

RLR Sport:

ELITE INSIGHT

October 2009



ROTSTEIN LOCKWOOD REDDY
COMMERCIAL LAWYERS



Welcome to RLR Sport: Elite Insight

With the AFL Grand Final fresh in our minds (particularly for disconsolate Saints' supporters and jubilant Geelong fanatics), the roar of V8 engines in our ears (with the V8 Supercars gearing up for Bathurst) and the thunder of galloping hooves in our hearts (with the Melbourne Spring Racing Carnival just around the corner) sports fans across Australia are currently spoilt for choice when it comes to watching the sporting greats in action.

In this issue of **RLR Sport: Elite Insight** we examine a number of issues of significance to our clients and punters alike, including:

- The landmark High Court decision of *Spriggs and Riddell*, which deals with the tax deductibility of athletes' management fees.

- The regulation of sports betting.
- The challenges faced by V8 Supercar teams in securing and retaining sponsors.
- Calls for the implementation of national anti-scalping legislation.

I trust that you will enjoy this issue of **RLR Sport: Elite Insight** (especially our interview with professional motor racing driver Marcus Marshall) and, most importantly, be the wiser for having read it.

Warm personal regards

Dean Lockwood
Principal
Rotstein Lockwood Redd



Rotstein Lockwood Reddy is a proud sponsor of the Royal Children's Hospital.

How Much Is That Ticket In The Window?¹



Shelley Wheatley*

Scalp (verb): to resell shares or tickets at a large or quick profit²

Key takeaways

- *Ticket scalping is seen by some to be little more than 'peacetime profiteering'.*
- *In Victoria, the Major Sporting Events Act 2009 (Vic) (the "Major Events Act") allows for tickets to certain events to include terms and conditions that prohibit or restrict those tickets from being sold or distributed for more than their face value without the written authorisation of the sports event organiser.*
- *A person who contravenes the relevant provisions of the Major Events Act commits an indictable offence and may be subject to substantial fines. Anyone who buys a 'scalped' ticket (including from an online auction site such as eBay), will be in jeopardy of the ticket being cancelled, with the result that he or she may be refused entry to the event.*

Introduction

Ticket scalping has probably existed since the first ticketed event was held.

The internet provides 'scalpers' with new tools to utilise to seek to profit from on-selling tickets. For example, in the lead up to the recent AFL Grand Final, internet site eBay had numerous listings which advertised tickets to the match for sale.

In Victoria, ticket scalping was formerly prohibited by the *Sports Event Ticketing (Fair Access) Act 2002* (Vic). This and related legislation (pertaining to crowd control

and advertising) was repealed by the Major Events Act in June this year. The main purpose of the Major Events Act is to consolidate the law relating to major sporting events and event venues. Sport and Recreation Victoria (a unit within the Department of Planning & Community Development) is responsible for administering the Major Events Act.

The anti-ticket scalping provisions

Pursuant to section 166(1) of the Major Events Act, if a ticket to a Sports Ticketing Event contains a condition, printed on the ticket, that prohibits or restricts that ticket from being sold or distributed for more than the face value of that ticket by a person who is not authorised in writing to do that on behalf of the sports event organizer ("Anti-scalping Condition"), a person must not contravene that Anti-scalping Condition. 'Sports Ticketing Events' include the AFL Grand Final series.

Pursuant to section 166(3) of the Major Events Act, a person who contravenes an Anti-Scalping Condition commits an indictable offence and thereby exposes themselves to a fine of up to \$7,009.20 (in the case of a natural person) and \$35,046.00 (in the case of a body corporate). If that person commits multiple offences, the maximum fine increases by a multiple of ten. Furthermore, anyone who buys a scalped ticket is in jeopardy of the ticket being cancelled, with the result that he or she will be refused entry to the event.

Ticket scalping and the AFL Grand Final series

In the lead up to the 2009 AFL Grand Final, numerous listings appeared on eBay which included tickets to the match. In an apparent attempt by some would-be sellers to avoid the Anti-Scalping Condition, the tickets were listed on eBay together with an item of football 'memorabilia'. For example, two tickets to the match were listed for 'free' if they were purchased together with an AFL football card. In that instance, bidding for the football card reached \$1,500.00 (the face value of those tickets was between \$142.50 and \$250.00).

As a result, Sport and Recreation Victoria announced that they were carefully monitoring such listings on eBay. In the past, eBay has said that it works with the Victorian Government with regard to major events and that it removes ticket listings from eBay if advised to do so by the Victorian Government.

