regular consumers sitting there at the box office unable to attend.

The CHAIR: And what is their complaint—that they cannot get in or they have paid too much?

...

Mrs CARREN: They cannot get in. Yes, so it is fraudulent tickets. We will field complaints in the lead-up to an event about the inflated prices, and often that is associated with incorrect access to tickets or incorrect information. So, the consumer would be incorrectly looking at viagogo sites or something that has ranked higher than the official outlet. If they contact us, we can redirect them to the official outlet, but otherwise it is actually at the venue on the night itself.

⁴³ Exchange between Hon Dr Sally Talbot MLC, Chair; Janis Carren, Director, Strategy and Partnerships, VenuesWest; and Hon Aaron Stonehouse MLC, Member, *Transcript of evidence*, 7 August 2019, p 10. A 'walk-up' is when a member of the public comes directly to the box office and purchases a ticket on the day of the event itself'. Per Janis Carren, Director, Strategy and Partnerships, VenuesWest, Email, 20 August 2019.

⁴⁴ NSW, Legislative Council, General Purpose Standing Committee, No. 4, Report 30, *Fair Trading Amendment (Ticket Reselling Bill) 2014*, 19 February 2015, p 9.
See: [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20\(Ticket\).pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20(Ticket).pdf).

⁴⁵ Janis Carren, Director, Strategy and Partnerships, VenuesWest, *Transcript of evidence*, 7 August 2019, p 4.

⁴⁶ The Western Australian Parliamentary Library Service, Information Page list of resources of these articles is at Appendix 6.

...

Hon NICK GOIRAN: So, is that five per cent of people—on average; I appreciate it is a ballpark figure—who are unable to access the event, or is it five per cent of people who are complaining about the inflated price, or is it both?

Mrs CARREN: It will be both. ... I would have to get you specific numbers, and it varies greatly event to event depending on, I guess, the popularity of the artist or the sporting event.⁴⁷

2.30 VenuesWest appears to be confusing fraudulently sold, fake tickets with scalped tickets. Fake tickets are not within the purview of the Bill or DMIRS, Consumer Protection division but for the Western Australia Police Force to investigate. Anecdotally, there appears to be an active industry operating around fake and invalid tickets for events at VenuesWest venues given that two years ago, the ABC news reported on:

- 354 people who were refused entry to Perth Arena at 14 separate events over the previous five months because they held invalid tickets;
- 143 people were refused entry to the 2017 Hopman Cup for the same reason.⁴⁸

2.31 Mrs Carren described the type of fraud that is occurring at VenuesWest events such as presenting:

Inventory that does not exist at venues, including things that you would perhaps expect on other types of goods and services that you would buy; things like reclining seats and viewpoints at venues that do not exist, and the resellers try to sell it to our consumers.⁴⁹

2.32 In an answer to a question on notice, VenuesWest said:

Since 1 January 2017, 1508 ticket holders did not gain access to an event at RAC arena due to the presentation of invalid tickets. When presenting to the box office. The following resale avenues were identified:

Ticketmaster resale— 379

viagogo— 1003

Facebook—6

Gumtree— 77

Queen of Tickets— 10

The Ticket Merchant— 9

Unknown— 24.⁵⁰

⁴⁷ Janis Carren, Director, Strategy and Partnerships, VenuesWest, *Transcript of evidence*, 7 August 2019, p 3.

⁴⁸ David Weber, *Ticket scalper warning after Perth Arena turns away 350 people with invalid tickets*, ABC news online, Perth, 26 August 2017. See: <https://www.abc.net.au/news/2017-08-26/ticket-scalper-warning-after-perth-arena-viagogo-scam/8845344>. Viewed on 21 August 2019.

⁴⁹ Janis Carren, Director, Strategy and Partnerships, VenuesWest, *Transcript of evidence*, 7 August 2019, p 9.

⁵⁰ Answers to question on notice A1 asked in the Committee by Hon Dr Sally Talbot MLC, Chair and A7 by Hon Aaron Stonehouse MLC, Member. Both answered by David Etherton, Chief Executive Officer, VenuesWest, 20 August 2019, pp 1-2.

2.33 Of these statistics, VenuesWest explained that:

'Invalid' tickets are tickets identified as resold contrary to the terms and conditions ie. scalped. Fraudulent or Fake tickets are very difficult for our box offices to pick up – you will note in our submission that at the Eminem Concert we have identified this type of practice ie. one lady resold the same tickets multiple times and fake tickets were presented to different gates.⁵¹

2.34 The Committee makes the following two findings.

FINDING 1

The prevalence of ticket scalping in Western Australia is contested and probably under-reported.

FINDING 2

The distinction between a scalped ticket and a fraudulently sold, fake ticket is unclear.

⁵¹ Janis Carren, Director, Strategy and Partnerships, VenuesWest, Email, 22 August 2019, p 1.

CHAPTER 3

Policy

Policy of the Bill

- 3.1 As part of the referral from the House, the Committee has been given the power to inquire into and report on the policy of the Bill. Policy may be defined as 'a course or line of action adopted and pursued by a government'.⁵²
- 3.2 Generally, the Bill's policy is revealed in the Second Reading Speech as— 'addressing ticket scalping practices that are adversely impacting consumers in Western Australia'.⁵³ More specifically, the policy is to provide a legitimate, regulated ticket reselling marketplace that 'unashamedly places the fans first'.⁵⁴ The Committee observed that fraudulent actions of ticket sellers are not part of the Bill's policy.
- 3.3 There are four policy objectives:
- To protect consumers from the detriment of paying inflated prices to commercial resellers for tickets to live sporting and entertainment events in Western Australia.
 - To provide a mechanism permitting the resale of tickets for the purchase price plus reasonable expenses when tickets can no longer be used by the original purchaser and to protect those subsequent purchases from cancellation.
 - To support event promoters and authorised ticket sellers in their efforts to prevent scalping.
 - To ensure that venues in Western Australia remain attractive and competitive to promoters for the staging of events.⁵⁵
- 3.4 It is clear that policy to address scalping of event tickets has evolved since the time of:
- The November 2010 Final Report of the Commonwealth Consumers Affairs Advisory Council Inquiry into Consumers and the ticket market: *Ticket onselling in the Australian market*. The Advisory Council's report found onselling did not cause significant consumer detriment. That consumer dissatisfaction was a result of market forces when high demand exceeds supply, rather than as a direct result of onselling and that existing consumer protection was adequate.⁵⁶
 - The March 2014 Senate Economics References Committee *Ticket Scalping in Australia* report.⁵⁷ It believed then that 'informed and better educated consumers can provide the impetus for change'. That 'ideally if states want legislation to curb ticket scalping, they

⁵² Arthur Delbridge et al (editors), *The Macquarie Dictionary*, Second edition, 1995, p 1369.

⁵³ Hon Alannah MacTiernan MLC, Minister for Regional Development representing the Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2019, p 4782b.

⁵⁴ *ibid.*

⁵⁵ Penny Lipscombe, Director, Legislation and Policy, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, pp 2-3.

⁵⁶ Australian Government the Treasury, *Consumers and the ticket market Ticket onselling in the Australian market*, Final report prepared by the Commonwealth Consumer Affairs Advisory Council, Barton, ACT, November 2010, pp iv and vi. See <http://ccaac.gov.au/2010/12/03/ticket-onselling-in-the-australian-market/>.

⁵⁷ Commonwealth Parliament, Senate, Economics References Committee, Report, *Ticket Scalping in Australia*, 24 March 2014, p 24. See: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Ticket_scalping_2013. Viewed 2 July 2019.

should aim at consistency and complementarity in legislation; and coordination and cooperation in implementing and enforcing the laws'.⁵⁸

- The October 2014 Queensland Parliament's State Development, Infrastructure and Industry Committee Major Events Bill 2014, Report No. 51 that agreed with the 2014 Senate report that there was limited evidence of a widespread problem with ticket scalping in Queensland and other jurisdictions.
- The February 2015 NSW Legislative Council, General Purpose Committee No. 4 Report 30: *Fair Trading Amendment (Ticket Reselling) Bill 2014*. That committee said 'while not denying there is some issue with ticket scalping, its incidence is 'relatively small'.⁵⁹

3.5 Sometime after 2015, ticket scalping was perceived to be a significant consumer protection issue requiring policy intervention in most Australian jurisdictions.

Committee comment on policy

3.6 The Committee is of the view that the first three of the four policy objectives listed in paragraph 3.3 have been addressed for consumers by clauses:

- 6 — the prohibition against selling ticket for an amount which exceeds the original ticket price by more than 10 percent; and
- 11(2) — the prohibition against using any software to circumvent the security measures of a website to purchase tickets.

3.7 The fourth objective of ensuring that venues in Western Australia remain attractive and competitive to promoters for the staging of events, cannot be assessed at this time but should be evaluated when the Bill is reviewed under clause 16.

⁵⁸ Commonwealth Parliament, Senate, Economics References Committee, Report, *Ticket Scalping in Australia*, 24 March 2014, p 61, paragraphs 4.96 and 4.98.
See: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Ticket_scalping_2013.
Viewed 2 July 2019.

⁵⁹ NSW, Legislative Council, General Purpose Standing Committee, No. 4, Report 30, *Fair Trading Amendment (Ticket Reselling Bill) 2014*, 19 February 2015, paragraph 4.72, p 41.
See: [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20\(Ticket\).pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20(Ticket).pdf).

CHAPTER 4

Different proposals

- 4.1 Acting on the Minister's suggestion, the Committee examined 10 inter-jurisdictional and international reports as well as publications on ticket reselling practices for protecting consumers from unscrupulous ticket re-sellers.⁶⁰ These are listed in Appendix 5.
- 4.2 Other proposals include: options listed in the 2018 Commonwealth Treasury Decision RIS, national uniform legislation, the use of prevailing legislation (such as the Australian Consumer Law (ACL)), and industry initiatives.

Other options in the 2018 Commonwealth Treasury Decision Regulation Impact Statement *Ticket Reselling in Australia*

- 4.3 The Committee noted:
- The 2017 Commonwealth Treasury, Consultation Regulation Impact Statement Ticket Reselling in Australia.
 - The 2018 Commonwealth Treasury, Decision Regulation Impact Statement Ticket Reselling in Australia.
- 4.4 These comprehensive publications were the product of a meeting in 2017 when Ministers of the Legislative and Governance Forum on Consumer Affairs agreed that the Commonwealth Department of the Treasury would undertake a regulatory impact assessment to address the issue of Australian ticket reselling.⁶¹
- 4.5 Key findings of the 2017 Commonwealth Treasury's *Consultation RIS* were:

Strong support for the continued existence of the secondary market.	Strong support for stronger enforcement of the ACL.	Strong support for a national approach to ticket reselling.
Strong support for a consumer education campaign.	Some support for a cap on the price of resold tickets and strong support for information disclosure.	Strong support for a ban on ticket-buying bots.

Source: Commonwealth Treasury, Consultation Regulation Impact Statement *Ticket Reselling in Australia*, November 2017, unnumbered page.

⁶⁰ Hon Alannah MacTiernan MLC, Minister for Regional Development representing the Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2019, pp 4782b-4783a.

⁶¹ The Australian Government the Treasury, Consultation Regulation Impact Statement, *Ticket Reselling in Australia*, 2017, p v, paragraph 1.1. See: https://consult.treasury.gov.au/small-business-and-consumer-division/ticket-reselling-in-australia/supporting_documents/cs2017t234743.pdf.

4.6 One year later, the 2018 Commonwealth Treasury's Decision RIS had analysed and published five policy options for dealing with ticket reselling. These were:

- Option 1: Status quo, with consumer education.
- Option 2: National prohibition on ticket reselling.
- Option 3: Restricted selling.
- Option 4: Improved information disclosure arrangements for ticket resellers.
- Option 5: A national ban on the use of ticket-buying bot software.⁶² Operators use bots to automate the execution of a pre-programmed set of instructions that 'flood reservations and gobble the best tickets'.⁶³

4.7 The Commonwealth Treasury preferred Option 4: Improved information disclosure arrangements for ticket resellers. This option requires ticket reselling platforms to disclose 'the face value of tickets and the fact that the website is not a primary ticket seller'.⁶⁴ A meeting of the Ministers of the Legislative and Governance Forum on Consumer Affairs in October 2018, endorsed Option 4 stating:

Fair access to affordable event tickets is an important objective for Australian consumers, but this has been undermined by some of the practices occurring in the secondary market for tickets.

To address these issues, Ministers agreed to require ticket resale websites to disclose the face value of tickets and to disclose the fact that the website is not a primary ticket seller.

This change will ensure consumers are aware they are buying from a reseller, rather than the official; seller, and of how much above the face value they are paying for a particular ticket. With this information, consumers will be able to make an informed decision about whether to buy tickets from resellers.⁶⁵

FINDING 3

In October 2018, Ministers of the Legislative and Governance Forum on Consumer Affairs endorsed Option 4 of the 2018 Commonwealth Treasury, Decision Regulation Impact Statement *Ticket Reselling in Australia*. Option 4 is 'improved information disclosure arrangements for ticket resellers'.

4.8 The Bill adopts a form of Option 3: 'Restricted selling' of which there are two types:

- 3(a) Face Value
- 3(b) Face value plus 10 percent.⁶⁶

⁶² The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 3 July 2019.

⁶³ Dr Pascal Courty, Professor of Economics, University of Victoria, (Victoria, Canada), *Ticket resale, bots, and the fair price ticketing curse*, Journal of Cultural Economics, Volume 43 2019, unnumbered page.

⁶⁴ Submission 4 from the Law Society of Western Australia, 25 July 2019, p 1.

⁶⁵ Legislative and Governance Forum on Consumer Affairs, Joint Communique Meeting of Ministers for Consumer Affairs, Melbourne, 26 October 2018.

⁶⁶ The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>, Chapter 5.

4.9 The Bill opts for Option 3(b) but of this choice, the Law Society of Western Australia said:

The Bill goes significantly further than the *2018 Decision Regulatory Impact Statement* which recommended a national approach preferring disclosure on ticket resale websites of the face value of tickets and the fact that the website is not a primary ticket seller.⁶⁷

FINDING 4

The Ticket Scalping Bill 2018 adopts a form of restricted selling. This is Option 3 in the 2018 Commonwealth Treasury, Decision Regulation Impact Statement *Ticket Reselling in Australia*.

4.10 The Law Society warned that the Bill's 'solution forecloses the potential for adequate disclosure and competition to resolve consumers' discontent'⁶⁸ whilst the Australian Taxpayers Alliance argued that:

Promoting transparency in the secondary ticket market, such as requiring the display of the original price of the ticket and a link to information on legal protections available and the terms and conditions imposed by the primary seller, will provide sufficient consumer protection while ensuring that the freedom of choice of the consumer is upheld.⁶⁹ Consumers are already protected from scalping by existing laws and policy.⁷⁰

4.11 The Ticket Brokers Association said:

Improved disclosure will enable consumers to continue to enjoy the benefits of a secondary market in a more informed measure and will not result in the creation of a black market for tickets.

It also means that the underlying transaction will not be rendered illegal because an arbitrary price cap has been exceeded. This will result in consumers still having access to consumer protections under the Australian Consumer Law when things go wrong in transactions with resellers.⁷¹

4.12 The 2018 Commonwealth Treasury Decision RIS explained the problem with using a restricted reselling model:

As with a prohibition on ticket reselling, restricted reselling options will not stop the practice of ticket scalping. If a price cap were applied to the secondary ticket market, it will result in the creation of a black market due to the existence of excess and unfulfilled demand for particular classes of tickets. If this were to occur, consumers would lose access to the consumer guarantees in the ACL.⁷²

⁶⁷ Submission 4 from the Law Society of Western Australia, 25 July 2019, p 1.

⁶⁸ *ibid.*

⁶⁹ Submission 5 from the Australian Taxpayers Alliance, 25 July 2019, p 5, paragraph 17.

⁷⁰ *ibid.*, p 6, paragraph 22.

⁷¹ Submission 14 from the Ticket Brokers Association, 30 July 2019, paragraph 4.1.

⁷² The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 3 July 2019. The Australian Taxpayers Alliance agreed with this position.

FINDING 5

Previous inquiries have concluded that if a price cap is applied, a black market will likely emerge. This will result in consumers losing access to protections under the Australian Consumer Law as the transaction will be rendered illegal.

National uniform scheme legislation

- 4.13 The Committee considered the merits of a national, uniform scheme arrangement for ticket scalping given that after 2015, ticket scalping had become a significant consumer protection issue both locally and globally.⁷³ This was evidenced both locally and globally by the publication of:
- The Australian Government the Treasury, *Consultation Regulation Impact Statement, Ticket Reselling in Australia*, November 2017.⁷⁴
 - The Australian Government the Treasury, *Decision Regulation Impact Statement, Ticket Reselling in Australia 2018*.⁷⁵
 - The Legislative and Governance Forum on Consumer Affairs, Joint Communique Meeting of Ministers for Consumer Affairs, 26 October 2018.⁷⁶
 - The United Kingdom, Waterson Inquiry *Independent Review of Consumer Protection Measures Concerning Online Secondary Ticketing Facilities*, May 2016.⁷⁷
 - The Government response to Professor Waterson's *Independent Review of Consumer Protection Measures Concerning Online Secondary Ticketing Facilities*, March 2017.⁷⁸
 - The Office of the New York State Attorney, *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, 2016.⁷⁹
 - The passing of the Federal, *Better Online Ticket Sales Act of 2016* (BOTS Act) in America.

⁷³ There are five structures for uniform legislation: (1) applied laws. (2) model legislation. (3) legislation of the States referring legislative power to the Commonwealth, (4) legislation of the States adopting a Commonwealth law and (5) a combination of structures. These are summarised in the Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report 64, *Information Report on Uniform Scheme Structures*, 31 August 2011.

⁷⁴ The Australian Government the Treasury, Consultation Regulation Impact Statement, *Ticket Reselling in Australia*, 2017, p v, paragraph 1.1. See: https://consult.treasury.gov.au/small-business-and-consumer-division/ticket-reselling-in-australia/supporting_documents/cs2017t234743.pdf. Viewed 27 June 2019.

⁷⁵ The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 3 July 2019.

⁷⁶ (Including the New Zealand Minister) Legislative and Governance Forum on Consumer Affairs, Joint Communique Meeting of Ministers for Consumer Affairs. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 25 July 2019. The Forum considers consumer affairs and fair trading issues of national significance and where possible, develops a consistent approach.

⁷⁷ M Waterson (2016) *Independent Review of Consumer Protection Measures Concerning Online Secondary Ticketing Facilities*, 26 May 2016.

⁷⁸ HM Government, *Government response to Professor Waterson's Independent Review, Consumer Protection Measures concerning Online Secondary Ticketing Facilities*, report prepared by the Secretary of State for Business, Energy and Industrial Strategy; and the Secretary of State for Culture, Media and Sport, London, March 2017, p 4. See: <https://www.gov.uk/government/publications/consumer-protection-measures-applying-to-ticket-resale-waterson-review>. Viewed 16 July 2019.

⁷⁹ Office of the New York State Attorney, Eric T Schneiderman, *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, p 35. See: https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf. Viewed 16 July 2019.

- 4.14 At the same time, media articles on the subject proliferated.⁸⁰
- 4.15 DMIRS explained that consideration was given to a national uniform scheme arrangement:
- There were some agreed outcomes in terms of the national process. One was in respect of misleading behaviour and the other is in respect of the prohibition on bots. There is still some work being done at a national level on that, although it may take a while to come to fruition.
- With respect to the resale price restrictions, that did not go ahead nationally but that may well be because a lot of jurisdictions already have their own restrictions along the lines of what we are proposing. I am speculating. The decision was made that it was not going to go ahead at a national level so the government here decided to act on a state basis on that particular issue, although there are some issues that are still being looked at nationally.⁸¹
- 4.16 The Ticket Brokers Association is 'very much in support of uniform legislation' stating:
- We do not think a hodgepodge of legislation across numerous jurisdictions is helpful to understand, especially for tourists who are coming here, in order for them to comply or to ensure that the underlying transaction fits within the relevant state's jurisdiction. What is frustrating that effort is state jurisdictions going off and bringing in legislation that is different to what [the Commonwealth] Treasury had anticipated.⁸²
- 4.17 The Committee is of the view that ticket scalping is an appropriate subject for national, uniform scheme legislation, especially given scalping's inter-jurisdictional and global nature; and the complication of disparate penalty regimes. It is particularly appropriate given the piecemeal approach to scalping in Australian jurisdictions. Currently, of the eight jurisdictions:
- five have 'major events' type legislation
 - two have reselling/scalping laws inside their Fair Trading enactments
 - two have both types. That is, major events legislation and reselling provisions inside Fair Trading enactments
 - three jurisdictions are absent any legislation and rely on the ACL
 - there are disparate modified penalty regimes⁸³

⁸⁰ See the Parliamentary Library's Information page of resources at Appendix 6.