In our view, the current Anti-Scalping Condition included on the back of AFL Grand Final tickets may not necessarily be contravened by 'bundled' eBay listings of the kind described above. We expect that the AFL is already giving consideration to how it may need to re-draft the Anti-Scalping Condition for next year's grand final series.

The anti-ticket scalping laws may not, in fact, be fan-friendly

In theory, Victoria's Anti-Ticket Scalping laws help reduce the risk of fans being overcharged for tickets. However, the fact that the laws expressly permit the event organiser to appoint others to on-sell tickets for higher

than the face value of those tickets has contributed to a scarcity of tickets available for fans at their actual face value. For example, it is common for 'authorised on-sellers' to package the tickets with a one-night stay at a hotel and to charge approximately \$2,000.00 for that package. There are a large number of such authorised on-sellers, who are allocated a significant number of tickets. In the result, only a fraction of the total tickets sold for the AFL Grand Final are sold to fans at face value.

* Shelley Wheatley is an Associate in Rotstein Lockwood Reddy's Melbourne office.

¹ Inspired by "(How Much Is) That Doggie in the Window?", Bob Merrill, 1952.

² Compact Oxford English Dictionary.



The internet provides 'scalpers' with new tools to utilise to seek to profit from on-selling tickets



Wanna Bet?



Shelley Wheatley and Daniel Song*

Key takeaways

- *Sport and gambling are inextricably linked for many Australians, with sports wagering attaining annual average compound growth of enviable levels.*
- *All providers of sports betting services in Victoria must obtain approval from the Victorian Commission for Gambling Regulation ("VCGR"), or the relevant sport's peak body in relation to any betting services provided on the sport.*
- *If you intend to offer sports wagering services, or if you already do, you need to ensure that you understand and comply with the applicable laws. Compliance is not something you can afford to leave to chance.*

Introduction

Around the globe, Australia is renowned for being a sports-mad nation. Many Australians are equally enthusiastic about having a bet on the outcome of various sporting pursuits.

The growth in the sports wagering market has been substantial. In a submission to the Victorian Government in 2006, the Coalition of Major Professional Sports (an affiliate of sporting bodies comprising the ARU, the PGA Tour, Tennis Australia, the NRL, the FFA and Cricket Australia), revealed that since the early 1990s, the average compound growth in the sports wagering market had been more than 30% per annum.¹

Regulation of betting

Gambling on sport is highly regulated, with each Australian State and Territory having responsibility for the administration of, and control over, the industry. In Victoria, the relevant body is the VCGR, a public authority which is a representative of the Crown. The functions of the VCGR are prescribed in the *Gambling Regulation Act 2003 (Vic)* (the "Act") under which it is granted "all the powers necessary to perform its functions and achieve its objectives, including the powers conferred on it by or under this or any other act" (section 10.1.5 of the Act).

Functions of the VCGR

The VCGR has a wide range of functions in relation to sports betting, which include:

- Approving sporting and other non-racing events for betting purposes;
- Registering and regulating bookmakers and bookmaker's key employees;
- Making determinations and performing other functions in relation to sports betting;
- Enabling sporting organisations to be approved as the 'peak body' for the purpose of betting on their sport; and
- Informing itself of current and emerging issues and practices in Victoria and elsewhere with respect to gambling, including sports betting.

Sport Controlling Body

Sporting organisations can apply to the VCGR for approval as the peak body for the purpose of betting on their sport ("Sport Controlling Body"). A Sport Controlling Body will have the right to negotiate a financial return with a sports betting provider for betting activities in respect of the Sport Controlling Body's sport. For example, the AFL is the Sport Controlling Body in relation to all sports betting for AFL pre-season competition matches, premiership season competition matches, grand final series matches and the Brownlow medal vote count ("AFL Events"). The AFL has the right to negotiate a financial return from a sports betting provider for any betting on an AFL Event.

In addition to the AFL, Sport Controlling Bodies have been appointed for sports betting on any cricket match conducted by Cricket Australia, any rugby match conducted by the ARL or NRL, any golf game conducted by the PGA and any tennis match conducted by Tennis Australia.

If a sports betting provider wishes to provide betting activities on a sport for which no Sport Controlling Body has been appointed, the sports betting provider must apply to the VCGR for approval.

Penalties

If you are involved with the sports betting market, you need to ensure that you strictly comply with the provisions of the Act. The VCGR has the power to investigate an alleged breach of the Act and can impose fines if a breach is established. For example, if a person or entity fails to comply with an infringement notice issued by the VCGR, the VCGR has the power to impose

a fine of up to \$7,009.20 for any person or entity that provides betting activities without the approval of the relevant Sport Controlling Body (if any), or the VCGR.