⁸¹ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 11.

⁸² Joshua Gladwin, President, Ticket Brokers Association, *Transcript of evidence*, 14 August 2019, p 7.

⁸³ For example, during a hearing Department of Mines, Industry Regulation and Safety (Consumer Protection), advised that Western Australia is contemplating a 20 percent modified penalty for breaching clause 6 (the 10 percent cap) which attracts a \$20 000 fine. This would be \$4 000. In a later answer to a question on notice, Department of Mines, Industry Regulation and Safety (Consumer Protection), said \$1 000 to \$2 000 is the likely penalty range. The equivalent 'Expiation fee' in South Australia is \$550 which amounts to 2.7 percent. Queensland's *Major Sports Facilities Act 2001* section 30C(1) has a maximum penalty of 20 penalty units for reselling above 10 percent (\$2,669) and section 30C(2) purchasing a ticket for more than 10 percent at 5 penalty units \$667.25. Its Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2019 (Qld), s 4 sets one penalty unit at \$133.45.

- in some jurisdictions police investigate scalping while in others, it is consumer protection agencies.⁸⁴
- 4.18 Live Performance Australia highlighted the problem of inconsistent interpretation of laws across jurisdictions with similar ticket scalping legislation. They are 'aware that ticketing companies and event organisers are reviewing models for authorised resale, in response to the differing regimes across Australia' and are undertaking this to combat scalping and fraud.⁸⁵
- 4.19 With respect to the disparate penalty regimes, DMIRS advised that the department is likely to recommend penalties in the range of \$1 000 - \$2 000. This is because infringement notices are likely to be used to deal with offences involving the sale of a small number of tickets by individuals and a penalty in that range is likely to offer a sufficient deterrent to such activity.⁸⁶
- 4.20 Relevantly, as long ago as the Commonwealth Consumers Affairs Advisory Council Inquiry report in November 2010, it was said that 'ideally, if states want legislation to curb ticket scalping, they should aim at consistency and complementarity in legislation; and coordination and cooperation in implementing and enforcing the laws'.⁸⁷
- 4.21 However, the Committee observed that the absence of a uniform scheme arrangement is consistent with the approach taken by Ministers of the Legislative and Governance Forum on Consumer Affairs in October 2018 for dealing with ticket reselling. As stated previously, Ministers endorsed the Commonwealth Treasury's preferred Option 4: improved information disclosure arrangements for ticket resellers and not restricted reselling, uniform legislation.
- 4.22 The Committee is persuaded that a national, uniform scheme arrangement for ticket scalping is desirable. Uniform laws would:
- benefit international and domestic tourists
 - benefit businesses operating interstate and internationally
 - provide Western Australia, mandated scrutiny from the Standing Committee on Uniform Legislation and Statutes Review.

Using prevailing legislation

- 4.23 The Committee considered the Australian Consumer Law (ACL) and its effectiveness with respect to ticket scalping, querying why the ACL cannot be relied upon in the current absence of Western Australian specific legislation.⁸⁸
- 4.24 The Australian Competition and Consumer Commission jointly administers and enforces the ACL with State and Territories' consumer affairs agencies. It applies to tickets as well as other consumer goods and services. Some commentators and those making submissions to

⁸⁴ For example, police investigate in Queensland. In Victoria, police support the relevant government department to investigate ticket scalping. In Western Australia, the Bill proposes just Department of Mines, Industry Regulation and Safety (Consumer Protection), investigate and inquire.

⁸⁵ Submission 18 from Live Performance Australia, 31 July 2019, p 2.

⁸⁶ Answer to question on notice A9 asked in the Committee hearing by Hon Nick Goiran MLC, Deputy Chair and answered by the Department of Mines, Industry Regulation and Safety (Consumer Protection), 16 August 2019, pp 2-3.

⁸⁷ Australian Government the Treasury, *Consumers and the ticket market Ticket onselling in the Australian market*, Final report prepared by the Commonwealth Consumer Affairs Advisory Council, Barton, ACT, November 2010, p 61 para 4.98. See <http://ccaac.gov.au/2010/12/03/ticket-onselling-in-the-australian-market/>.

⁸⁸ The Australian Consumer Law commenced on 1 January 2011.

inquiries argue that the ACL is difficult to enforce.⁸⁹ In particular, that the transactions in question may not be considered to be undertaken 'in trade or commerce'.⁹⁰

- 4.25 In the private setting (person to person) it is likely the ACL would not apply but there is a role where tickets are resold at a premium or through commercial reselling platforms such as viagogo, Ticketmaster Resale, StubHub (owned by eBay), Twickets⁹¹ and Gumtree (owned by eBay).⁹²

- 4.26 In the following exchange, DMIRS explained:

Ms Lipscombe: The Australian Consumer Law does not directly address overcharging, if we look at scalping as overcharging rather than the fraudulent sale of tickets. It leaves it really to the seller and the buyer to determine what the price would be.

The CHAIR: The ACL requires a seller to provide tickets which are fit for purpose and match their description; advertise the full price and include all fees, plus the minimum postage costs, if known by the seller at the time; provide a receipt; and not mislead in any way. What is the deficiency in there? What is that not covering?

Ms LIPSCOMBE: When it is talking about the price, it is really that there be full disclosure of the price up front, so if there are embedded fees and so on, that that be included as part of the price so that somebody purchasing from the original site knows what they are getting. With scalping, it is usually a reseller who has bought at the original price and then chooses to resell at a mark-up. The Australian Consumer Law does not address that.⁹³

- 4.27 In recent years five other jurisdictions have introduced specific legislation regulating the reselling of tickets, such as maximum price caps.
- 4.28 Relevantly, on 18 April 2019, the Federal Court found ticket reseller *Viagogo AG* made false or misleading representations and engaged in conduct liable to mislead the public when reselling entertainment, music and live sport event tickets, in breach of the ACL.⁹⁴ Viagogo misled consumers by claiming tickets to certain events were scarce when the scarcity only referred to the tickets available on its resale platform and failed to include tickets available elsewhere. The Court also found that using the word 'official' in its online advertisements was misleading. As a result of this, consumers were misled into thinking they were purchasing from the official website.⁹⁵

⁸⁹ The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 15 July 2019. In April 2018, the USA's *Government Accountability Office* study also commented on the challenge of enforcing price caps.

⁹⁰ Section 18 of the Australian Consumer Law states: (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. A "person" includes corporations and individuals. Trade or commerce is defined in section 2 very broadly so as to include 'any business or professional activity whether or not carried on for profit'. The term 'business' expressly includes 'a business not carried on for profit'.

⁹¹ Twickets describes itself as an 'ethical ticket resale marketplace'. It is a fan-to-fan ticket trading platform that enables users to buy and sell at no more than face value. See: <https://www.twickets.live/how-it-works>.

⁹² The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>, unnumbered page. Viewed 15 July 2019.

⁹³ Exchange between Hon Dr Sally Talbot MLC, Chair and Penny Lipscombe, Director, Legislation and Policy, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, pp 5-6.

⁹⁴ *ACCC v viagogo AG* [2019] FCA 544 (18 April 2019).

⁹⁵ On 18 July 2019, the ABC news reported that Google had taken action against 'controversial ticket reselling platform viagogo, banning it from prime position in search results following years of complaints from fans and

- 4.29 The 2018 Commonwealth Treasury Decision RIS estimated in November 2018 that in Australia, 10 firms participate in the secondary market. These include viagogo, Ticketmaster Resale, StubHub, Twickets and Gumtree.

Industry initiatives

- 4.30 In 2016, the value of the Australian live entertainment industry was \$1.43 billion.⁹⁶ In Western Australia, the value is difficult to quantify. VenuesWest supplied the following:
- [In 2017] Live Performance Australia Results for WA indicated an attendance of 2.6 m patrons and Revenue of \$197 million ... associated with culture and the arts/entertainment events.
- In 2018, the RAC Arena ... grossed \$25.54 million in 12 months.⁹⁷
- 4.31 Eighteen million tickets are sold to live performances in Australia each year and another 17 million to major live sporting events. Live events are important to Western Australia, both in economic and cultural terms. Industry therefore has a vested interest in taking steps to minimise scalping.
- 4.32 At a practical level, AEG Ogden, Manager of the RAC Arena disclosed that:
- Ticket offices quietly assist patrons to resell their tickets since tickets were first sold in advance, notwithstanding the generally stated conditions declining any refunds.⁹⁸
- 4.33 The Ticket Brokers Association of Australia provided eight, non-legislative proposals for dealing with scalping. These are:
- (1) More sustained pressure on paid search advertisers.
 - (2) Moving away from exclusive ticketing arrangements with venues.
 - (3) Reducing the prevalence of electronic tickets.
 - (4) Encouraging the enforcement of narrower ticket limits by event organisers.
 - (5) Encouraging greater use of anti-scalping technology.
 - (6) Ticket suppression.
 - (7) Proof of purchase and proof of identity measures.
 - (8) Allowing refunds and providing exchange mechanisms.⁹⁹
- 4.34 Of these eight listed above the Committee noted, with interest, ticket suppression. This is a promoter-implemented decision that results in tickets being delayed. It is a shorter sales period that is put in place until much closer to an event which constrains scalpers' funds so they have a reduced time within which to invest in other events. Until the scalper has fulfilled

artists about inflated prices and misleading claims'. See: <https://www.abc.net.au/news/2019-07-18/viagogo-google-blocks-advertising-from-ticket-reseller/11321792>.

⁹⁶ The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>, Chapter 1. Viewed 3 July 2019.

⁹⁷ Answer to question on notice A3 asked in the Committee hearing by Hon Dr Sally Talbot MLC, Chair and answered by David Etherton, Chief Executive Officer, VenuesWest, 20 August 2019, p 1.

⁹⁸ Submission 7 from AEG Ogden, 26 July 2019, p 3.

⁹⁹ Submission 14 from Ticket Brokers Association of Australia, 31 July 2019, paragraph 6.

the transaction on a reselling platform, the person will not be paid'.¹⁰⁰ Ticket suppression interrupts the arbitrage opportunity scalpers enjoy. (See paragraph 2.13)

4.35 DMIRS advised that on 1 August 2019, primary seller Ticketmaster announced plans to trial new technology in Australia in 2020. Called SafeTix, this encrypted ticket system will use technology that tracks each ticket issued by the agency to a specific mobile phone at all times.

4.36 The website states:

SafeTix™ are powered by a new and unique barcode that automatically refreshes every few seconds so it cannot be stolen or copied, keeping your tickets safe and secure.¹⁰¹

4.37 DMIRS admitted that SafeTix 'will not prevent scalping, but will minimise the opportunities for fraud and make the purchase of large quantities of tickets by scalpers more difficult'.¹⁰² However, fraud is neither the subject matter of the Bill nor the mischief sought to be remedied.

Reflections on proposals other than legislation

4.38 The Committee supports:

- a stronger enforcement regime to protect consumers
- a consumer education campaign
- the desirability for national, uniform laws
- the continued existence of a secondary market composed of scrupulous sellers or businesses adhering to a code of ethics
- enhancing information disclosure to consumers
- a ban on bots.

Reflections on price caps

4.39 In submissions and hearings, the price cap concept had both supporters and detractors. Committee members too had mixed views given that it was not the preferred option for responding to ticket scalping in the 2018 Commonwealth Treasury Decision RIS.

4.40 Consumers may reasonably expect to be protected from unscrupulous ticket reselling practice. The role of Government in enforcing protection from fake or fraudulent ticket sellers is clear. What is less clear is the role of Government in setting and enforcing a price cap. Accordingly, the 10 percent cap requires monitoring to see if there are any unintended consequences for consumers in particular, and the ticket market in general.

4.41 The Committee made the following four findings.

FINDING 6

Strong monitoring and enforcement actions are essential for reducing consumer detriment in the ticket reselling marketplace.

¹⁰⁰ Joshua Gladwin, President, Ticket Brokers Association of Australia, *Transcript of evidence*, 14 August 2019, p 22.

¹⁰¹ See: <https://www.ticketmaster.com/safetix>. Viewed 11 August 2019.

¹⁰² Penny Lipscombe, Director, Legislation and Policy, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 2.

FINDING 7

There is consumer benefit in a strong community education campaign on ticket scalping and how to minimise it.

FINDING 8

National uniform laws for reselling event tickets are desirable.

FINDING 9

There is consumer benefit in banning bots.

CHAPTER 5

Selected clauses in the Bill

Scrutiny of selected clauses in the Bill

- 5.1 The Bill that is replicated in Appendix 3 has 17 clauses in five Parts.
- Part 1: contains the standard short title and commencement clause as well as 13 terms used in the Bill and a clause about the extra-territorial application of the Act.
 - Part 2: contains clauses about the resale, supply or advertising of event entertainment tickets.
 - Part 3: contains one clause about the online purchase of tickets.
 - Part 4: contains miscellaneous clauses including a regulation-making power and a one time, 'five-year review of the Act' clause.
 - Part 5: contains one transitional clause about how tickets purchased before Part 2 is proclaimed are not captured by the Bill.
- 5.2 A list of 16 defined terms is provided at the back of the Bill which do not form part of the written law.
- 5.3 Consistent with past practice and as previously stated at paragraph 1.10, the Committee has scrutinised and reported on the following selected clauses of the Bill.

Part 1, Clause 1

Clause 1

- 5.4 Clause 1 states:
- 1. Short title**
- This is the *Ticket Scalping Act 2018*.
- 5.5 The Long title states:
- A Bill for an Act to restrict the resale of event tickets and to prohibit the use of software designed to circumvent security measures on ticket selling websites, and for related purposes.
- 5.6 It can be seen that the Bill has two separate subject matters. First to restrict the resale of event tickets regarding price and secondly to prohibit what has become colloquially known as 'bot technology' to purchase tickets.
- 5.7 Whilst a Long title must accurately reflect the subject matter of a Bill, it also needs to be compatible or synchronous with the Short title. The absence of an express definition of ticket scalping begs the question of whether *restricting* the resale of event tickets in the Long title is the same subject matter as 'scalping' in the Short title because scalping is the *unauthorised* reselling of tickets.
- 5.8 Arguably, the Bill is authorising ticket scalping but imposing restrictions. The fact of the Long title including the term 'restrict' narrows the scope of the Bill in that it may effectively prevent any amendments that would allow or commercialise scalping. On balance, the Short and Long titles are not so far apart in compatibility as to be in conflict with one another.

Part 1, Clause 2

5.9 Clause 2 states:

2. Commencement

This Act comes into operation as follows—

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation.

- 5.10 Clause 2(a) is the standard provision stating that Part 1 comes into operation on Royal Assent. Part 1 subject matters are: (1) the Short title, (2) Commencement, (3) Terms used, (4) a definition of ‘resale restrictions’ and (5) the territorial application of the Act. The other four Parts commence later by one proclamation. Both provisions rely on Executive action.
- 5.11 Clause 2(b) raises FLP 12. It asks the question: *Does the Bill have sufficient regard to the institution of Parliament* by ‘allowing the delegation of legislative power only in appropriate cases and to appropriate persons’?
- 5.12 Clause 2(b) is routinely found in bills. It has the capacity to impinge on the Parliament’s sovereignty because the Executive controls commencement dates. Absent in the proposed subsection is anything that requires proclamation within a prescribed time frame. Conceivably, a proclamation may never be made and the will of the Parliament, in passing the Bill would be frustrated. The Parliament should be responsible for determining when laws come into operation, not the Executive
- 5.13 Delay is usually due to the need for regulations to be drafted or a public education campaign mounted in preparation for new laws. DMIRS confirmed that this is the case.¹⁰³ With respect to an estimate of the implementation date, DMIRS said:
- The Department understands that it is the Government’s intention that the legislation should commence as soon as possible. Drafting of regulations in support of the Act is likely to take around three months. Some additional time will be required to undertake initial information campaigns to ensure that industry and consumers have reasonable notice of the proposed changes. Our best estimate is that the Act will be proclaimed around six months after the Bill completes passage through Parliament.¹⁰⁴
- 5.14 The Committee finds that DMIRS has given ‘sufficient regard’ to the delegation of legislative power to the Executive and it is appropriate. The proclamation device in clause 2(b) is primarily needed for drafting regulations and mounting a public education campaign.

FINDING 10

The reason advanced for leaving the commencement of the key operative clauses of the Ticket Scalping Bill 2018 to the Executive is justified.

¹⁰³ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 12.

¹⁰⁴ Answer to question on notice A4 asked in the Committee hearing by Hon Nick Goiran MLC, Deputy Chair and answered by the Department of Mines, Industry Regulation and Safety (Consumer Protection), 16 August 2019, p 1.

- 5.15 The Committee does not support clause 16 (the statutory review of the Act) coming into operation by proclamation. Clause 16 is canvassed at paragraphs 5.170 to 5.175 where a number of statutory form amendments have been made to it.
- 5.16 Clause 16 also raises FLP 12. The Committee is of the view that there is no persuasive reason for why clause 16 needs to wait for a proclamation to be made. The Committee notes that similar provisions with respect to a 'Review of Act' clause have been accepted by the Legislative Council recently. Accordingly, the Committee recommends that clause 2(a) include clause 16.
- 5.17 The Committee makes the following recommendation.

RECOMMENDATION 1

Clause 2(a) be amended as follows:

Page 2, line 6 — To insert after "Part 1":

and section 16

Part 1, Clause 3

- 5.18 There are 13 definitions in Part 1. However, the Committee first addresses the absence of a definition of 'ticket scalping' or 'scalping' in clause 3.
- 5.19 This absence of a definition is curious, especially within the context of whether consumer complaints relate to a fraudulently sold, fake ticket or the purchaser has paid an inflated price for a resold ticket as the following exchange reveals.

Hon NICK GOIRAN: I think this goes to the heart of what the definition of ticket scalping is because there really does seem to be distinction between a fraudulent ticket—that is my phrase—as one variety. The second variety is the excessively purchased ticket and the third variety is the—I do not know how to describe it other than the street scammer. They seem to be the three types of complaints. It would assist me if we could be clear as to which of those three types this bill is intended to address.

Ms PETERSON: This bill is intended to address primarily the second type because it controls the resale price—a ticket that is being sold for a price that is in excess of the allowed mark-up. It also has other restrictions like the prohibition on bots, but of those three types of scalping, primarily where a ticket is sold by many times the mark-up of its original price.¹⁰⁵

¹⁰⁵ Exchange between Hon Nick Goiran MLC, Deputy Chair and Penny Lipscombe, Director, Legislation and Policy, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 7.

- 5.20 The absence of a definition suggests the term does not lend itself easily to definition. This is also borne out by a 2015 NSW Legislative Council committee report into a ticket reselling bill which documented a number of witnesses' divergent views about the difference between 'scalping' and 'reselling'.¹⁰⁶ Victoria's *Major Events Act 2009* is also absent a definition though the term 'scalping' is included in headings to various sections.¹⁰⁷
- 5.21 The Committee noted that the term 'ticket scalping' only appears twice in the Bill:
- As the Short title.
 - In the heading to clause 6 (noting that headings to sections of an Act do not form part of a written law).¹⁰⁸
- 5.22 Given this absence, its ordinary meaning applies. The most recent definition below is extracted from the 2018 Commonwealth Treasury Decision RIS:
- Ticket scalping is the unauthorised reselling of tickets to entertainment and sporting events, at a price higher than the ticket's original face value.¹⁰⁹
- 5.23 DMIRS defines ticket scalping as 'the practice by which tickets are purchased for the purpose of reselling the tickets at an increased price in order to realise a profit from the transactions'.¹¹⁰
- 5.24 The Australian Taxpayers Alliance suggested the Bill include a definition but limit it to 'those who purchase tickets that are in short supply with the intention of selling them to the public at highly inflated prices thereby denying access to fans who cannot afford to pay those prices'.¹¹¹

¹⁰⁶ NSW, Legislative Council, General Purpose Standing Committee, No. 4, Report 30, *Fair Trading Amendment (Ticket Reselling Bill) 2014*, 19 February 2015, p 5. See: [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20\(Ticket\).pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20(Ticket).pdf). For example, that an individual who purchases tickets with no intention of personally using the tickets is a scalper. Live Performance Australia said 'illegitimate organised ticket reselling operations is scalping. The Coalition of Major Professional and Participation Sports Inc said scalpers are unauthorized third parties who lawfully purchase tickets that are in short supply. Ticket master contended that a person who resells and makes a profit is not scalping. Resale is not scalping. It is simply a safe and reliable marketplace in which to sell unwanted tickets or buy tickets that might not be otherwise available. See: [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20\(Ticket\).pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20(Ticket).pdf), pp 8-9. Viewed 22 July 2019. The Senate Economics References Committee's report also noted the distinction between ticket scalping and ticket resale at p 22.

¹⁰⁷ For example, the offence in section 166A where the heading states: 'Sale of 5 or less tickets at a premium (scalping)'.

¹⁰⁸ *Interpretation Act 1984* s 32.

¹⁰⁹ The Australian Government the Treasury, Commonwealth of Australia 2018, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 3 July 2019. Alternatively: (1) ticket scalping is the practice of selling tickets to events at an inflated price. (2) Scalping is when someone buys tickets and sells them for a profit. Per Hon John Quigley MLA, Minister for Commerce, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 19 June 2019, pp 4340c-4349a. In 1901, a New York City magistrate described scalpers as 'practically highwaymen and hold up everybody that goes to a place of amusement'.

¹¹⁰ Submission 2 from the Department of Mines, Industry Regulation and Safety (Consumer Protection), 22 July 2019, paragraph 2.

¹¹¹ Submission 5 from the Australian Taxpayers Alliance, 25 July 2019, p 2, paragraph 8.

5.25 The Western Australia Police Force said:

Our definition of [ticket scalping] would be someone onselling a ticket at a higher price than what they purchased it for. A fraudulent ticket sale would be the sale of a non-existent ticket.¹¹²

5.26 The Committee sees merit in defining ticket scalping in order to assist:

- the general public to understand the nature of the offence in clause 6
- the courts when prosecuting the offence of ticket scalping
- VenuesWest who appear to be equating scalped tickets with fraudulently sold, fake tickets
- DMIRS' Retail and Sales Directorate when triaging consumer complaints
- in clarifying the confusing distinction between a scalped ticket and a fraudulently sold, fake ticket.

5.27 As Hon Nick Goiran MLC explained:

The title of the bill is the Ticket Scalping Bill and I think it is useful for Western Australians to be clear as to what this law is intended to address. We went through those three scenarios earlier. I think the evidence that was given was helpful to indicate that it was the second scenario, which was the inflated ticket scenario that is sought to be addressed here. If that is the case, it is probably useful to have a definition.¹¹³

5.28 DMIRS said:

Advice has been sought from the Office of Parliamentary Counsel (PCO). PCO advises that it would not be appropriate to define a term that is not used in the Bill. In the view of PCO, the short title, which uses the term, is descriptive of the content of the Bill and it is not unusual for a term used in that context not to appear in the Bill and not to be defined. The term would have its usually understood meaning.¹¹⁴

5.29 The Committee is of the view that the evidence it gathered reveals many stakeholders are unclear as to the meaning of 'ticket scalping' and therefore makes the following statutory form recommendation.

RECOMMENDATION 2

Clause 3 be amended as follows:

Page 3, after line 30 — To insert:

ticket scalping means to sell a ticket for admission to an event for an amount which exceeds the original ticket price by more than 10%.

¹¹² Detective Senior Sergeant Ken Foster, Officer in Charge, Major Fraud Squad, Western Australia Police Force, *Transcript of evidence*, 21 August 2019, p 1.

¹¹³ Hon Nick Goiran MLC, Deputy Chair, *Transcript of evidence*, 7 August 2019, p 14 as part of an exchange with Karine Broux, General Manager, Legislation and Policy, Consumer Protection Division, Department of Mines, Industry Regulation and Safety.

¹¹⁴ Answer to question on notice A5 asked in the Committee hearing by Hon Dr Sally Talbot MLC, Chair and answered by the Department of Mines, Industry Regulation and Safety (Consumer Protection), 16 August 2019, p 1.

The definition of 'advertising publication'

5.30 The definition of 'advertising publication' in clause 3 is as follows:

advertising publication means any website, online facility, newspaper, magazine or other publication or service containing advertisements to which members of the public have access (whether or not a member of the public is first required to pay a fee or subscription, register or become a member);

5.31 This definition though exhaustive is sufficiently broad enough to cover advertisements on for example, a shopping precinct's noticeboard. It replicates section 58I(4) of the *Fair Trading Act 1987* (NSW) but the clause is a little more expansive than NSW by including the term 'online facility'. The following exchange reveals the reason for the definition's breadth.

Ms PETERSON: The definition of "advertising publication" has been left as broad as we can possibly leave it, because of the fact that a lot of this advertising happens online, and there are new mechanisms and newly described mechanisms coming on board all the time. We have a specific discussion about this with PCO, because we have actually added to the definition that was in the New South Wales one this is based on to add "online facility" because, after discussion with PCO we decided that just saying "website" was not sufficient to cover all online selling facilities.

The CHAIR: So "online facility" includes Facebook and Twitter?

Ms PETERSON: Exactly. Those are the ones at the moment, but obviously there can be new systems coming on board. The reason for describing it so broadly is that the advertising is one of the big issues that we have with this, because one of the targets is the activity of the resale platforms, or the retail advertising platforms.

One of the issues that we have with dealing with an online reselling broker, like viagogo, is that they are not the seller of the ticket. That is what they tell us in the course of consumer law proceedings and conversations that we have with them. The seller is the person who owns the ticket. They are simply a broker, or an advertiser, and because the target of this bill is that advertising process, in a lot of cases that is where the damage is caused. We want to make sure that we are capturing any platform or publication or any mechanism by which that promotion is carried out.

The CHAIR: So it is a kind of futureproofing?

Ms PETERSON: Yes.¹¹⁵

5.32 The Committee is satisfied with this explanation.

¹¹⁵ Exchange between Hon Dr Sally Talbot MLC, Chair and Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, pp 13-14.

The definition of 'authorised ticket seller'

5.33 The definition of 'authorised ticket seller' in clause 3 is as follows:

authorised ticket seller, in relation to an event, means—

(a) if the event organiser has authorised a person to supply tickets for admission to the event on behalf of the event organiser, or to resupply tickets for admission to the event after acquiring them from the event organiser—that person; or

(b) in any other case—any event organiser for the event;

5.34 This definition is exhaustive but captures an individual person or more than one person selling event tickets as well as sole traders and corporations in the business of selling tickets. Section 5 of the *Interpretation Act 1984* applies to the definition of 'person' in Line 18. It states '**person**' includes 'a public body, company or association or body of persons, corporate or unincorporate'.

The definition of 'event'

5.35 The definition of 'event' in clause 3 is as follows:

event includes the following—

(a) a sporting event;

(b) an entertainment event, including a concert, a performance at a theatre or the opera, and a dance event;

(c) a festival;

(d) a cultural event or display;

(f) an arena event;

(f) any other form of public performance, exhibition, display or public gathering;

5.36 The definition is inclusive, not exhaustive. The Explanatory Memorandum states that the term 'event' has 'broad application and includes any performance or display which may be accessed by purchase of a ticket'.¹¹⁶ The only limitation in the definition is that the types of events listed must always be public, not private events.

The definition of 'event organiser'

5.37 The definition of 'event organiser' in clause 3 is as follows:

event organiser, in relation to an event, means—

(a) the person who authorises the first supply of tickets for admission to the event, whether or not that person is also a performer, the promoter of the event or the operator of the event venue; or

(b) a person within a class of persons declared by the regulations to be the event organiser in relation to a class of events to which the event belongs;

5.38 This definition replicates section 58C of the *Fair Trading Act 1987* (NSW) and gives broad meaning to who may be an event organiser. Pursuant to subclause (a) it could be a performer, promoter or the venue operator. Pursuant to subclause (b) for when it is not

¹¹⁶ Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 1.

readily recognisable which person authorised the first supply of tickets, regulations can provide clarity via a declaration in regulations.¹¹⁷

- 5.39 The definition is critical for the Bill to operate. Identifying the organiser means it is then possible to quantify the original ticket price. Without that information, a ticket cannot be resold for more than 10 percent of its price originally set by that organiser. Defining an 'event organiser' as the person who authorises the *first* supply of tickets makes identification of that person or class of persons certain.
- 5.40 The Committee considered the use of the term 'declared' in subclause (b), noting that it only appears once in the Bill and is replicated from section 58C of the *Fair Trading Act 1987* (NSW).
- 5.41 The Committee is of the view that the term 'declared' should be deleted and 'prescribed' inserted instead for consistency with clause 15 (the Governor making regulations *prescribing* certain things). For this reason, the Committee makes the following statutory form amendment.

RECOMMENDATION 3

Clause 3 be amended as follows:

Page 3, line 11 — To delete "declared" and insert:
prescribed

The definition of 'original ticket price'

- 5.42 The definition of 'original ticket price' in clause 3 is as follows:

original ticket price, in relation to a ticket for admission to an event, means the amount for which the ticket was purchased when first offered for retail sale by the event organiser or authorised ticket seller (and includes, if a booking fee or other commission was payable to an authorised ticket seller in relation to that sale, the amount of that fee or commission);

- 5.43 This definition has a nexus with the definition of 'event organiser'. Once the organiser who authorised the first supply of tickets is identified, that retail price becomes the 'original ticket price'.
- 5.44 NSW and South Australian provisions are similar. However, those jurisdictions use different language— 'original supply cost' instead of 'original ticket price'.¹¹⁸ NSW and South Australia also include various transaction costs in their definitions. These are itemised as 'any commission, booking fee, payment surcharge or ticket delivery fee incurred by the first purchaser'.¹¹⁹ However, the Bill's definition limits these fees to two items:
- the 'amount of a booking fee; or
 - other commission.'

¹¹⁷ In the Legislative Assembly, the Minister for Commerce gave the example of an eastern states AFL club playing at Optus Stadium. The organiser could be the home team or a national sporting organisation that set the ticket price. See: Hon John Quigley MLA, Minister for Commerce, WA, Legislative Assembly, *Parliamentary Debates (Hansard)*, 9 May 2019, pp 3089b-3096a.

¹¹⁸ *Fair Trading Act 1987* (NSW) s 58E. *Fair Trading Act 1987* (SA) s 37E.

¹¹⁹ *Fair Trading Act 1987* (NSW) s 58E(3). *Fair Trading Act 1987* (SA) s 37E.

- 5.45 This may be compared with the NSW definition which includes the provision that the transaction cost cannot exceed 10 percent of the original supply cost of any 'commission, booking fee, payment surcharge or ticket delivery fee' incurred by the first purchaser of the ticket.¹²⁰
- 5.46 The Committee explored inserting items such as the incurring of a delivery fee or printing fee within the definition so that when, pursuant to clause 6 the ticket is resold, those additional hidden fees are captured rather than assuming all the hidden fees will not amount to any more than 10 percent of the original ticket price. This was a point of contention during debate in the Legislative Assembly where the Minister argued for just the two items stating:
- We largely followed the lead of NSW ... with respect to the sale price. NSW said that people should pay the price of the ticket plus extras, taking the total price up to 110%. We say do not go through the justification. Ticket sellers can charge what they paid plus 10 percent, inclusive of the booking fee and the commission. We think that is fair and they get their money back.¹²¹
- 5.47 It is important to note that the 'original ticket price' for an event, means the amount for which the ticket was purchased when first offered for retail sale. Not all tickets are offered for retail sale, some are held back for complimentary use and cannot be resold. The Bill does not apply to such tickets.¹²²

The definition of 'owner'

- 5.48 The definition of 'owner' in clause 3 is as follows:
- owner**, of an advertising publication, includes any person who carries on the business or undertaking of the advertising publication;
- 5.49 The definition is similar to section 58I(4) of the *Fair Trading Act 1987* (NSW). However, NSW goes a little further by including words that exclude 'any person of a class prescribed by the regulations'.

¹²⁰ *Fair Trading Act 1987* (NSW) s 58E(3).

¹²¹ Hon John Quigley MLA, Minister for Commerce, WA, Legislative Assembly, *Parliamentary Debates (Hansard)*, 19 June 2019, pp 4340c-4349a.

¹²² In the Legislative Assembly the Minister said: 'VenuesWest has been searching the internet and has reported back to Government that complimentary tickets do not present a problem'. See Hon John Quigley MLA, Minister for Commerce, WA, Legislative Assembly, *Parliamentary Debates (Hansard)*, 9 May 2019, pp 3089b-3096a. In the USA, 'lottery' tickets were distributed to organisations and persons for the papal visit in 2015 and the Mohammed Ali Memorial Service in 2016. Tickets were then resold. Similarly, after Hurricane Sandy in 2012, Billy Joel, Bruce Springsteen and others performed free to raise funds for relief effort. The 13,500 tickets sold out on Ticketmaster within minutes of release and were being resold on StubHub on the same day. Prices ranged from \$790 to \$6 500 each. See Dylan Porcello: *A fixed game- the frustrations of ticket scalping and the realities of its solution*. Brooklyn Law Review, Volume 84, 2018, p 259. The Bill would not apply to such public events as no retail sale was involved.

Part 1, Clause 4

5.50 Clause 4 states:

4. Resale restrictions

(1) For the purposes of this Act, a **resale restriction** is a term or condition of a ticket for admission to an event that limits the circumstances in which the ticket may be resold.

(2) A term or condition that limits the circumstances in which a ticket may be resold includes a term or condition that provides for the ticket to be cancelled, surrendered or rendered invalid if the ticket is resold or if the ticket is resold in certain circumstances.

5.51 Clause 4(1) provides a definition of '**resale restriction**' that benefits the event organiser by limiting the circumstances in which a ticket may be resold. Clause 4(2) then provides three examples of terms or conditions that will limit those circumstances. These are for the ticket to be cancelled; surrendered or rendered invalid.

5.52 The inclusive nature of clause 4(2) gives the event organiser significant flexibility and control with respect to terms and conditions. The authorised ticket seller then reflects the event organiser's term or conditions by printing for example, 'Not transferrable' or 'Cancelled if transferred' on the face of the ticket.

5.53 The Committee noted that pursuant to clause 4(1), it is for the event organiser to decide whether or not to impose a restriction on the face of the ticket by inserting relevant words. Copied from the NSW model, ticket restriction there is wider, including an express prohibition against resale of the ticket. In contrast, clause 4 presupposes that all tickets may be resold.

5.54 The Committee queried the absence of an express prohibition. DMIRS advised:

Ms PETERSON: We do not want to completely prohibit resale. We want to permit resale in accordance with requirements of the Act. What ticket sellers do is that they will put a condition on the ticket saying that it will be cancelled if it is resold.

They generally do that as a way of attempting to prevent scalping, and they do act on it, as we said before, to cancel the ticket if they have evidence that it has been resold. So what we are trying to do is, we are trying to create a situation where, if a resale restriction has been placed on the ticket—if it has been sold subject to a condition that it will not be resold, and if it is resold it will be cancelled—then that ticket will have the protection of this legislation.

If the original organiser is not concerned about tickets being resold, and is happy for them to be resold by the purchaser at will—that will normally be a small event, or community event where they do not believe that there will be a risk of tickets being resold at marked-up prices—then the legislation will not apply.¹²³

5.55 The Committee is satisfied with this explanation.

5.56 Live Performance Australia drew the Committee's attention to the fact that because the Bill is similar to NSW and South Australia, consistency is needed for when there are multiple parties involved in presenting an event. In this scenario, a question arises as to whose terms

¹²³ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 14.

and conditions apply. In NSW, for example, it is the organiser's terms and conditions but in Western Australia, it is the authorised seller and the original purchaser.¹²⁴

Part 1, Clause 5

5.57 Clause 5 states:

5. Application of Act

(1) This Act applies to tickets for admission to events in Western Australia that are subject to a resale restriction.

(2) Subject to subsection (1), this Act extends to conduct, and other acts, matters and things, occurring or existing outside or partly outside Western Australia (whether within or outside Australia)

5.58 Clause 5(1) is a substantive provision with a nexus to the definition of 'resale restriction' in clause 4(1). Clause 5(1) provides for the Bill to only apply 'to tickets for admission to events in Western Australia that are subject to a resale restriction'. The event organiser decides whether to apply the Bill to a particular event by imposing a resale restriction.

5.59 If an event organiser is also the performer, that performer may have an interest in applying the Bill because of the desire to protect their fan base or sponsors but also to financially benefit from their own performances, rather than scalpers profiteering.

5.60 If the event organiser decides to apply the Bill to a particular event, then pursuant to clause 5(2), any actions, matters and things happening outside of Western Australia are also caught by the Bill. The Explanatory Memorandum states that clause 5 is particularly relevant to the offence in clause 11 which includes activity on a website that could occur wholly outside Western Australia.¹²⁵

5.61 DMIRS explained that once a consumer reports an offence, Consumer Protection would then be responsible for making a decision on how best to deal with it.¹²⁶ However, the overseas tourist scenario is more problematic as the following exchange reveals:

Hon NICK GOIRAN: What action would be available to Consumer Protection at that point, on behalf of this overseas tourist?

Ms LIPSCOMBE: We would approach the organisation that sold the ticket and carry out our investigations accordingly.

Hon NICK GOIRAN: That would be more difficult if that organisation was based overseas than in Western Australia for Consumer Protection?

Ms LIPSCOMBE: Yes, it is always more difficult if you are pursuing something overseas.¹²⁷

The presumption against extraterritorial effect

5.62 Clause 5 raises the presumption adopted by the courts that legislation will not have extraterritorial effect. In other words, that the legislature does not intend to exceed its

¹²⁴ Submission 18 from Live Performance Australia, 31 July 2019, p 3, paragraph 3.

¹²⁵ Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 2.

¹²⁶ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 15.

¹²⁷ Exchange between Hon Nick Goiran MLC, Deputy Chair and Penny Lipscombe, Director, Legislation and Policy, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 15.

jurisdiction. Most statutes are always read as being prima facie restricted in their operation within territorial limits.¹²⁸ However, Pearce and Geddes argue that the presumption is more readily displaced when factoring:

The concept of the federal system, the homogeneity of the population, the frequent movement of people between states and the commonality of problems needing a common and cooperative solution.¹²⁹

- 5.63 The Committee observed that the express displacement of the presumption in clause 5 is necessary in a globalised commercial world using computer software in the 'borderless reality of the internet'.¹³⁰ The Committee therefore makes the following finding.

FINDING 11

The clear words in clause 5 have effectively displaced the presumption against extraterritorial effect.

Part 2, Clause 6

- 5.64 Clause 6 states:

6. Ticket scalping

A person must not sell a ticket for admission to an event for an amount which exceeds the original ticket price by more than 10%.

Penalty: a fine of \$20 000.

- 5.65 Noting that headings to a section do not form part of a written law,¹³¹ this clause which at first glance has the appearance of a definition, creates a criminal offence and imposes a penalty. The 'person' in clause 6 can include a corporation.¹³²
- 5.66 If the *Criminal Procedure Act 2004* is prescribed in regulations pursuant to clauses 14(1) and 15(1), an infringement notice regime will crystallise. DMIRS is contemplating a modified penalty for breaching clause 6 'of up to 20 per cent of that \$20 000', that is up to \$4 000.¹³³ However, in an answer to a question on notice, DMIRS said:

After consultation with our compliance area we can advise that it is likely that the penalty sought for infringement notices for [clause 6] is likely to be significantly lower than the maximum permitted by the legislation.

The Department is likely to recommend a penalty in the range of \$1000 - \$2000. This is because infringement notices are likely to be used to deal with offences

¹²⁸ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363.

¹²⁹ DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 8th edition LexisNexis Butterworths, Sydney, 2014, p 220.

¹³⁰ M Waterson *Independent Review of Consumer Protection Measures Concerning Online Secondary Ticketing Facilities*, May 2016, pp 119-220.

¹³¹ *Interpretation Act 1984* s 32. Other than the short title, this is the only other occurrence of the term 'ticket scalping' in the Bill.

¹³² Section 5 of the *Interpretation Act 1984* states 'person' includes 'a public body, company or association or body of persons, corporate or unincorporate'.

¹³³ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 16. Section 5(4)(b) of the *Criminal Procedure Act 2004* prescribes that any modified penalty 'must not exceed 20% of the statutory penalty for the offence'.

involving the sale of a small number of tickets by individuals and a penalty in that range is likely to offer a sufficient deterrent to such activity.¹³⁴

- 5.67 DMIRS advised that both the 10 percent cap in clause 6 and provisions about commission costs being incorporated into the definition of 'original ticket price' in clause 3 were replicated from Queensland legislation.¹³⁵

Discussion on clause 6

- 5.68 Clause 6 is without doubt, the most contentious clause in the Bill but central to the entire legislative proposal. Half of submissions to the Inquiry came from the ticket broking industry and their satisfied customers who argued that because of clause 6, their businesses will become unviable and 'destroy the small Australian businesses that operate in the ticket resale market'.¹³⁶

- 5.69 One broker argued that brokers provide an important service that will be lost to those reliant on broking such as:

People that ... are computer-illiterate or they are not as tech-savvy as the general population. They like to use the phone; they like to visit us in person. They are not so comfortable using a mobile device or a computer.

Eleven per cent of people do not have a smartphone, so that shows potentially there are 300 000 people in WA that could be disenfranchised, so they will not have access to my services. We also cater to a lot of regional customers, whether they be FIFO or farmers or people who just live in the regions that do not know when they are coming to Perth, they do not have good internet access to be able to buy tickets at 9.00 am or whenever they go on sale, and people that just have unclear schedules.¹³⁷

- 5.70 One business owner supportive of brokers submitted his 'right to choose' whether to purchase an event ticket directly from Ticketmaster and Ticketek, or an Australian ticket broker who can arrange his ticketing and hospitality needs requirements.¹³⁸ Another supporter said that in the absence of a broker, he is unwilling to take the risk that his clients will gain entry to an event.¹³⁹ A supporter entertaining Chinese clients referred to feeling 'much more comfortable' supporting a local broker than paying an overseas company'.¹⁴⁰
- 5.71 If passed, the impact of the Bill on the broking industry will be significant given that in March 2017, StubHub estimated 50% of tickets on that site were listed by consumers reselling their

¹³⁴ Answer to question on notice A9 asked in the Committee hearing by Hon Nick Goiran MLC, Deputy Chair and answered by the Department of Mines, Industry Regulation and Safety (Consumer Protection), 16 August 2019, pp 2-3.

¹³⁵ Submission 2 from the Department of Mines, Industry Regulation and Safety (Consumer Protection), July 2019, paragraph 3.1.

¹³⁶ Submission 3 from Oren Flam, 25 July 2019, p 1.

¹³⁷ David Luong, Director, Epic Tickets, *Transcript of evidence*, 14 August 2019, p 3. The Committee confirmed from a Deloitte mobile consumer survey in 2017 that 'Australia remains one of the leading global adopters of the smartphone and 88 percent of Australians now own one, with the market being driven by older generations'. See: http://landing.deloitte.com.au/rs/761-IBL-328/images/tmt-mobile-consumer-survey-2017_pdf.pdf, p 4.

¹³⁸ Submission 16 from iFrames, 30 July 2019, p 1.

¹³⁹ Submission 15 from Blue Water Business Solutions, 30 July 2019, p 1.

¹⁴⁰ Submission 22 from Westoz Industrial Supplies, 31 July 2019, p 1.

own tickets. The other 50% were likely professional traders.¹⁴¹ However, DMIRS was dismissive of ticket brokers as the following exchange reveals:

Hon COLIN de GRUSSA: Who was consulted in determining that 10 per cent? Were ticket brokers consulted as to what their costs of operation might be in setting that 10 per cent?

Ms PETERSON: No, they were not, because it is not intended to provide an income for ticket brokers as such.¹⁴²

- 5.72 In their submission, DMIRS acknowledged the services brokers offer their customers but claim their 'concierge service is not materially different in character from the scalping activity that the legislation seeks to proscribe'.¹⁴³ However, the Ticket Brokers Association argue that scalpers have no relationship with the client and are 'out there solely to realise the maximum profit possible' and not pay income tax.

Ticket brokers have ongoing relationships with their clients. There is a trust relationship. I think if that was eroded by the legislation, our customers would have to, if an event is sold out, rather than going to someone they rely, they would have to go either offshore to viagogo or Gumtree and just hope that tickets from those entities will work.¹⁴⁴

- 5.73 DMIRS stated that the intention of clause 6 is to:

Cover the reasonable costs of someone who can no longer use their ticket in order to make sure that they are not out of pocket through the process of passing it on to someone else to use.¹⁴⁵

While factual, this intention appears to disregard brokers who derive livelihood from the market opportunity they have identified in ticket reselling. Submissions revealed that brokers' customers value the services brokers provide and are prepared to pay a premium for the service they demand. Clause 6 will reduce the ability of brokers to continue providing their service and thereby diminish the industry.

- 5.74 Ticketblaster disclosed that they 'generally work towards margins of 20-30% on average' for their sales and that the proposed price cap will lead to the ceasing of operations in Western Australia.¹⁴⁶
- 5.75 In the Committee's view, the policy objective of protecting 'consumers from the detriment of paying inflated prices to commercial resellers', necessarily comes at a high cost to those legitimate, tax-paying ticket broker businesses that are meeting the demand for a unique, broking service. In the quest to minimise scalping, brokers may be forced to leave the marketplace.

¹⁴¹ Submission 2 from the Department of Mines, Industry Regulation and Safety (Consumer Protection), 22 July 2019, paragraph 2.2.

¹⁴² Exchange between Hon Colin De Grussa MLC, Member, and Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 16.

¹⁴³ Submission 2 from the Department of Mines, Industry Regulation and Safety (Consumer Protection), 22 July 2019, paragraph 5.1. Chris Bishop, Director, FAT Digital Marketing, submitted that 'the standard mark-up we pay on tickets from my trusted broker is somewhere closer to 25-30% which we consider completely reasonable & transparent'. See Submission 12, p 1.

¹⁴⁴ Joshua Gladwin, President, Ticket Brokers Association, *Transcript of evidence*, 14 August 2019, pp 8-9.

¹⁴⁵ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 16.

¹⁴⁶ Submission 19 from Ticketblaster, 31 July 2019, p 1.

- 5.76 The 10 percent cap may be seen as anti-competitive, a restraint on trade or Government price setting in the marketplace. Relevantly, neither the brokers who will be adversely affected by the Bill nor the general public reselling their tickets were consulted on the quantum of the cap. DMIRS said the cap is taken directly from peers in other jurisdictions following consultation with 'partner-managed venues, AEG Ogden, VenuesLive' and venues run by the Department of Culture and the Arts.¹⁴⁷
- 5.77 The Australian Taxpayers' Alliance stated that 'in undermining taxpaying Australian businesses who must comply with the law, the cap will help entrench and grow the market share of foreign and/or dubious websites and ticket resellers, thereby exposing consumers to greater risk of fraud or deception'.¹⁴⁸
- 5.78 The Committee understands the desirability for inter-jurisdictional price cap consistency when considering the Bill's extra-territoriality application and acknowledges that it is Government policy to set a cap on the resale of tickets.
- 5.79 The Committee recognises that in an open market place between a willing seller and a willing buyer, the rationale for capping the resale amount is based on full or partial cost recovery for the seller. Here, the seller can no longer use or desire the ticket and may have incurred effort in onselling which can be quantified. The Bill (like other jurisdictions) recognises this effort but quantifies it at no more than 10 percent. No profiteering is permitted. By operation of the term 'original ticket price', the resale price includes amounts paid to an authorised ticket seller for booking fees or commissions. The Australian Taxpayers Alliance argue that the cost of placing an advertisement to resell a ticket is another cost. A cap means the quantified costs may result in a loss.
- 5.80 DMIRS said:
- If you are a person who has purchased a ticket, there will be other costs associated with the purchase of that ticket and advertising it for resale that we need to provide an amount that is reasonable to cover.
- There are other ways of doing it. In New South Wales you can claim your expenses back up to a maximum of 10 per cent, but then of course when you try to enforce it and try to work out whether there has been a breach, you have the process of having to account for all of those various costs and fees, which is quite difficult to do.
- This is based on the Queensland model, which is the one that was in place when the drafting first started and when we first started considering putting legislation in place in Western Australia, which was the cost price plus 10 per cent. We have kept the same provision in Western Australia because when it was looked at, that was considered to be the most effective way of doing it.¹⁴⁹
- 5.81 A variety of reasons explain why the cap concept is contentious.
- The Law Society of Western Australia submission sees limiting ticket resale prices as 'particularly problematic' given that one reason for the existence of a secondary market is primary sellers restricting supply.¹⁵⁰
 - The Australian Taxpayers Alliance take the view that Government's role is to promote consumer welfare through adequate protections for informed decision making. That

¹⁴⁷ Janis Carren, Director, Strategy and Partnerships, VenuesWest, *Transcript of evidence*, 7 August 2019, p 17.

¹⁴⁸ Submission 3 from the Australian Taxpayers' Alliance, 25 July 2019, p 1, paragraph 3.

¹⁴⁹ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 16.

¹⁵⁰ Submission 4 from the Law Society of Western Australia, 25 July 2019, p 1.

intervention in the market place through what effectively amounts to price setting for tickets valued differently by different consumers, is not Government's role.¹⁵¹

- The Ticket Brokers Association of Australia argue that the broking business will no longer be viable because of staff costs, rent and other overheads that will 'far exceed' the 10% profit threshold.¹⁵²

5.82 Professor Waterson is against the cap. He conducted the United Kingdom *Independent Review of Consumer Protection measures concerning Online Secondary Ticketing Facilities* in 2016 making the following observations:

- The history of price caps in other spheres is not favourable. People find their way around the cap.
- There are associated difficulties in defining what is meant by a 10 percent mark-up. That is, on what precise base value is the mark-up imposed?
- There is an increased likelihood that sellers will move abroad to circumvent the cap.
- Who enforces the cap?
- A cap is of limited effect since there are rapidly changing routes to market, including social networking sites, some of which are based in other jurisdictions, meaning any legislation would be extremely difficult to police or future-proof.
- Merely declaring there to be a cap is not sufficient. Caps applied against disparate sellers are likely to break down in the absence of clear regulatory authority. Capping requires funding and human resources to hear complaints.
- A price limit of 10 or 20 percent is a substantial margin for any business. Imposing a mark-up limiting the absence of primary ticketing market controls in effect legitimises through legislation the operator who makes multiple purchases from the primary site in order to themselves operate a secondary site charging the full mark-up, plus whatever fees the legislation allows.
- Capping is not a solution. What consumers need is simplified and standardised online price information.¹⁵³

5.83 America's *Government Accountability Office* report in April 2018 claims that three government studies they analysed reported that price caps are difficult to enforce and compliance is rare.¹⁵⁴

5.84 Ontario Canada, in 2018 'paused' part of a law that would have capped ticket resale prices at 50 percent above the original face value. During debate in May 2019, the Minister for Economic Development said:

What we've done is—we saw the previous Liberal legislation that was completely unenforceable. There was absolutely no way that we were going to be able to enforce this. What it actually was doing was driving more people to the black market. So we've taken some steps: increasing penalties to discourage black market ticket sales, cracking down on illegal ticket bots, making ticket sellers

¹⁵¹ Submission 5 from the Australian Taxpayers Alliance, 25 July 2019, paragraph 17, p 5.

¹⁵² Submission 15 from the Ticket Brokers Association of Australia, 31 July 2019.

¹⁵³ Professor Michael Waterson, Professor of Economics, Warwick University, *Independent review of consumer protection measures concerning online secondary ticketing facilities*, p 137.

¹⁵⁴ United States Government Accountability Office, Report to Congressional Requesters, *Event Ticket Sales, Market Characteristics and Consumer Protection Issues*, April 2018, p 40. See: <https://www.gao.gov/assets/700/691247.pdf>.

provide clear and easy-to-understand information about ticket availabilities, getting rid of the print-at-home fees.¹⁵⁵

5.85 Ontario's Consumer Protection Board website currently states:

The government is reviewing an aspect of the new *Ticket Sales Act* that would have capped the resale price of tickets to find the best way to protect consumers and improve enforcement.

Previously scheduled changes could have reduced Ontarians' access to tickets by driving consumers to online markets and vendors outside of Ontario.¹⁵⁶

5.86 Viagogo claims that price caps limitations are not feasible in application. Their global experience 'demonstrates caps create an inefficient, informal online market which cannot be policed and results in higher prices and fewer protections for consumers'. Caps are 'impossible to enforce and drain resources unnecessarily'.¹⁵⁷

5.87 Observations and criticisms of the 10 percent cap led the Committee to consider whether caps are working in other jurisdictions.

Is the 10 percent cap working in other jurisdictions?

5.88 Publicly available information that might reveal if the cap is working is sparse. There is some evidence from NSW, Queensland and Victoria.

New South Wales

5.89 The Australian Taxpayers Alliance referred to how in July 2013, Fair Trading NSW reported to a NSW parliamentary committee that of 128 ticket-related complaints they received, none were related to scalping. Approximately 70% related to cancelled or postponed events, or electronic glitches in the ticket purchase process.¹⁵⁸

5.90 The amendments made to NSW's *Fair Trading Act 1987* have only been in operation for 15 months so drawing any conclusions about the success or otherwise of the cap is premature.

5.91 In July 2019, the NSW Bureau of Crime Statistics and Research provided the latest data on convictions for the offences created by Part 4A of the *Fair Trading Act 1987* (NSW). The Committee was advised that since commencement, no finalised criminal charges have been brought under sections:

- 58G(1) and (2): the prohibition on ticket resale profit exceeding 10 percent of the original supply cost
- 58H(1): the supply of tickets not to be made contingent on other purchasers
- 58I(1): ticket resale advertising
- 58K(1): prohibited conduct in relation to the use of ticketing websites.¹⁵⁹

5.92 This information does not necessarily mean the law in NSW is not working.

¹⁵⁵ Hon. Todd Smith, Minister for Economic Development, Ontario, Legislative Assembly, *Parliamentary Debates (Hansard)*, 30 May 2019.

¹⁵⁶ See: <https://www.ontario.ca/page/buying-tickets-events-ontario#section-3>. Viewed 30 July 2019.

¹⁵⁷ Submission 21 from viagogo, 31 July 2019, p 4.

¹⁵⁸ Submission 5 from the Australian Taxpayers Alliance, 25 July 2019, p 5, paragraph 19.

¹⁵⁹ Tom Gotis, NSW Parliamentary Library, Email, 31 July 2019, p 1.

Queensland

- 5.93 Unfortunately, comprehensive statistics in relation to the number of charges or prosecutions for specific offences in Queensland are not publicly available.¹⁶⁰ However, in response to a question taken on notice during a parliamentary inquiry into the Major Events Bill 2014 (Qld) the relevant department advised the following in October 2014.¹⁶¹

Table 1: Number of ticket scalping offences by year under the *Major Sports Facilities Act 2001* (Qld)

Year	Number of Offences
2007	9
2008	5
2009	16
2010	3
2011	1
2012	19
Total	53

Source: Parliament of Queensland, answer to question on notice number 3, 3 October 2014.

- 5.94 The Queensland Department of Justice and Attorney-General further advised in that answer that 'from 2007 to 2014 there have been 19 charges laid in court under section 30C of the *Major Sports Facilities Act 2001* (Restriction on resale or purchase of tickets)' ¹⁶² However, this information relates to charges laid, rather than successful prosecutions in court. The information is contained in the Parliament of Queensland, State Development, Infrastructure and Industry Committee, *Scalping offences under the Major Sports Facilities Act 2001* report.¹⁶³
- 5.95 More recently in 2018 and during the lead up to the Gold Coast 2018 Commonwealth Games (GC 2018),¹⁶⁴ the Gold Coast 2018 Commonwealth Games Corporation (GOLDOC) was responsible for monitoring and providing primary oversight of websites in relation to ticket scalping activities. The *Major Events Act 2014* provision relating to ticket scalping was available for GOLDOC to use both in the lead up to and during GC2018. GOLDOC used this provision in conjunction with the terms and conditions of its ticket sales.
- 5.96 No formal prosecutions were undertaken during GC2018.¹⁶⁵ Again this information does not necessarily mean the law in Queensland is not working.

Victoria

- 5.97 The earliest public evidence of scalping in Victoria comes from the 2014 Senate report which stated that 'over the previous three years five individuals and the operators of Ticketfinders had been found guilty of various ticket scalping offences and an injunction obtained against Ticketfinders to prevent it from illegally selling tickets to the 2011 AFL grand final'.¹⁶⁶

¹⁶⁰ Queensland Police Service, 'Open Data Information', QPS Data Extracts, 23 July 2019.

¹⁶¹ The question was: How many prosecutions have occurred under the *Major Sports Facilities Act 2001*?

¹⁶² Queensland Parliament, State Development, Infrastructure and Industry Committee, Major Events Bill 2014, (Report No. 51), 20 October 2014.
See: <https://www.parliament.qld.gov.au/documents/committees/SDIIC/2014/26-MajEvents2014/26-rpt-20Oct2014.pdf>, pp 12-16. Viewed 24 July 2019. Also answer to a question on notice Number 3 in response to a question on notice during a public hearing on 3 October 2014 regarding the Major Events Bill 2014, October 2014.

¹⁶³ *ibid.*

¹⁶⁴ An event featuring the largest integrated Commonwealth Games Para-Sport program in history.

¹⁶⁵ The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 3 July 2019.

¹⁶⁶ Commonwealth Parliament, Senate, Economics References Committee, Report, *Ticket Scalping in Australia*, 24 March 2014, p 39, paragraph 4.8 quoting the then Victorian Department of Transport, Planning and Local

- 5.98 DMIRS quoted Consumer Affairs Victoria reporting seven successful prosecutions with fines ranging from \$500 to \$5 000 as well as costs awarded to the Victorian Government.¹⁶⁷ However, when these prosecutions occurred is unknown. DMIRS derived this information from the 2018 Commonwealth Treasury publication and that information was 'to date', meaning November 2018.
- 5.99 Since amendments to the *Major Events Act 2009 (Vic)* became operational 14 months ago, a recent media article dated 27 June 2019 states that 'scalpers have not yet been hit with any penalties, despite the State Government introducing tougher laws'.¹⁶⁸ The article claims that the authorities have been concentrating on removing 300 posts for reselling tickets 'on local and overseas sites marked up by hundreds of dollars'. There have been a 'number of investigations, but seemingly no-one has been charged yet' pursuant to Part 9: 'Sports ticketing' or Part 10A 'Major event ticketing'.¹⁶⁹ The Committee was unable to corroborate this media article. However, the Ticket Brokers Association provided the following anecdotal evidence that:
- One of our members observed officers from the Department for Jobs, Precincts and Regions (which has enforcement oversight of the *Major Events Act 2019*) attend hospitality functions to verify the package inclusions conformed to what was advertised (in this instance, the package involved a food and beverage function and ticket for the 2019 ANZAC Day clash).¹⁷⁰
- 5.100 Live Performance Australia is supportive of Victoria's *Major Events Act 2009* with its 10 percent cap once a declaration is made. Relevantly and authoritatively, its members have provided positive feedback on the legislation. 'More importantly, they have not detected a vast number of declared event tickets offered for resale on online platforms'.¹⁷¹ Live Performance Australia attributes this to the Victorian Government investing in additional dedicated resources (authorised ticketing officers) to monitor ticket scalping activities.¹⁷²
- 5.101 At this time and with the paucity of current, publicly available authoritative information from which to extrapolate, the Committee is unable to assess whether the 10 percent cap will minimise ticket scalping in Western Australia.
- 5.102 The Committee is persuaded that the 10 percent cap in clause 6:
- provides uniformity with those other Australian jurisdictions that have legislated caps, given the extra-territorial application of the Bill
 - is central to the operation of the Bill.

Infrastructure, Additional Information, 'Factual Information — Major Sporting Events Act 2009'.

See: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Ticket_scalping_2013
Viewed 18 August 2019.

¹⁶⁷ Submission 2 from the Department of Mines, Industry Regulation and Safety (Consumer Protection), 22 July 2019, paragraph 3.1, footnote 11.

¹⁶⁸ Alex White, 'Ticket rorts booted 300 axed but scalpers dodge fines', *Herald Sun*, 27 June 2019, p 15.

¹⁶⁹ *Major Events Act 2019 (Vic)*, Part 9 Sports ticketing: Section 166: Selling event tickets contrary to the ticket conditions. Section 166A: Sale of 5 or less tickets at a premium (scalping). Section 166B: Advertising for resale of 5 or less tickets at a premium. Part 10A Major event ticketing: Section 182E: Price to be displayed on tickets. Section 182F: Ticket scalping (6 or more tickets). Section 182G: Ticket scalping (5 or less tickets).

¹⁷⁰ Josh Gladwin, President, Ticket Brokers Association of Australia, Email, 14 August 2019, p 1.

¹⁷¹ Submission 18 from Live Performance Australia, 31 July 2019, p 2.

¹⁷² *ibid.*

- 5.103 The 10 per cent cap is likely to have a significant impact on the ticket broking industry, sole traders and small business in both Western Australia and other jurisdictions. The Committee therefore makes the following two findings.

FINDING 12

The prohibition in clause 6 against a person selling an event ticket by more than 10 percent may have a deleterious impact on the continued existence of a secondary market composed of scrupulous sellers or businesses adhering to a code of ethics.

FINDING 13

International inquiries suggest a price cap may not work and may be unenforceable.

Part 2, Clause 7

- 5.104 Clause 7 states:

Invalid resale restrictions

A resale restriction is void to the extent that it provides for the ticket to be cancelled, surrendered or rendered invalid if the ticket is resold for an amount not exceeding 110% of the original ticket price.

- 5.105 The Explanatory Memorandum states that this clause protects purchasers of resold tickets. When a reseller abides by the law, that is, the reseller's price does not exceed 110% of the original ticket price, the purchaser will have secured a valid ticket despite any term or condition on the face of the ticket.
- 5.106 The Law Society of Western Australia sees this clause as risky. It may be understood to effectively prohibit invitation only or non-transferable ticketing which operates by invalidating the ticket if it is transferred (because it would be a condition of invalidity not linked to a price of more than 110%).¹⁷³ Of this, DMIRS said:

That is correct. Part of the intent of the Bill is to provide a legitimate avenue for resale of tickets at the price paid by the original purchaser plus reasonable costs. This ensures that the original purchaser can recover the cost and the purchaser on the secondary market is protected from cancellation in those circumstances.

We do note though that this will only apply where the event comes within the definition of event in section 3 and tickets are offered for retail sale.

PCO has confirmed that in their view any ticket which has not been offered for retail sale, including any ticket provided on a complementary basis, will not be subject to the restrictions in the Bill.¹⁷⁴

- 5.107 The Committee is satisfied with this explanation.

¹⁷³ Submission 4 from the Law Society of Western Australia, 25 July 2019, p 1.

¹⁷⁴ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, Email, 19 August 2019, p 1.

Part 2, Clause 8

5.108 Clause 8 states:

8. Supply of tickets not to be made contingent on other purchases

(1) A person (the **supplier**) must not supply a ticket or admission to an event to any other person (the **recipient**) under an agreement that makes the liability of the supplier to supply the ticket to the recipient contingent on payment by the recipient to the supplier of an amount in consideration for the provision to the recipient of any other goods or services.

Penalty for this subsection: a fine of \$20 000.

(2) Subsection (1) does not apply to the supply of a ticket under—

(a) an agreement that has been authorised by the event organiser for the relevant event; or

(b) any other agreement of a kind prescribed by the regulations.

- 5.109 Clause 8(1) creates an offence and imposes a penalty. Modelled on section 58H(1) of the *Fair Trading Act 1987* (NSW), it prevents the ticket price 'being effectively increased above 110% of the ticket price by including an additional premium in the charge for the associated goods or services'.¹⁷⁵
- 5.110 Clause 8(2) is the reverse scenario allowing the supply of a ticket to be contingent on other purchases, such as a meal or accommodation as a promotional package tool, when the event organiser consents.
- 5.111 This clause is contentious among brokers. Ticketblaster for example, stated that it is in the business of providing tickets and hospitality packages for global events and that Western Australian events are a significant component of their business for time poor private individuals, businesses wanting to entertain staff and clients, concierge and credit companies and hotels.¹⁷⁶
- 5.112 Similarly, the Ticket Brokers Association explained that a significant portion of each Member's business pertains to self-packaged offerings to VIP clients, the supply of which would otherwise be illegal under this clause. However, in Victoria where the bulk of their members operate, there is no clause 8 equivalent.¹⁷⁷ This meant for example, that brokers were able to service their existing client base through bespoke packages such as the AFL Anzac Day 2019.¹⁷⁸
- 5.113 It appears to the Committee that the ticket broking industry in Western Australia is in jeopardy (be it a sole trader, a Ticket Broker Association Member or other brokers who do not meet the Association's code of ethics). The combination of the 10 percent cap in clause 6 with the contingent sales prohibition in clause 8 means ticket brokers will (unlike their Victorian counterparts) be unable to independently grow this part of their businesses because they will be dependent on an agreement with an event organiser to provide a package.

¹⁷⁵ Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 3.

¹⁷⁶ Submission 19 from Ticketblaster, 31 July 2019, p 1.

¹⁷⁷ The Ticket Brokers Association of Australia said that although there is no obligation on brokers under Victorian legislation to disclose the face value of the ticket within a package, in order to obtain Google reseller certification (to obtain paid search placement), the face value of the ticket is required to be displayed. Joshua Gladwin, President, Ticket Brokers Association of Australia, Email, 14 August 2019, p 1.

¹⁷⁸ Joshua Gladwin, President, Ticket Brokers Association of Australia, *Transcript of evidence*, 14 August 2019, p 8.

5.114 The Committee makes the following finding.

FINDING 14

The Committee finds the evidence of the Ticket Brokers Association of Australia to be persuasive and that the contingent sales prohibition in clause 8 will have a significant, deleterious impact on ticket brokers' livelihood. This can be ameliorated by amending clause 8 to better reflect the effects of the Victorian model where there is no contingent sales prohibition.

5.115 The Committee notes that one way in which amelioration could be achieved is by making the following statutory form amendment.

Page 5, after line 25 — To insert:

(3) Subsection (1) does not apply to the supply of a ticket if the goods or services are part of a hospitality package for the relevant event.

(4) In subsection (3) —

hospitality package, for a relevant event, means food, beverages, accommodation, transport or other goods and services provided as a package in association with attendance at an event.

Part 2, Clause 9

5.116 Clause 9 states:

9. Prohibited advertisements

(1) A ticket resale advertisement must not specify an amount for the sale of the tickets that is more than 110% of the original ticket price.

(2) A ticket resale advertisement must specify—

(a) the original price; and

(b) details of the location from which the ticket holder is authorised to view the event (including, for example, any bay number, row number and seat number for the ticket)

5.117 This clause mandates certain advertising standards and is self-explanatory.

5.118 There is a nexus between clause 9 and the definition of 'original ticket price' in clause 3 as well as clause 6 regarding the prohibition against reselling for an amount exceeding the original ticket price by more than 10%. The cost of placing an advertisement to resell a ticket is (understandably) not factored into the definition of 'original ticket price' but nevertheless is a cost the reseller bears. This means the reseller who chooses to advertise in a newspaper for example, may incur further loss.

Part 2, Clause 10

5.119 Clause 10 states:

10. Ticket resale advertising

(1) The owner of an advertising publication must ensure that no prohibited advertisement is published in the publication.

Penalty for this subsection: a fine of \$20 000.

(2) It is a defence to a charge of an offence under subsection (1) to prove that—

(a) the advertisement was received by the person charged, or by a person acting on that person's behalf, in the ordinary course of carrying on the business or undertaking associated with the advertising publication; and

(b) the agreement relating to the publication of the advertisement between the person charged and the person placing the advertisement was subject to terms or conditions prohibiting the publication of prohibited advertisements; and

(c) the person charged, or a persons responsible for managing the advertising publication on that person's behalf, as soon as practicable after becoming aware that the prohibited advertisement had been published in the publication, took reasonable steps to ensure that the advertisement was removed from the publication; and

(d) the person charged took such other steps as were reasonable in the circumstances to ensure that no prohibited advertisement was published in the publication.

5.120 Clause 10(1) creates the *criminal* offence of publishing a prohibited advertisement and imposes a \$20 000 penalty to be dealt with in Magistrates Courts.¹⁷⁹ Clause 10(2) then provides one special defence with four elements, all of which must be satisfied.

5.121 At first glance, clause 10(2) appears to be reversing the onus of proof in criminal proceedings which the High Court has validated on the basis that Parliaments have power to pass laws with respect to the rules of evidence.¹⁸⁰

5.122 Clarifying which party has the burden of proof in relation to a particular fact in issue on a trial, clears away a source of difficulty in the interpretation of the relevant statutory provision, which in turn makes it easier for the parties to prepare for litigation; or simply to understand their position. Reversing the onus may be justified in some circumstances, including where the reversal relates to an issue that is peculiarly within the knowledge of the person charged.

5.123 It is important to discern whether the burden or onus placed on the person charged in clause 10(2) is a legal onus or merely an evidentiary onus. A legal onus means the person charged has to disprove the elements at the level of the balance of probabilities. An evidentiary onus

¹⁷⁹ Department of Mines, Industry Regulation and Safety (Consumer Protection) confirmed these are criminal, not civil proceedings and mirror the Australian Consumer Law where a monetary fine (*criminal* penalty) is imposed by courts in *criminal* proceedings.

¹⁸⁰ *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1, 12 and 17-18. Issacs J said: There are 'many enactments placing the burden of proof on defendants, whose knowledge of the true facts is necessarily greater than that of anyone else. Justice might easily be otherwise defeated'. See also *Kuczborski v Queensland* [2014] HCA 46 [40] where the majority said 'it has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof'.

or burden only requires the person charged to raise some evidence to create reasonable doubt.¹⁸¹

- 5.124 Interestingly South Australia's *Major Events Act 2013* in providing defences for contraventions of that Act leaves no room for doubt. South Australia expressly states that the relevant section 'places an *evidential* burden on the accused' to show something.
- 5.125 On balance, the person being charged in clause 10(2) bears only an evidential burden to raise (a) to (d) above, while the prosecution bears the onus of disproving (a) to (d) beyond reasonable doubt.¹⁸²
- 5.126 All that is being provided for in clause 10(2) is one extra defence (in addition to criminal responsibility provisions that may be relevant in *The Criminal Code*)¹⁸³ that benefits the person charged. If the person can show certain events occurred, what would otherwise be conduct resulting in a conviction, will not have that effect.
- 5.127 The defence in clause 10(2) is beneficial to the person charged because it is peculiarly within that person's knowledge. However, clause 10(2) may give the impression that this is the person's sole defence thus raising FLP 11 which asks the question: *Is the Bill unambiguous and drafted in a sufficiently clear and precise way?* To a person representing themselves in the Magistrates Court, he or she may be unaware that the Chapter 5 provisions in *The Criminal Code* dealing with criminal responsibility are also available.¹⁸⁴ For this reason the Committee makes a statutory form recommendation at paragraph 5.134.

The clause 10(2) nexus with clause 13(1)(c)

- 5.128 Clause 13(1)(c) states:

13. Application of the *Fair Trading Act 2010*

(1) The following provisions of the *Fair Trading Act 2010* apply, with any modifications that are necessary for the purposes of this Act, as if those provisions were a part of this Act—

(c) Part 7, other than sections 96, 97, 98, 100 and 108 and Division 4;

- 5.129 The subject matters in the references above are as follows:
- Part 7 is titled 'Criminal and civil proceedings'.
 - Section 96 is the 'reasonable mistake of fact' defence in criminal proceedings.
 - Section 97 contains the 'accident, act or default of another etc' defences in criminal proceedings.
 - Section 98 is the 'publication of advertisements in the ordinary course of business' defence.
 - Section 100 provides for injunctions to 'prevent other contraventions' of the *Fair Trading Act 2010*.

¹⁸¹ *R v DPP; ex parte Kebileme* [2000] 2 AC 326, 378–79 quoted in the Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Final Report 129, December 2015, p 261, paragraph 9.13.

¹⁸² *R v QX* [2015] VSC 784, [58].

¹⁸³ The criminal responsibility provisions in *The Criminal Code* excuse or justify conduct so that what occurred was not unlawful. Some of these so called 'defences' include self-defence, provocation, accident, emergency, mistake of fact, insanity, intoxication and unwilling acts.

¹⁸⁴ In its criminal jurisdiction, the Magistrates Court deals with less serious criminal matters and the early stage of more serious criminal matters.

- Section 108 makes available 'findings of fact in certain proceedings are to be evidence in other' civil proceedings.
 - Part 7, Division 4 contains further provisions relating to proceedings involving the charged person's or body corporate's 'state of mind'.
- 5.130 In criminal proceedings, none of the three defences are available to the person charged under clause 10. In civil proceedings, neither the injunctions nor the findings of fact are available. Part 7, Division 4 provisions regarding a person's state of mind are also not available.
- 5.131 The Explanatory Memorandum states that these above sections 'are not to be applied as they are not relevant to the Act'.¹⁸⁵ This means that other than *The Criminal Code* criminal responsibility provisions, only the clause 10(2) defence is available. DMIRS is of the view there may be common law defences and in an answer to a question on notice said:
- PCO has confirmed that the inclusion of a specific defence would not limit the operation of defences that may be available to a defendant under other laws. In their view, it would be possible to draft an amendment to include a subsection specifically stating that. They note, however, that this would not accord with usual drafting practice. Such statements are not usually included when specific defences are drafted for an offence.¹⁸⁶
- 5.132 The Committee is of the view that a Note regarding clause 10 that refers to either the availability of other defences under *The Criminal Code* or that the express defence not exclude any other available defences, is desirable.¹⁸⁷ This is provided for by a Note in recommendation 4 below.
- 5.133 DMIRS said:
- PCO have advised that it would be possible to draft an informational note stating what the applied provisions of the Fair Trading Act 2010 relate to, so that this information is more readily available. This could be inserted by amendment in Committee.
- 5.134 The Committee makes the following statutory form recommendation to benefit the person charged in clause 10(2).

¹⁸⁵ Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 5.

¹⁸⁶ Answer to question on notice A8 asked in the Committee hearing by Hon Dr Sally Talbot MLC, Chair and answered by the Department of Mines, Industry Regulation and Safety (Consumer Protection), 16 August 2019, p 2.

¹⁸⁷ Though arguably, not necessary because section 36 of *The Criminal Code* provides that Chapter 5 (titled Criminal responsibility) applies to all persons charged with any offence against the statute law of Western Australia. In *Harper v Racing Penalties Appeal Tribunal* (1995) WAR 337 Anderson and Owen JJ stated that although the term 'statute law' was not defined for the purposes of *The Criminal Code*, the phrase would have a similar meaning to 'written law' which is defined in the *Interpretation Act 1984* as Acts of the Parliament and subsidiary legislation.

RECOMMENDATION 4

Amend clause 10 as follows:

Page 6, after line 32 — To insert:

- (3) The defence provided for in subsection (2) is in addition to and does not affect the operation of *The Criminal Code* Chapter V.

Note for this subsection:

Section 13(1)(c) does not apply certain defences in the *Fair Trading Act 2010* Part 7.

Part 3, Clause 11

5.135 It states:

11. Prohibited conduct in relation to the use of ticketing websites

(1) In this section—

security measures, in relation to a website, include any measures of a kind prescribed by the regulations for the purposes of this definition.

(2) A person must not use any software to enable or assist the person to circumvent the security measures of a website to purchase tickets in contravention of the published terms of use of the website.

Penalty for this subsection: a fine of \$100 000.

(3) For the purposes of subsection (2), terms of use of a website are published if they are published on the website.

- 5.136 Clause 11(2) creates the offence of using ‘any software’ to circumvent a website’s security measures when those terms are published on the website and imposes a \$100,000 maximum penalty.¹⁸⁸ Like NSW and South Australia, the clause does not expressly prohibit the use of ‘bot’ software or ‘botnets’ which sensibly future proofs the legislation for changes in computer technology terminology.¹⁸⁹
- 5.137 The term ‘software’ is not defined so its ordinary meaning applies. The Australian Taxation Office describes computer software as ‘computer programs consisting of encoded instructions designed to cause a computer to perform a particular task or to produce a particular result.’¹⁹⁰
- 5.138 With respect to the elements of the offence in clause 11(2), DMIRS said it would have to be ‘established that there were conditions in respect of the purchase of tickets from the primary seller that prohibited the use of particular types of software and that the software had been used in contravention of that condition’.¹⁹¹

¹⁸⁸ Under section 9(2) of the *Sentencing Act 1995*, all penalties are a maximum.

¹⁸⁹ A botnet is a group of computers controlled by software containing harmful programs, without their users’ knowledge.

¹⁹⁰ See: <https://www.ato.gov.au/law/view/document?docid=TXR/TR9312/NAT/ATO/00001>. Viewed 9 July 2019.

¹⁹¹ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 18.

Bots

- 5.139 The 2018 Commonwealth Treasury Decision RIS quotes ticket buying bots as accounting for 'as much as 30% of the traffic to primary ticketing sights in the moments after a major event goes on sale'.¹⁹²
- 5.140 Scalpers using ticket bots tend to base themselves in small countries in the absence of government oversight, countries that are known tax havens. One of the top-ranked websites selling bots is registered in Panama where websites sell a range of bots for \$300 - \$900.¹⁹³

How does a bot work?

- 5.141 An operator uses a bot to automate the execution of a pre-programmed set of instructions. Humans click through the stages of selecting the event, seats and then paying which can take a few minutes. A bot simply purchases the maximum number of tickets per order as quickly as possible, on repeat usually until the allocation is exhausted. This allows scalpers to purchase the best seats, in bulk, very quickly before a human user gets an opportunity. Programmers often have vast processing power so they can run hundreds of bots at once to purchase tickets at an incredibly fast pace.
- 5.142 In 2016, Ticketmaster alone blocked more than 6 million attempts by bots to gain access to its websites globally, including Australia. Describing a 'bot epidemic' crowding out human purchasers in New York,¹⁹⁴ the consensus in the academic literature is that ticket buying bots reduce consumers' fair access to tickets.

Bot speed

- 5.143 Primary ticketing websites' drop-down prompt boxes can be filled by a bot in 'less than a tenth of the time that even a skilled human can do'.¹⁹⁵ In 2016, the New York State Attorney's Office gave the following examples of lightning speed sourced from their *Investigative Materials*.¹⁹⁶

¹⁹² The 2018 Commonwealth Treasury Decision Regulation Impact Statement, *Ticket Reselling in Australia* quotes Rolfe (2017). See: J Rolfe, 'NSW Government to Outlaw Scalping Software after Ashes, Bieber Ripoffs', Daily Telegraph, 8 October 2017.

¹⁹³ According to James Purtill, Triple j Hack, 'The man who invented ticket bots explains why you can't get that gig ticket', 16 October 2017. See: <https://www.abc.net.au/triplej/programs/hack/ticketbot-inventor-ken-lowson-explains-scalping/9055238>. Viewed 3 July 2019.

¹⁹⁴ Office of the New York State Attorney, Eric T Schneiderman, *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, p 35. See: https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf. Viewed 16 July 2019.

¹⁹⁵ The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia*, 2018, unnumbered page. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 15 July 2019.

¹⁹⁶ Office of the New York State Attorney, Eric T Schneiderman, *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, p 3. See: https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf, p 18. Viewed 16 July 2019.



- 5.144 The company that invented bot software made more than \$20 million in profits over a seven-year period between 2002 and 2009. Given this, the Committee considered whether \$100 000 is a sufficient penalty for what one author describes as a global \$7 - \$8 billion industry.¹⁹⁷ A further complication of the FBI indictment against the inventor was that the court case had to decide whether the four men involved had committed a crime or merely violated Ticketmaster's terms of service. The presiding judge said prison was too severe a punishment for the crime and the law was too unsettled.¹⁹⁸
- 5.145 In December 2016, America signed into federal law the *Better Online Ticket Sales Act of 2016* (colloquially known as the BOTS Act). It outlawed the resale of tickets purchased using bot technology and set a fine of \$16,000 for violations.¹⁹⁹ The committee to which the bill was referred reported how primary ticket sellers had estimated ticket bots obtain 60 percent of the most desirable tickets for some shows and how one study found that 'on average, scalpers mark up the price of tickets on the secondary market by 49 percent of the primary ticket seller's price. That, in some instances scalpers have marked up the price by over 1,000 percent'.²⁰⁰
- 5.146 The Explanatory Memorandum states that the penalty 'recognises that there are software programs that would generate a large amount of money'.²⁰¹ DMIRS said the nature of the offence; the potential for a lot of profit to be generated out of the activity; and how the activity takes place on 'quite a significant scale', accounts for the penalty's quantum.²⁰²

¹⁹⁷ Dr Pascal Courty, Professor of Economics, University of Victoria, (Victoria, Canada), 'Ticket resale, bots, and the fair price ticketing curse', *Journal of Cultural Economics*, Volume 43, 2019, unnumbered page.

¹⁹⁸ Robert McFadden, 'The BOTS Act: A Small Step for Fankind When a Giant Leap is Needed', *Washburn Law Journal*, 2016, vol. 55, p 443. Two of the owners pled guilty to a charge of conspiracy to commit fraud which had a maximum sentence of five years in prison and a \$250 000 fine. They received two-year probations and 300 hours of community service. One forfeited \$1.2 million.

¹⁹⁹ The impetus for the legislation was Ticketmaster suing Prestige Entertainment under the claim that Prestige used ticket bots to purchase nearly 40 percent of tickets to the Broadway production of *Hamilton* and nearly half of all tickets to a Floyd Mayweather and Manny Pacquiao boxing match in 2015.

²⁰⁰ The American Senate, 114th Congress second session, *Better Online Ticket Sales Act of 2016 report*, 5 December 2016, p 2. See: <https://www.govinfo.gov/content/pkg/CRPT-114srpt391/pdf/CRPT-114srpt391.pdf>. Viewed 12 August 2019.

²⁰¹ Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 4.

²⁰² Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 18.

- 5.147 The Committee noted that the \$100 000 penalty in clause 11(2) is a 'maximum' penalty pursuant to section 9(2) of the *Sentencing Act 1995*. It states:
- If the statutory penalty for an offence is a fine of a particular amount ... then that penalty is the maximum penalty that may be imposed for that offence...
- 5.148 Section 44 of the *Sentencing Act 1995* then applies. It states that if a statutory penalty is a fine only (which is the case in clause 10(1)), then various sentencing options are available under section 39(2)(a),(b),(c) and (ca). These are (with or without making a spent conviction order), no sentence, a conditional release order, a fine or a suspended fine. If a corporation: impose no sentence, a fine, or a suspended fine. The court may only impose these, but nothing more serious.
- 5.149 The Committee questioned DMIRS about monitoring security measures given that in South Australia, one FTE monitors computer sites and sessional staff are employed for major events. DMIRS said the assessment is for 'one additional FTE in the initial stages and probably 0.5 ongoing'.²⁰³
- 5.150 The Committee is persuaded that clause 11 is (like clause 6) central to the Bill. It is necessary for achieving the Bill's third policy objective 'to support event promoters and authorised ticket sellers in their efforts to prevent scalping'. Without doubt, bots, compromise the availability of tickets for the general public.

Part 4, Clause 12

- 5.151 Clause 12(1)(d) states:

12. Functions of Commissioner

(1) The functions of the Commissioner include the following—

- (a) to promote the operation and effect of this Act;
- (b) to conduct educational activities associated with promoting compliance with this Act;
- (c) to receive complaints and information concerning potential breaches of this Act and, if the Commissioner considers it warranted, to investigate any matter and to take any action in respect of those complaints or that information considered to be appropriate by the Commissioner;
- (d) to publish (in any form) statements identifying and giving warnings about conduct or practices that are in breach of this Act, including by identifying persons who engage or are likely to engage in such conduct or practices;
- (e) to perform other functions associated with the operation or enforcement of this Act, or otherwise conferred on the Commissioner under, or for the purposes of, this Act.

(2) The Commissioner must not make or issue a statement under subsection 1(d) that identifies a specific person unless satisfied that it is in the public interest to do so.

- 5.152 Clause 12 is an inclusive provision with the listed functions being broadly consistent with the range of functions exercised by the Commissioner in respect of other legislation administered by the Consumer Protection Division of DMIRS.²⁰⁴

²⁰³ *ibid.*, p 21.

²⁰⁴ Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 4.

5.153 Clause 12(1)(d) is protective. It gives the Commissioner an option to issue a public statement or warning about conduct or practices that are in breach of the Act where 'prosecution of the offender may not be possible or appropriate'.²⁰⁵

5.154 In a submission, AEG Ogden stated that its organisation is encouraged by the Commissioner delegating authorised persons to carry out investigations. That this is 'more practical than the limitation in some other jurisdictions that only police officers can deal with such breaches of the law'. AEG Ogden stated:

The 'demands on our police forces often lead to ticket scalping slipping down the levels of priority with which they must assess the matters they take up for investigation'.²⁰⁶

The clause 12(1) nexus with clause 13(2)(d)

5.155 Clause 13(2)(d) states:

13. Application of the *Fair Trading Act 2010*

(1) The following provisions of the *Fair Trading Act 2010* apply, with any modifications that are necessary for the purposes of this Act, as if those provisions were a part of this Act—

...

(2) For the purposes of subsection (1), the *Fair Trading Act 2010* is to be read as if—

(d) the words "or police officer assisting in an investigation under section 88D" in paragraph (c) of the definition of **authorised person** in section 63 were deleted;

5.156 The subject matter of section 88D is how the Western Australia Police Force provide assistance to the Commissioner for Consumer Protection with investigations and inquiries. DMIRS advised that the Bill proposes 'the police have no formal role in investigating offences as an "authorised person" under the Bill'.²⁰⁷ After deleting police officers, this leaves just the Commissioner, a delegate or an investigator as those authorised to conduct investigations and inquiries.

5.157 The Explanatory Memorandum states that subclause (2) 'removes references to those sections that have not been applied'.²⁰⁸ However, DMIRS further advised that:

There are occasions on which police officers are asked for assistance in investigation of consumer protection matters under section 67 (for example in execution of warrants where they have specialist knowledge of how to deal with seizure and examination of computer equipment or where CP investigators may be at risk of violence) and they will still be able to do this, but would be acting in the capacity of assistant to an investigator – and physically accompanied by an investigator – rather than having responsibility for the investigation as an authorised person.

²⁰⁵ Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 4

²⁰⁶ Submission 7 from AEG Ogden, 29 July 2019, p 1.

²⁰⁷ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, Email, 30 July 2019, p 1.

²⁰⁸ Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 5.

There is also a possibility that matters could be referred to the police for investigation if there is evidence of an offence under The Criminal Code, such as sale of fake or fraudulently reproduced tickets.²⁰⁹

- 5.158 The Committee requested information on the position of the Western Australia Police Force regarding section 88D of the *Fair Trading Act 2010*. In an answer to a question on notice, the Western Australia Police Force advised:

With the time available I can only rely upon anecdotal information and I can find no reference or knowledge of the last time a request was made of police under section 88D of the Act. I am unable to advise on the implication of this section of the Act, if any with regard to the Ticket Scalping Bill.²¹⁰

- 5.159 The Committee makes the following finding and recommendation.

FINDING 15

It is a policy decision of Government that police officers are excluded from investigating offences under the Ticket Scalping Bill 2018.

RECOMMENDATION 5

When the Ticket Scalping Bill 2018 is debated in the Legislative Council, clarification be sought on the decision of Government for police officers to be excluded from assisting the Commissioner for Consumer Protection with investigating offences.

Part 4, Clause 13

- 5.160 Clause 13(1) states:

13. Application of the *Fair Trading Act 2010*

(1) The following provisions of the *Fair Trading Act 2010* apply, with any modifications that are necessary for the purposes of this Act, as if those provisions were a part of this Act—

... (see Appendix 3 on pages 76-78 of this report for the full content)

- 5.161 Three lengthy subsections filling 39 lines of text then follow containing a forest of multiple cross references, deletions and insertions that make navigation difficult, time consuming and complex for the ordinary reader switching back and forth across the *Fair Trading Act 2010*.
- 5.162 Clause 13 raises FLP 11 which asks the question: is the Bill unambiguous and drafted in a sufficiently clear and precise way? The Committee is of the view that an 'aide de memoir' summarising the modifications with a Note explaining that the 'aide de memoir' does not form part of the written law, would be useful. Pages 4 and 5 of the Explanatory Memorandum are a readable, plain English solution to this navigation challenge. DMIRS said:

²⁰⁹ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, Email, 30 July 2019, p 1.

²¹⁰ Answer to question on notice A2 asked in the Committee hearing by Hon Dr Sally Talbot MLC, Chair and answered by Ken Foster, Officer in Charge, Major Fraud Squad, Western Australia Police Force, 23 August 2019, p 1.

PCO have advised that it would be possible to draft an informational note stating what the applied provisions of the Fair Trading Act 2010 relate to, so that this information is more readily available. This could be inserted by amendment in Committee.²¹¹

5.163 The Committee recommends the following informational Note be inserted in clause 13.

RECOMMENDATION 6

Amend clause 13 as follows:

Page 10, after line 3 — To insert:

Notes for this section:

1. Subsection (1) incorporates into this Act certain provisions of the *Fair Trading Act 2010* that provide for or in relation to —
 - (a) powers of the Commissioner;
 - (b) investigation and enforcement;
 - (c) criminal and civil proceedings;
 - (d) miscellaneous matters.
2. Subsection (2) makes certain modifications to those provisions in their application as part of this Act.

Part 4, Clause 14

5.164 Clause 14 states:

14. Infringement notices and the *Criminal Procedure Act 2004*

(1) If this Act is a prescribed Act for the purposes of the *Criminal Procedure Act 2004* Part 2, this section applies in relations to the service of an infringement notice under that Part by an authorised officer in relation to an alleged offence under this Act.

(2) The infringement notice must be served within—

- (a) 21 days after the day on which the authorised officer forms the opinion that there is sufficient evidence to support the allegation of the offence; and
- (b) 6 months after the day on which the alleged offence is believed to have been committed.

(3) The *Criminal Procedure Act 2004* Part 2 is modified to the extent necessary to give effect to this section.

5.165 This clause, if enacted, will allow less serious offences to be dealt with by issuing an infringement notice.²¹² In comparison, South Australia has prescribed 'Expiation fees' for

²¹¹ Answer to question on notice A10 asked in the Committee hearing by Hon Dr Sally Talbot MLC, Chair and answered by the Department of Mines, Industry Regulation and Safety (Consumer Protection), 16 August 2019, p 3.

²¹² Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 5 and *Criminal Procedure Act 2004*, s 5(1). Section 5(1) states: 'Regulations made under a prescribed Act may prescribe an offence under the prescribed Act, or under any regulations made under the prescribed Act, to be an offence for which an infringement notice may be issued under this Part'.

three of its offences where the 'fee' is approximately 2.7% of the \$20 000 maximum penalty.²¹³ The Western Australian equivalent of these offences are:

- Clause 6: Ticket scalping (\$20 000)
- Clause 8: Supply of tickets not to be made contingent on other purchases (\$20 000)
- Clause 10: Ticket resale advertising (\$20 000).

5.166 At the time of the hearing, DMIRS said it had 'not settled on penalties as yet'.²¹⁴ However, in a later answer to a question on notice (and as previously discussed at paragraph 5.66), DMIRS advised it would recommend clauses 6, 8 and 10 attract a penalty 'in the range of \$1000 - \$2000'.²¹⁵

Part 4, Clause 15

5.167 Clause 15 states:

15. Regulations

(1) The Governor may make regulations prescribing matters—

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for giving effect to the purposes of this Act.

(2) The regulations may provide for offences against the regulations and prescribe penalties for those offences not exceeding a fine of \$5 000.

5.168 This is the Governor's standard regulation-making power and is similar to section 116(1) of the *Fair Trading Act 2010*. Given that the Bill is a stand-alone enactment outside the *Fair Trading Act 2010* (and thus different to NSW and South Australia), the Committee gave consideration to the Governor making regulations 'in consultation with the Commissioner for Consumer Protection'. DMIRS said:

PCO advise that requirements for consultation to be undertaken before regulations are made are unusual, but have sometimes been included in legislation. The requirement would be for the Minister, rather than the Governor to consult with another person (in this case the Commissioner for Consumer Protection) before making regulations. Examples of cases where this has previously been done are section 194 of the Biodiversity Conservation Act 2016 and section 20 of the Legal Deposit Act 2012.

PCO notes that it is difficult to imagine why this requirement would add anything of value in this case. In other instances where this has been done, the requirement is to consult with a representative of an agency outside of the Department which administers the legislation and is making the regulations, which may also have an interest in the content. In this instance, staff of the Commissioner for Consumer

²¹³ An expiation notice alleges the person committed an offence and sets out an expiation fee, which is paid to atone for the offence rather than being prosecuted. The offences are: (1) section 37G 'Restriction on ticket resale profit' where the maximum penalty is \$100 000 for a body corporate and a natural person \$20 000. The expiation fee is \$550. (2) Section 37H 'Supply of tickets not to be made contingent on other purchases'. Same penalties and same expiation fee. (3) Section 37I 'Ticket resale advertising'. Same penalty and same expiation fee.

²¹⁴ Robyn Peterson, Legal Policy Officer, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 21.

²¹⁵ Answer to question on notice A9 asked in the Committee hearing by Hon Nick Goiran MLC, Deputy Chair and answered by the Department of Mines, Industry Regulation and Safety (Consumer Protection), 16 August 2019, pp 2-3.

Protection would be drafting the regulations and it would be expected that consultation with the Commissioner would occur in the usual course of events.²¹⁶

5.169 The Committee is satisfied with this explanation.

Part 4, Clause 16

5.170 Clause 16 states:

16. Review of Act

(1) The Minister must review the operation and effectiveness of this Act, and prepare a report based on the review, as soon as practicable after the 5th anniversary of the day on which this section comes into operation.

(2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after the 5th anniversary.

5.171 This is a 'one time only', standard review clause after five years seen in many bills. The Explanatory Memorandum states:

As the Bill will result in new regulation, and mechanisms for ticket selling have changed significantly in recent years, clause 16 will provide for statutory review of the operation and effectiveness of the legislation after 5 years ...²¹⁷

5.172 Given that rapid change in computer software technology to circumvent security measures is inevitable, it may be prudent to cause an earlier review. South Australia has a review provision that states 'not before 18 months, and not later than 2 years', following commencement.²¹⁸ That review 'must be completed ... within 3 years following commencement'.²¹⁹ NSW is absent a review provision.

5.173 DMIRS are of the view that the five-year period is sufficient given the time it takes to 'actually get things up and going, to educate the public, and to allow time for people to familiarise themselves and then start to avail themselves of the avenues of redress'.²²⁰ In an answer to a question on notice, DMIRS said:

A period of five years after commencement of the Act was selected for the review clause as it is the view of the Department that at that point there will be a sufficient period of operation to enable reasonable assessment of the impact of the legislation. In order to ensure that appropriate data is available to undertake a review, it is preferable for the provisions to commence at the same time as other operative provisions in the Bill.

There is no intention on the part of the Department to delay commencement of any of the provisions of this Bill beyond the minimum period of time necessary to prepare for commencement, neither is there any intention for delay of the

²¹⁶ Answer to question on notice A12 asked in the Committee hearing by Hon Dr Sally Talbot MLC, Chair and answered by the Department of Mines, Industry Regulation and Safety (Consumer Protection), 16 August 2019, p 3.

²¹⁷ Ticket Scalping Bill 2018, *Explanatory Memorandum*, Legislative Council, p 5.

²¹⁸ *Fair Trading Act 1987* (SA) s 37N.

²¹⁹ *ibid.*, s 37N(2).

²²⁰ Penny Lipscombe, Director, Legislation and Policy, Consumer Protection Division, Department of Mines, Industry Regulation and Safety, *Transcript of evidence*, 7 August 2019, p 22.

commencement of clause 16 beyond the date on which other operative provisions are proclaimed.²²¹

- 5.174 The Committee prefers a three-year review period and that an appropriate Legislative Council committee conduct the review, not the Executive. One reason for reducing the review period is the uncertainty around whether the laws (especially clauses 6, 8 and 11) will have the intended consequences.
- 5.175 The Committee therefore makes the following statutory form recommendation.

RECOMMENDATION 7

Page 10, line 26 to page 11, line 3 — To delete the lines and insert after page 11, line 3:

16. Review of Act

- (1) An appropriate Standing Committee of the Legislative Council must review the operation and effectiveness of this Act, and prepare a report based on the review, as soon as practicable after the 3rd anniversary of the day on which section 6 comes into operation.
- (2) The review must address whether sections 6, 8 and 11 have been effective in reducing the practice of ticket scalping.
- (3) The Standing Committee must cause the report to be laid before the Legislative Council as soon as practicable after it is prepared, but not later than 12 months after the 3rd anniversary.

Part 5, Clause 17

- 5.176 Clause 17 states:

17. Transitional provision

This Act does not apply to a ticket purchased from an authorised ticket seller before the day on which Part 2 comes into operation.

- 5.177 The Bill recognises that Part 2 clauses dealing with the resale, supply or advertising of tickets could have retrospective effect. Clause 17 responds to this by including a transitional provision that the five clauses in Part 2 are prospective.

Making the number of tickets publicly available

- 5.178 The Committee sees merit in an amendment to the Bill regarding the public disclosure of ticketing information. In particular, the ticket quantities and allocations in the primary market.
- 5.179 Hon Alison Xamon MLC identified the following drivers of scalping:
- the finite supply of tickets exceeding demand
 - the withholding of tickets from the general public and 'redistributing them via fan clubs, corporate sponsors or reward schemes with credit card companies or hotels instead'.²²²

²²¹ Answer to question on notice A13 asked in the Committee hearing by Hon Nick Goiran MLC, Deputy Chair and answered by the Department of Mines, Industry Regulation and Safety (Consumer Protection), 16 August 2019, p 4.

²²² Submission 1 from Hon Alison Xamon MLC, 18 July 2019, p 1.

- 5.180 Hon Alison Xamon MLC submitted that ‘improved disclosure and transparency regarding ticket quantities and allocations in the primary market is a way that Parliament can address those drivers’.²²³
- 5.181 The Commonwealth Treasury’s 2018 Decision RIS describes these drivers a little differently—as ‘characteristics inherent in the primary ticket market for tickets that contribute to the existence of a secondary ticket selling or resale market’. These characteristics include:
- a perfectly inelastic supply of tickets coupled with circumstances where demand for tickets can exceed supply for popular events;
 - ticket resellers having early or priority access to tickets through pre-sales and the like (ticket allocation and availability);
 - ticket underpricing that creates opportunities for profits to be made by reselling tickets; and
 - a lack of variation of prices between tickets based on quality, which provides opportunities for tickets to be resold at different prices based on the differences in quality.²²⁴
- 5.182 The Committee considered including a clause similar to section 58L of the *Fair Trading Act 1987* (NSW). Section 58L(1) provides for a ministerial order to be published on the NSW legislation website giving public notice of the total number of tickets for the event that are to be made available by authorised sellers for general public sale.
- 5.183 DMIRS said section 58L was considered early in the development of the Bill. However, authorised ticket sellers were strongly opposed to its inclusion in Western Australia. In the following exchange, DMIRS objected on the grounds that such a clause benefits scalpers, not consumers.
- Mrs CARRÉN:** In fact, the publication of total inventory available actually gives the scalpers all the information that they need, and that is quite a considered concern. It is also then anti any of the marketing strategies that are at play, where you can test the demand and make sure that your prices are set correctly. So there was strong consideration and opposition to the inclusion.
- The CHAIR:** It is interesting that it has been accepted in New South Wales, or presumably they objected to it there as well.
- Mrs CARRÉN:** Perhaps, but it has been untested at this time.²²⁵
- 5.184 Live Performance Australia commends the Bill for excluding disclosure information clauses because it is an unnecessary burden on producers and promoters in the live performance industry.²²⁶ However, viagogo is keen for the primary market to reveal the number of tickets that are actually available to the general public given that the ‘basis of any functioning market and a consumer’s ability to determine what is fair price, is the knowledge of the full supply quantity of a good’.²²⁷

²²³ Submission 1 from Hon Alison Xamon MLC, 18 July 2019, p 2.

²²⁴ The Australian Government the Treasury, Decision Regulation Impact Statement, Ticket Reselling in Australia 2018, Chapter 1, See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>.

²²⁵ Exchange between Hon Dr Sally Talbot MLC, Chair and Janis Carren, Director, Strategy and Partnerships, VenuesWest, *Transcript of evidence*, 7 August 2019, p 20.

²²⁶ Submission 18 from Live Performance Australia, 31 July 2019, p 4, paragraph 5.

²²⁷ Submission 21 from viagogo, 31 July 2019, p 3.

- 5.185 The Committee considered the competing arguments and is of the view that an equivalent to section 58L of the *Fair Trading Act 1987* (NSW) may have merit. The Committee notes that one way in which this could be achieved is by the following statutory form amendment.

Page 7, after line 14 — To insert:

Part 3A — Number of tickets publicly available

11A. Minister may require notification of number of tickets publicly available

(1) The Minister may, by order in writing given to an event organiser, require the event organiser to give public notice of the total number of tickets for the event to be made available for general public sale by authorised ticket sellers (including tickets made available before the requirement is made).

(2) Before making an order, the Minister must —

- (a) be satisfied that each event organiser for the event has been notified of the Minister's intention to make the order; and
- (b) give each event organiser a reasonable opportunity to make submissions in relation to the proposed order; and
- (c) consider any submissions made by an event organiser; and
- (d) be satisfied that it is in the public interest to make the order.

(3) For the purposes of this section, a ticket is not made available for general public sale if the authorised ticket seller requires a person to do either or both of the following in order to purchase the ticket —

- (a) pay an amount in addition to the price of the ticket and any booking fee or other commission payable to the authorised ticket seller;
- (b) register for access to any pre-sale, publication, competition or other special offer.

(4) The regulations may, for the purposes of this section, make further provision for the circumstances in which a ticket is, or is not, made available for general public sale.

(5) An event organiser must comply with an order under this section within the time and in the manner specified in the order.

Penalty for this subsection: a fine of \$20 000.

(6) It is a defence to a charge of an offence under subsection (5) to prove that the event organiser —

- (a) gave public notice in accordance with the time and manner specified in the order; and
- (b) believed, on reasonable grounds, that the number of tickets specified in the notice was within 10% of the total number of tickets to be made available for general public sale.

CHAPTER 6

Conclusions and recommendation

Conclusions on policy

- 6.1 The policy of the Bill is to provide a legitimate, regulated ticket reselling marketplace that 'unashamedly places the fans first'. The Committee supports the policy.
- 6.2 The policy was supported by agency and industry consultation. There was no general public consultation during the drafting stage of the Bill.
- 6.3 The Committee is satisfied that the Bill achieves the first three policy objectives but the fourth cannot be determined at this time. The objectives are:
 - 1. To protect consumers from the detriment of paying inflated prices to commercial resellers for tickets to live sporting and entertainment events in Western Australia.
 - 2. To provide a mechanism permitting the resale of tickets for the purchase price plus reasonable expenses when tickets can no longer be used by the original purchaser and to protect those subsequent purchases from cancellation.
 - 3. To support event promoters and authorised ticket sellers in their efforts to prevent scalping.
 - 4. To ensure that venues in Western Australia remain attractive and competitive to promoters for the staging of events.
- 6.4 The approach taken by the Bill diverges from both the 2018 Commonwealth Treasury Decision RIS and the October 2018, Joint Communique of the Ministers of the Legislative and Governance Forum on Consumer Affairs. The communique endorsed the Commonwealth Treasury's preference for improved information disclosure arrangements for ticket resellers, not restricted reselling legislation.
- 6.5 From a policy perspective, the inter-jurisdictional nature of ticket scalping makes it an appropriate subject for uniform laws.

Conclusions on the Bill

- 6.6 The Bill's primary purpose is to 'provide strong mechanisms to address the consumer detriment that occurs as a result of ticket scalping'. The strong mechanisms are clauses 6 (the 10 percent price cap) and 11 (the prohibition against bots).
- 6.7 Both global and local inquiries suggest a view that the 10 percent price cap may not work and may result in the creation of a black market. The prohibition in clause 6 may have a deleterious impact on the continued existence of a secondary market composed of scrupulous sellers or businesses adhering to a code of ethics.

- 6.8 There is a paucity of publicly available, empirical evidence that price caps and robotic software prohibitions work. The Committee cannot be certain that the mechanisms to reduce detriment are sufficiently 'strong'.

Recommendation

- 6.9 The Committee recommends the Bill be passed subject to the recommendations it has made.

A handwritten signature in blue ink, appearing to read 'Sally Talbot', with a stylized flourish at the end.

Hon Dr Sally Talbot MLC

Chair

APPENDIX 1

STAKEHOLDERS CONTACTED, SUBMISSIONS RECEIVED AND PUBLIC HEARINGS

Stakeholders contacted

Number	Agency
1	Department of Mines, Industry Regulation and Safety (Consumer Protection)
2	The Law Society of Western Australia
3	The Consumers' Association of Western Australia
4	Australian Consumers' Association (CHOICE)
5	The Ticket Brokers Association of Australia
6	Epic Tickets
7	VenuesWest
8	AEG Ogden
9	Live Performance Australia
10	Tourism WA
11	Department of Treasury
12	Department of Local Government, Sport and Cultural Industries
13	Western Australian Local Government Association (WALGA)
14	Hon Dave Kelly MLA, Minister for Innovation and ICT
15	The Australian Taxpayers' Alliance
16	Ticketmaster
17	Australian Interactive Media Industry

Submissions received

Number	From
1	Hon Alison Xamon MLC
2	Department of Mines, Industry Regulation and Safety (Consumer Protection)
3	Hodges Caulfield Pty Ltd
4	The Law Society of Western Australia

Number	From
5	Australian Taxpayers' Alliance
6	First Contact
7	AEG Ogden
8	Perth Theatre Trust
9	Let Go BnB Management
10	Challenge
11	Private citizen
12	FAT Digital Marketing
13	Craig Brooks
14	Ticket Brokers Association of Australia
15	Blue Water Business Solutions
16	iFrames
17	VenuesWest
18	Live Performance Australia
19	Ticketblaster
20	Epic Tickets
21	viagogo
22	Westoz Industrial Supplies

Public hearings held

Date	Participants
7 August 2019	Department of Mines, Industry Regulation and Safety (Consumer Protection)
14 August 2019	The Ticket Brokers Association of Australia

APPENDIX 2

FUNDAMENTAL LEGISLATIVE PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?
--

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 3

THE BILL

Western Australia

Ticket Scalping Bill 2018

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Western Australia

LEGISLATIVE ASSEMBLY

Ticket Scalping Bill 2018

A Bill for

An Act to restrict the resale of event tickets and to prohibit the use of software designed to circumvent security measures on ticket selling websites, and for related purposes.

The Parliament of Western Australia enacts as follows:

page 1

Part 1 — Preliminary

1. Short title

This is the *Ticket Scalping Act 2018*.

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation.

3. Terms used

In this Act —

advertisement means any advertisement, whether paid or not;

advertising publication means any website, on-line facility, newspaper, magazine or other publication or service containing advertisements to which members of the public have access (whether or not a member of the public is first required to pay a fee or subscription, register or become a member);

authorised ticket seller, in relation to an event, means —

- (a) if the event organiser has authorised a person to supply tickets for admission to the event on behalf of the event organiser, or to resupply tickets for admission to the event after acquiring them from the event organiser — that person; or
- (b) in any other case — any event organiser for the event;

Commissioner has the meaning given in the *Fair Trading Act 2010* section 6;

event includes the following —

- (a) a sporting event;
- (b) an entertainment event, including a concert, a performance at a theatre or the opera, and a dance event;

- 1 (c) a festival;
- 2 (d) a cultural event or display;
- 3 (e) an arena event;
- 4 (f) any other form of public performance, exhibition,
5 display or public gathering;
- 6 **event organiser**, in relation to an event, means —
- 7 (a) the person who authorises the first supply of tickets for
8 admission to the event, whether or not that person is also
9 a performer, the promoter of the event or the operator of
10 the event venue; or
- 11 (b) a person within a class of persons declared by the
12 regulations to be the event organiser in relation to a class
13 of events to which the event belongs;
- 14 **original ticket price**, in relation to a ticket for admission to an
15 event, means the amount for which the ticket was purchased
16 when first offered for retail sale by the event organiser or an
17 authorised ticket seller (and includes, if a booking fee or other
18 commission was payable to an authorised ticket seller in relation
19 to that sale, the amount of that fee or commission);
- 20 **owner**, of an advertising publication, includes any person who
21 carries on the business or undertaking of the advertising
22 publication;
- 23 **prohibited advertisement** means a ticket resale advertisement
24 that does not comply with section 9;
- 25 **resale restriction** has the meaning given in section 4;
- 26 **sell** includes offer or advertise for sale;
- 27 **supply** includes offer to supply and advertise for supply;
- 28 **ticket resale advertisement** means an advertisement for the sale
29 of a ticket for admission to an event by a person other than an
30 authorised ticket seller.

s. 4

1 **4. Resale restrictions**

2 (1) For the purposes of this Act, a ***resale restriction*** is a term or
3 condition of a ticket for admission to an event that limits the
4 circumstances in which the ticket may be resold.

5 (2) A term or condition that limits the circumstances in which a
6 ticket may be resold includes a term or condition that provides
7 for the ticket to be cancelled, surrendered or rendered invalid if
8 the ticket is resold or if the ticket is resold in certain
9 circumstances.

10 **5. Application of Act**

11 (1) This Act applies to tickets for admission to events in Western
12 Australia that are subject to a resale restriction.

13 (2) Subject to subsection (1), this Act extends to conduct, and other
14 acts, matters and things, occurring or existing outside or partly
15 outside Western Australia (whether within or outside Australia).

Part 2 — Resale, supply or advertising of tickets

6. Ticket scalping

A person must not sell a ticket for admission to an event for an amount which exceeds the original ticket price by more than 10%.

Penalty: a fine of \$20 000.

7. Invalid resale restrictions

A resale restriction is void to the extent that it provides for the ticket to be cancelled, surrendered or rendered invalid if the ticket is resold for an amount not exceeding 110% of the original ticket price.

8. Supply of tickets not to be made contingent on other purchases

(1) A person (the *supplier*) must not supply a ticket for admission to an event to any other person (the *recipient*) under an agreement that makes the liability of the supplier to supply the ticket to the recipient contingent on payment by the recipient to the supplier of an amount in consideration for the provision to the recipient of any other goods or services.

Penalty for this subsection: a fine of \$20 000.

(2) Subsection (1) does not apply to the supply of a ticket under —

- (a) an agreement that has been authorised by the event organiser for the relevant event; or
- (b) any other agreement of a kind prescribed by the regulations.

9. Prohibited advertisements

(1) A ticket resale advertisement must not specify an amount for the sale of the ticket that is more than 110% of the original ticket price.

Ticket Scalping Bill 2018

Part 2 Resale, supply or advertising of tickets

s. 10

- 1 (2) A ticket resale advertisement must specify —
2 (a) the original ticket price; and
3 (b) details of the location from which the ticket holder is
4 authorised to view the event (including, for example,
5 any bay number, row number and seat number for the
6 ticket).

7 **10. Ticket resale advertising**

- 8 (1) The owner of an advertising publication must ensure that no
9 prohibited advertisement is published in the publication.
10 Penalty for this subsection: a fine of \$20 000.
- 11 (2) It is a defence to a charge of an offence under subsection (1) to
12 prove that —
- 13 (a) the advertisement was received by the person charged,
14 or by a person acting on that person's behalf, in the
15 ordinary course of carrying on the business or
16 undertaking associated with the advertising publication;
17 and
- 18 (b) the agreement relating to the publication of the
19 advertisement between the person charged and the
20 person placing the advertisement was subject to terms or
21 conditions prohibiting the publication of prohibited
22 advertisements; and
- 23 (c) the person charged, or a person responsible for
24 managing the advertising publication on that person's
25 behalf, as soon as practicable after becoming aware that
26 the prohibited advertisement had been published in the
27 publication, took reasonable steps to ensure that the
28 advertisement was removed from the publication; and
- 29 (d) the person charged took such other steps as were
30 reasonable in the circumstances to ensure that no
31 prohibited advertisement was published in the
32 publication.

Part 3 — Online purchase of tickets

11. Prohibited conduct in relation to the use of ticketing websites

(1) In this section —

security measures, in relation to a website, include any measures of a kind prescribed by the regulations for the purposes of this definition.

(2) A person must not use any software to enable or assist the person to circumvent the security measures of a website to purchase tickets in contravention of the published terms of use of the website.

Penalty for this subsection: a fine of \$100 000.

(3) For the purposes of subsection (2), terms of use of a website are published if they are published on the website.

Part 4 — Miscellaneous

12. Functions of Commissioner

- (1) The functions of the Commissioner include the following —
- (a) to promote the operation and effect of this Act;
 - (b) to conduct educational activities associated with promoting compliance with this Act;
 - (c) to receive complaints and information concerning potential breaches of this Act and, if the Commissioner considers it warranted, to investigate any matter and to take any action in respect of those complaints or that information considered to be appropriate by the Commissioner;
 - (d) to publish (in any form) statements identifying and giving warnings about conduct or practices that are in breach of this Act, including by identifying persons who engage or are likely to engage in such conduct or practices;
 - (e) to perform other functions associated with the operation or enforcement of this Act, or otherwise conferred on the Commissioner under, or for the purposes of, this Act.
- (2) The Commissioner must not make or issue a statement under subsection (1)(d) that identifies a specific person unless satisfied that it is in the public interest to do so.

13. Application of the *Fair Trading Act 2010*

- (1) The following provisions of the *Fair Trading Act 2010* apply, with any modifications that are necessary for the purposes of this Act, as if those provisions were a part of this Act —
- (a) sections 60 and 61;
 - (b) Part 6, other than sections 64 and 65 and Division 4A;

- 1 (c) Part 7, other than sections 96, 97, 98, 100 and 108 and
2 Division 4;
- 3 (d) Part 8, other than section 116.
- 4 (2) For the purposes of subsection (1), the *Fair Trading Act 2010* is
5 to be read as if —
- 6 (a) a reference to “this Act” or “this or any other Act” were
7 a reference to this Act; and
- 8 (b) the words “or another Act”, “or any other Act” (other
9 than in section 60(1)) or “or another Act that confers
10 functions on the Commissioner” were deleted; and
- 11 (c) a reference to “the Department” were a reference to the
12 department of the Public Service principally assisting
13 the Minister in the administration of this Act; and
- 14 (d) the words “or a police officer assisting in an
15 investigation under section 88D” in paragraph (c) of the
16 definition of ***authorised person*** in section 63 were
17 deleted; and
- 18 (e) the words “the *Fair Trading Act 2010*” were inserted in
19 the definition of ***investigator*** in section 63 after the
20 words “designated under”; and
- 21 (f) the words “the *Fair Trading Act 2010*” were inserted in
22 section 66 after the words “the document provided
23 under”; and
- 24 (g) sections 77(6), 89(2A) and (5A), 95(5), 106(3)(c) and
25 112(3)(c)(ii), (da) and (f) were deleted; and
- 26 (h) the words “or 4A” in section 88(1) were deleted; and
- 27 (i) the words “or 88E” in section 89(2) were deleted; and
- 28 (j) the words “or 100” in sections 94(1)(a), 105(1) and
29 106(3)(b) were deleted; and
- 30 (k) the definition of ***regulated person*** in section 112(1)
31 were deleted.

s. 14

- 1 (3) Subject to subsection (2), any definition contained in the *Fair*
2 *Trading Act 2010* of a term used in the provisions applied by
3 subsection (1) also applies for the purposes of those provisions.

4 **14. Infringement notices and the *Criminal Procedure Act 2004***

- 5 (1) If this Act is a prescribed Act for the purposes of the *Criminal*
6 *Procedure Act 2004* Part 2, this section applies in relation to the
7 service of an infringement notice under that Part by an
8 authorised officer in relation to an alleged offence under this
9 Act.

- 10 (2) The infringement notice must be served within —
11 (a) 21 days after the day on which the authorised officer
12 forms the opinion that there is sufficient evidence to
13 support the allegation of the offence; and
14 (b) 6 months after the day on which the alleged offence is
15 believed to have been committed.

- 16 (3) The *Criminal Procedure Act 2004* Part 2 is modified to the
17 extent necessary to give effect to this section.

18 **15. Regulations**

- 19 (1) The Governor may make regulations prescribing matters —
20 (a) required or permitted by this Act to be prescribed; or
21 (b) necessary or convenient to be prescribed for giving
22 effect to the purposes of this Act.
23 (2) The regulations may provide for offences against the regulations
24 and prescribe penalties for those offences not exceeding a fine
25 of \$5 000.

26 **16. Review of Act**

- 27 (1) The Minister must review the operation and effectiveness of this
28 Act, and prepare a report based on the review, as soon as
29 practicable after the 5th anniversary of the day on which this
30 section comes into operation.

- 1 (2) The Minister must cause the report to be laid before each House
2 of Parliament as soon as practicable after it is prepared, but not
3 later than 12 months after the 5th anniversary.

APPENDIX 4

LEGISLATION IN OTHER JURISDICTIONS

- 4.1 In the Second Reading Speech, the Minister referred to how the responsible Minister 'is aware that Members present may have different proposals they want examined' for protecting consumers from unscrupulous ticket re-sellers.²²⁸ In light of this, the Committee considered the following features of the Commonwealth, Victoria, Queensland, ACT, South Australia and NSW enactments relating to scalping or reselling.

Victoria

Major Events Act 2009

- 4.2 Historically, the *Sports Event Ticketing (Fair Access) Act 2002* was the first piece of legislation that dealt specifically with ticket scalping by attempting to control scalping activity in the physical vicinity of venues. The Act was later replaced with the *Major Sporting Events Act 2009* (MSEA).
- 4.3 Under the MSEA, the Minister may make a sports ticketing event declaration in respect of a sports event. Within 60 days of the declaration being made, the operator of the event must submit a ticket scheme proposal to the Minister for approval which publicly declares how tickets are to be distributed and to whom and in what quantity.
- 4.4 If the sports event has been declared and there is a condition in the proposal that prohibits the sale or distribution of a ticket (by a person who is not authorised to sell or distribute tickets), then that person has contravened the Act.
- 4.5 To date (November 2018) there have been seven successful prosecutions for ticket scalping with fines ranging from \$500 to \$5 000 issued, as well as costs awarded to the Victorian Government.²²⁹ In addition, *Sport and Recreation Victoria* was successful in securing an injunction against the operators of the website Ticketfinders to prevent them illegally selling tickets to the 2011 AFL Grand Final.
- 4.6 Following a review of the MSEA the Victorian Parliament passed laws on 15 May 2018, to rename MSEA as the *Major Events Act 2009*. The new laws commenced on 1 June 2018. These laws expand the ticket scalping provisions to apply to non-sporting major events (such as cultural events, including theatre events, concerts, gallery exhibitions and festivals). Where an event is the subject of a major event ticketing declaration, it will now be a criminal offence to advertise or resell a ticket for more than 10% above the face value of the ticket.
- 4.7 Fines can range from \$790 up to \$475 000 depending on the nature of the offences. New authorised ticketing officers have been given equivalent powers to that available to police officers under the ticket scalping provisions, to support the Victorian Police in the enforcement of the Act.
- 4.8 In summary, the Act applies to exclusive major events in Victoria, or key note events that an event promoter or organiser actively seeks application for, expanding on the *Major Sporting*

²²⁸ Hon Alannah MacTiernan MLC, Minister representing the Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2019, p 4782b-4783a.

²²⁹ Submission 2 from David Smith, Director General, Department of Mines, Industry Regulation and Safety (Consumer Protection), 22 July 2019, paragraph 3.1, footnote 11.

Events Act 2009 to also cover non-sporting events such as cultural events including theatre events, concerts, gallery exhibitions and festivals.²³⁰

Queensland

Major Sports Facilities Act 2001 (MSFA) and the Major Events Act 2014 (MEA).

- 4.9 In Queensland, ticket reselling is regulated under both the MSFA and the MEA. The MSFA applies only to events conducted at declared major sports facilities (typically major stadiums) and the MEA applies to prescribed major events (which occur over larger areas during temporary periods).

MSFA

- 4.10 Under section 30C(1) of the MSFA it is an offence to resell a ticket to a major sports facility event for a price greater than 10% above the original face value of the ticket. It is also an offence to purchase a ticket to a major sports facility event for more than 10% of the original price.
- 4.11 Currently declared major sports facilities under the MSFA include the Brisbane Cricket Ground, Brisbane Entertainment Centre, Suncorp Stadium, Metricon Stadium and other venues.
- 4.12 Enforcement activities under the MSFA are the responsibility of Queensland Police. Penalties for contraventions range from \$65 on-the-spot infringement notices (for contravening the MSFA by purchasing a scalped ticket) to maximum fines of \$2 611 for reselling a ticket in contravention of the MSFA. However, it has become increasingly difficult for the Queensland Police to enforce ticket scalping provisions, particularly due to the growing number of online companies used to resell tickets.

MEA

- 4.13 Similarly, section 31(1)(b) of the MEA prohibits a person from selling tickets to a prescribed major event within a controlled area or a major event area, or at a price greater than 10% above the original sale price of the ticket. The prohibition does not apply where the person has the written approval of the major event organiser.
- 4.14 To date, the Townsville and Gold Coast V8 Supercars, the 2015 AFC Asian Football Cup and the Gold Coast 2018 Commonwealth Games (GC2018) have been prescribed as major events under the MEA.

Australian Capital Territory

Major Events Act 2014

- 4.15 The ACT legislation is similar to Victoria, Queensland and NSW. The Executive may declare an event to be a major event and Part 5 contains provisions protecting ticketing arrangements.
- 4.16 Section 41 creates the offence of 'ticket scalping' which is committed if (a) the person sells or trades a ticket to a major event; and (b) the value of the ticket is more than the original sale price of the ticket; and (c) the person does not have the written permission of the event organiser to do so. 'Sell or trade' a ticket, 'includes any form of transaction in which a substantial purpose of the transaction is the sale or trade of the ticket for a value more than the original sale price of the ticket'. The maximum penalty for breach is 30 penalty units.

²³⁰ Visit Victoria, Major events legislation update. See: <https://corporate.visitvictoria.com/news/major-events-legislation-amendment>. Viewed 12 July 2019.

- 4.17 Under the Act, notice must be given for either a major event (through a Major Event Declaration) or an important sporting event (through an Important Sporting Event Notice).
- 4.18 Since the Act was introduced, the One Day Cricket International (2014) was declared as an important sporting event. Also the AFC Asian Cup (2015), the Cricket World Cup (2015) and the Rugby League World Cup (2017).

New South Wales

Fair Trading Act 1987 and the Major Events Act 2009

- 4.19 In June 2018, NSW Fair Trading advised it had received more than 1000 complaints and enquiries about entertainment and ticketing issues in 2016-17. Viagogo was named on the Complaints Register every month for 2017.²³¹

Fair Trading Act 1987

- 4.20 On 1 June 2018, amendments to the *Fair Trading Act 1987* (a new Part 4A titled: *Regulation of event ticket transactions*) now prohibits the resale of tickets to sporting or entertainment events in NSW, for any amount above the original acquisition cost of the ticket.
- 4.21 Fair Trading NSW applies its *Compliance and Enforcement* policy when deciding what action to take against breaches of the law. The policy sets out a series of escalating options for enforcement, starting with education to achieve compliance and moving to warnings, imposition of penalties and prosecution.
- 4.22 The ticket scalping laws provide for maximum penalties (court-imposed) for all offences of \$22 000 for individuals or \$110 000 for corporations. The *Fair Trading Regulation* also empowers Fair Trading officers to issue a penalty infringement notice (a \$550 fine) for any of the offences under the laws, including one-off breaches. If a ticket is resold in breach of the ticket scalping laws, the event organiser is within their rights to cancel the ticket and refuse entry to the person who holds it.²³²
- 4.23 The original acquisition cost is defined as the original supply cost (or face value) of the ticket, plus the transaction costs not exceeding 10 percent of the original supply cost. Transaction costs include any commission, booking fees, payment surcharges and ticket delivery fees incurred by the first purchaser of the ticket in connection with the purchase of the ticket.
- 4.24 Section 58K, though not expressly referring to 'bot' software, prohibits conduct in relation to 'any software' use of ticketing websites which the WA Bill has essentially replicated.²³³
- 4.25 Further, the new laws prohibit advertising the resale of a ticket for an amount that is more than 110 percent of the original supply cost of the ticket. Any advertisement must also disclose the original supply cost as well as the details of the location from which the ticket holder is authorised to view the event, such as the section, row and seat, as well as the admission type.

²³¹ See: <https://www.nsw.gov.au/news-and-events/news/new-laws-crack-down-on-ticket-scalping/> published 4 June 2018 in NSW Environment, Sport & Recreation news.

²³² See: <https://www.fairtrading.nsw.gov.au/buying-products-and-services/buying-services/buying-tickets-and-ticket-reselling>. Viewed 9 July 2019.

²³³ It states: (1) A person must not engage in any prohibited conduct in relation to the use of a ticketing website. Maximum penalty: 1 000 penalty units (in the case of a corporation) or 200 penalty units (in the case of an individual). (2) A person engages in prohibited conduct in relation to the use of a ticketing website if the person uses any software to enable or assist the person to circumvent the security measures of the website and to purchase tickets in contravention of the terms of use of the website that are published on the website. (3) The security measures of a website include any measures of a kind prescribed by the regulations.

- 4.26 The NSW law also aims to protect 'legitimate' resale by voiding any ticketing condition that invalidates or cancels a resold ticket where the ticket was resold for no more than the original acquisition cost. Further, the Minister is able to issue an order requiring the public disclosure of ticketing information about certain events, provided certain procedural fairness steps for event organisers have been met. When the order is made, the event organiser must give public notification of the number of tickets available for general public sale by authorised sellers (section 58L).

Major Events Act 2009

- 4.27 Like the ACT, the *Major Events Act 2009* facilitates the holding and conduct of major events pursuant to a regulation declaring such an event. Section 3 has seven objects, including the prevention of unauthorised commercial exploitation of major events at the expense of event organisers and sponsors.
- 4.28 Section 37(3) states that an 'authorised officer may give a direction to a person who sells or distributes any prescribed article during the sales control period in a controlled area without the approval of the responsible authority to remove the article, and any other prescribed articles within the person's possession or under the person's control, from the area immediately or by such other time as may be directed'. Regulations could declare event tickets as a 'prescribed article'.
- 4.29 Two other enactments²³⁴ have prohibitions on engaging in unauthorised commercial, trade or business activities on certain public lands or community lands respectively, that would apply to the reselling of event tickets on those lands.
- 4.30 Additionally, various enactments²³⁵ contain prohibitions against trading that in effect would prohibit ticket resale at the relevant venues. However, the prohibitions in these Acts only apply if the sale or attempted sale takes place at the venue or lands in question (that is, they do not apply to internet sales).

South Australia

Fair Trading Act 1987

- 4.31 In South Australia, ticket reselling for certain events was regulated under the *Major Events Act 2013* which formerly required a declaration. From 10 December 2018, amendments to the *Fair Trading Act 1987* now make it an offence to sell a ticket to a sporting or entertainment event in South Australia that is subject to a re-sale restriction, for an amount that exceeds 110% of the original supply cost of the ticket.
- 4.32 Section 37L(2) expressly prohibits conduct in relation to ticketing websites such as using 'any software' to enable or assist the person to circumvent the website's security measures.

Major Events Act 2013

- 4.33 This enactment is similar to the NSW Act. For example, the prohibition against selling a prescribed article 'in a controlled area' without written approval of the event organiser. The Act has four objects and like other jurisdictions, includes supporting and facilitating the holding and conduct of major events that are declared by either the Minister under section 6B or by the Governor prescribing a regulation under section 7. Another object is to prevent

²³⁴ *Crown Lands Act 1989* (NSW); *Local Government Act 1993* (NSW).

²³⁵ *Sydney Cricket and Sports Ground Act 1978* (NSW), the *Sydney Olympic Park Authority Act 2001* (NSW), and the *Centennial Park and Moore Park Trust Act 1983* (NSW).

unauthorised commercial exploitation of major events at the expense of organisers and sponsors.

Tasmania

- 4.34 Tasmania has no stand-alone or fair trading legislation on ticket scalping. Section 6 of the *Australian Consumer Law (Tasmania) Act 2010* applies the ACL which contains provisions that provide a level of coverage to address issues associated with ticket reselling. A warning on the Premier's website provides a link to the ACL.²³⁶

Northern Territory

- 4.35 Similar to Tasmania, the Northern Territory has no stand-alone or fair trading legislation on ticket scalping. Section 27 of the *Consumer Affairs and Fair Trading Act 1990* applies the ACL.

Western Australia

- 4.36 In Western Australia, there is currently no ticket scalping legislation. However, on 19 September 2018 Hon John McGrath MLA introduced a private members bill titled: *Major Events (Ticket Scalping) Bill 2018*. To date, it has not progressed.

Western Australian Local Governments

- 4.37 It is possible for local governments to issue a trader's permit based on a Western Australian Local Government Association's (WALGA) proforma. The *Activities in Thoroughfares and Trading in Public Places Local Law* proforma provides for permits to be issued under Part 6 for trading in thoroughfares and public places (including private land accessible to the public).
- 4.38 WALGA's proforma does not define 'ticket scalping' and in the absence of surveying, it would be highly unlikely that a local government would consider ticket scalping as a suitable trading or stallholder activity.²³⁷ WALGA advised that a large number of local laws do prohibit or restrict street trading in general. Those local laws could apply to a scalper who was selling tickets out in the open but it would depend on the local law's wording and how closely it follows the WALGA proforma.
- 4.39 The Department of Local Government, Sport and Cultural Industries advised that after checking the Department's records and the publicly available Local Laws Register, no local law specifically dealing with ticket scalping was found.²³⁸

New Zealand

- 4.40 New Zealand recently announced it will introduce scalping legislation because the caveat emptor 'mentality is not working'.²³⁹

²³⁶ Andrew Goldsworthy, Acting Director Consumer Affairs and Fair Trading, 'Dangers of ticket resale websites'. See http://www.premier.tas.gov.au/releases/dangers_of_ticket_resale_websites, 4 December 2018.

²³⁷ James McGovern, Manager and Governance, WALGA, Email, 8 July 2019, p 1.

²³⁸ Steven Elliott, Senior Legislation Officer, Department of Local Government, Sport and Cultural Industries, Email, 5 July 2019, p 1.

²³⁹ See: https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12209396, 4 March 2019. New Zealand is included in this Chapter because it has a seat on the *Legislative and Governance Forum on Consumer Affairs*.

APPENDIX 5

INTERJURISDICTIONAL AND INTERNATIONAL REPORTS

In Australia, there have been seven reports or publications on ticket reselling or scalping. In chronological order these are:

1. Commonwealth Consumers Affairs Advisory Council Inquiry, *Consumers and the ticket market Ticket on selling in the Australian market*, Final Report, November 2010.²⁴⁰
2. The Senate's Economics References Committee, Inquiry into *Ticket Scalping in Australia*, March 2014.²⁴¹
3. Queensland Parliament, State Development, Infrastructure and Industry Committee, *Major Events Bill 2014*, (Report No. 51), 20 October 2014.²⁴²
4. Legislative Council, NSW General Purpose Committee No. 4, Report 30: Fair Trading Amendment (Ticket Reselling) Bill 2014, tabled 19 February 2015²⁴³ and its Government response 25 August 2015.²⁴⁴
5. The Australian Government the Treasury, Consultation Regulation Impact Statement, *Ticket Reselling in Australia, November 2017*.²⁴⁵
6. The Australian Government the Treasury, Decision Regulation Impact Statement, *Ticket Reselling in Australia 2018*.²⁴⁶
7. The Legislative and Governance Forum on Consumer Affairs, Joint Communique Meeting of Ministers for Consumer Affairs, 26 October 2018.²⁴⁷

Three relevant international publications are:

1. The United Kingdom, Waterson Inquiry *Independent Review of Consumer Protection Measures Concerning Online Secondary Ticketing Facilities*, May 2016.²⁴⁸

²⁴⁰ See <http://ccaac.gov.au/2010/12/03/ticket-onselling-in-the-australian-market/>.

²⁴¹ See: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Ticket_scalping_2013.

²⁴² See: <https://www.parliament.qld.gov.au/documents/committees/SDIIC/2014/26-MajEvents2014/26-rpt-20Oct2014.pdf>.

²⁴³ See: [https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20\(Ticket.pdf](https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/GPSC4%20-%20Report%2030%20-%20Fair%20Trading%20Amendment%20(Ticket.pdf).

²⁴⁴ See: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2088/150825%20Government%20response%20-%20Ticketing%20inquiry.pdf>.

²⁴⁵ See: https://consult.treasury.gov.au/small-business-and-consumer-division/ticket-reselling-in-australia/supporting_documents/cs2017t234743.pdf.

²⁴⁶ See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>.

²⁴⁷ (Including the New Zealand Minister) Legislative and Governance Forum on Consumer Affairs, Joint Communique Meeting of Ministers for Consumer Affairs. See: <https://ris.pmc.gov.au/2018/11/30/ticket-reselling>. Viewed 25 July 2019. The Forum considers consumer affairs and fair trading issues of national significance and where possible, develops a consistent approach.

²⁴⁸ M Waterson M, *Independent Review of Consumer Protection Measures Concerning Online Secondary Ticketing Facilities*, 26 May 2016.
See:

2. The United Kingdom Government response to Professor Waterson's *Independent Review of Consumer Protection Measures Concerning Online Secondary Ticketing Facilities*, March 2017.²⁴⁹

3. Office of the New York State Attorney, *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, 2016.²⁵⁰

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525885/ind-16-7-independent-review-online-secondary-ticketing-facilities.pdf.

²⁴⁹ Government response to Professor Waterson's *Independent Review of Consumer Protection Measures Concerning Online Secondary Ticketing Facilities*, March 2017. See: <https://www.gov.uk/government/publications/consumer-protection-measures-applying-to-ticket-resale-waterson-review-government-response>. Viewed 16 July 2019.

²⁵⁰ Office of the New York State Attorney, Eric T Schneiderman, *Obstructed View: What's Blocking New Yorkers from Getting Tickets*, p 35. See: https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf. Viewed 16 July 2019.

APPENDIX 6

TICKET SCALPING BILL 2018 RESOURCES PAGE

Legislation

Australian Capital Territory: ACT Major Events Act 2014
New South Wales: Fair Trading Act 1987 NSW and Fair Trading Amendment (Ticket Scalping and Gift Cards) Act 2017
Queensland: Major Sports Facilities Act 2001 and Major Events Act 2014
South Australia: Fair Trading Act 1987 and Major Events Act 2013
Victoria: Sports Event Ticketing (Fair Access) Act 2002 Major Events Act 2009 and Major Events Legislation Amendment (Ticket Scalping and Other Matters) Act 2018
United Kingdom: Digital Economy Act 2017 s105 & s106
British Columbia: Ticket Sales Act 2019

Reports

Decision Regulation Impact Statement Ticket Reselling in Australia 2018 , The Australian Government the Treasury (2018)
Ticketing code of conduct , Live Performance Australia (October 2018)
Ticket reselling in Australia , The Australian Government the Treasury Consultation Regulation Impact Statement (November 2017)
Ticked off: consumers attitudes to secondary ticketing , FanFair (November 2017)
Independent Review of Consumer Protection Measures concerning Online Secondary Ticketing Facilities Waterson Report, United Kingdom (May 2016)
Government response to Waterson Report , United Kingdom (March 2017)
Inquiry into the Fair Trading Amendment (Ticket Reselling) Bill 2014 , NSW Parliament. Legislative Council, General Purpose Standing Committee No. 4 (February 2015) and NSW Government Response
Ticket scalping in Australia , Senate's Economics References Committee (March 2014) and Government response (June 2014)
Consumers and the ticket market: ticket onselling in the Australian market Commonwealth Consumer Affairs Advisory Council (November 2010)
Ticket scalping: Ticket onselling and consumers , Commonwealth Consumer Affairs Advisory Council (May 2010)

Articles

Hon Bill Johnston MLA, Media Statement, 25 November 2018, Ticket scalping Bill goes to Parliament
Pascal Courty (Journal of Cultural Economics vol 43 2019), Ticket resale, bots, and the fair price ticketing curse
Phillipe Cyrenne (Managerial Decision Economics 2019), Antiscalping laws and the selling of season tickets by professional sports teams
Brandon Ferrick (SSRN 2019), The times they are a-changin': incorporating blockchain networks into the event ticket industry
Michael Waterson (Warwick Economic Research Paper 1177 2018), Ticketing as if consumers mattered
Barry Bozeman (Sociological Inquiry vol 88 no 3 2018), Markets, clans, and arbitrage: a participant-observation study of "coopetition" among baseball ticket scalpers
Dylan C Porcello (Brooklyn Law Review, vol 84 2018), A fixed game: the frustrations of ticket scalping and the realities of its solutions
Suzan Delibasic (The New Daily 27 November 2018), Disgusting scam: Australian artists and promoters call for Viagogo ban
Alana Mitchelson (The New Daily, 6 July 2018), The ticket scalping websites ripping off genuine Aussie fans
Nels Popp et al (Journal of Applied Sport Management vol 10 no 1 Spring 2018), Factors impacting ticket price paid by consumers on the secondary market for a major sporting event
Keith Parry (Australasian Leisure Management no 124, 2017), Taking on the scalpers
Keith Parry (The Conversation, 28 November 2017), The new ticketing technology that may make scalping a thing of the past
Paul Crosby (The Conversation, 28 November 2017), The economics of ticket scalping
Aditya Bhawe & Eric Budish (National Bureau of Economic Research Working paper no 23770 September 2017), Primary market auctions for event tickets: eliminating the rents of 'Bob the Broker'
Rod Pilbeam (Australasian Leisure Management no 119 2016), Seller beware
Joe D'Agostino (St John Fischer College Digital Publication, Spring 2016), Factors contributing to consumer's buying habits in the online ticketing industry
Dana Jaskier (Western State Law Review vol 44 2016), Keep the tickets with the fans
Robert McFadden (Washburn Law Journal vol 55 2016), The BOTS Act: a small step for fankind when a giant leap is needed
James Hanley (Music Week 23 May 2016), The great ticketing debate
Nigel Benton (Australasian Leisure Management no 97 2013), Sell out
David E. Harrington (Regulation Fall 2012), Scalping scalpers - or consumers

Joris Drayer (Sport Management Review vol 14 2011), Examining the effectiveness of anti-scalping laws in a United States market
Joris Drayer (Sport Management Review vol 13 2010), Establishing legitimacy in the secondary ticket market: A case study of an NFL market

Media

Alex White (Herald Sun 26 June 2019), Ticket rorts booted: 300 axed but scalpers dodge fines
Stephanie Chalmers (ABC News Online 18 April 2019), Ticket reseller Viagogo engaged in misleading and deceptive conduct, Federal Court finds
ABC Triple J Hack 27 November 2018, Once again, ticket scalpers have left genuine fans fuming. Why can't we get ticketing right
Rachel Clun (Sydney Morning Herald 1 June 2018), New laws to stop 'dodgy' ticket scalping labelled 'a waste of time'
Christie Eliezer (Music Network 5 November 2017), New study shows ticket resale anxiety as Aussies question if Government action is enough
Jake Sturmer (ABC News Online 30 August 2017), Viagogo: google urged to crack down on ticket resellers who are allegedly duping Australian fans
David Weber (ABC News Online 26 August 2017), Ticket scalper warning after Perth Arena turns away 350 people with invalid tickets

GLOSSARY

Term	Definition
ACL	Australian Consumer Law
ACT	Australian Capital Territory
AFL	Australian Football League
Commonwealth Consumers Affairs Advisory Council report	Commonwealth Consumers Affairs Advisory Council Inquiry, <i>Consumers and the ticket market Ticket on selling in the Australian market</i> , Final Report
DMIRS	Department of Mines, Industry Regulation and Safety (DMIRS) Consumer Protection Division
Fake ticket	Fraudulently sold ticket
PCO	Parliamentary Counsel Office
Ticket Brokers Association	Ticket Brokers Association of Australia
WALGA	Western Australian Local Government Association
2014 Senate report	Commonwealth Parliament, Senate, Economics References Committee, Report, <i>Ticket Scalping in Australia</i> , 24 March 2014.
2015 NSW Legislative Council committee report	NSW Legislative Council, General Purpose Committee No. 4 Report 30: <i>Fair Trading Amendment (Ticket Reselling) Bill 2014</i>
2017 Commonwealth Treasury, Consultation RIS	The Australian Government the Treasury, Consultation Regulation Impact Statement, <i>Ticket Reselling in Australia</i> , 2017
2018 Commonwealth Treasury, Decision RIS	The Australian Government the Treasury, Decision Regulation Impact Statement, <i>Ticket Reselling in Australia</i> , 2018

Standing Committee on Legislation


Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'4. Legislation Committee

- 4.1 *A Legislation Committee* is established.
 - 4.2 The Committee consists of 5 Members.
 - 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
 - 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of the Bill.'
- 



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