Further, a person or entity that breaches the provisions of the Act can expose their brand to negative publicity, as details of that breach may be posted on VCGR's website.

Conclusion

Whether it's having a punt on the winner of the AFL Grand Final, aiming for the trifecta in the Melbourne Cup or placing a bet on who'll triumph at Bathurst, sport and gambling go hand in hand for many Australians. Many businesses have recognised the opportunity to generate substantial profits from sports wagering. However, the industry is highly regulated, and closely scrutinised. Accordingly, if you intend to offer sports wagering services, or you already do, you need to ensure that you understand and comply with the applicable laws. Compliance is not something you can afford to leave to chance.

* Shelley Wheatley is an Associate and Daniel Song is a Solicitor in Rotstein Lockwood Reddy's Melbourne office.

¹ Submission in respect of the Victorian Department of Justice Discussion Paper "Wagering Licence Arrangements Post-2012 Issues Paper" (March 2006).

5 Minutes With Marcus Marshall



RLR was fortunate enough to recently watch a V8 Supercar race from the pits alongside professional motor racing driver Marcus Marshall, who drove in four events during the 2009 V8 Supercar Championship.

RLR: To date in your career you have raced in Formula Ford, Formula Renault, Formula Three, Formula Holden, Champcar, A1 Grand Prix, Carrera Cup, Supercup and V8 Supercars. Which of those cars have you enjoyed racing the most and why?

MM: Yes, I have been fortunate enough to drive some of the best race cars in the world. It is difficult to single out one as my favourite.

I really enjoyed driving in Formula Ford - the races are always very close and there is a lot of 'drafting' involved. You really learn race craft from driving in Formula Ford. Champcar was also awesome. The cars are extremely fast, have 900 horsepower and generate massive down force. Perhaps the wildest aspect of Champcar is the circuits. The majority of tracks are street circuits, such as San Jose, which has a railway line on the start finish straight and on the back straight. Every time I crossed the railway line the car would be completely airborne. Literally flying in a car at 250 kilometers per hour is an exhilarating experience! I also raced Champcar on oval

tracks. It's amazing to drive a car at full throttle for an entire lap at 360 kilometers per hour.

RLR: During this year's V8 Supercar event at Winton raceway, you set a new lap record. How did you do that in a 2008 car, when other teams were running 2009 cars?

MM: Before this year, Winton had been a bogie track for me in a V8 Supercar. So, I was not expecting a great result and I certainly didn't anticipate breaking the lap record.

We were 8th fastest in practice on Friday, where we used our soft tyres, so we had good pace. For Saturday's race, we qualified well [in 14th place], but I had that time taken off me because I crossed the bend line coming out of pit lane. That meant that we started from 20th on the grid for Saturday's race, so we decided to keep our soft tyres for Sunday's race. During Sunday's race, the car was a rocket. I was thrilled to break Jason Bright's 7 year old lap record and we finished 8th. That was a tremendous result for our team, which had only 5 people and no sponsor at the time. I can't wait to race at Winton again in a V8 Supercar!

RLR: What scares you more and why: driving in a motor race or driving with the public on a public road?

MM: That's an easy question to answer - driving on a public road is far scarier. A public road is a very dangerous place and should never be taken lightly. There are speed limits and other road laws for very good reasons.

RLR: You have previously driven in the V8 Supercars event at Bathurst and you plan to race there again this year as part of the Fujitsu series. Why do you think that Bathurst holds such a special place in the heart of Australian motor racing fans?

MM: I'm working very hard to secure a sponsor for this year's race at Bathurst. I have my fingers crossed because I have not missed a race there since 2000.

I am sure that there isn't one person in Australia who has not heard of the great race. It is a unique, brutal and awe-inspiring event. Bathurst is a place where, as a race driver, you can experience the highest of highs and the lowest of lows. The race lasts almost 7 hours, with two drivers for each car and it is the pinnacle of the Holden versus Ford rivalry. The track just has to be seen to be believed. The hills are so steep, with blind crests over the top of the mountain and the cars hit 300 kilometers per hour on Conrod Straight. All of those things, and, of course, the history of the event with iconic past champions such as Brock, Moffat, Richards and Skaife, give it so much character. Every year, more than 2.2 million people in Australia watch the race on television. Everyone has their own special memory of Bathurst.

RLR: What three things do you believe make the difference between being a great racing driver and being a champion racing driver?

MM: Determination, hunger and hard work. The driver who has the most determination, hunger and greatest work ethic will win.

RLR: As you know, we have previously spent 5 minutes with former V8 Supercar driver John Bowe. One of the questions we asked him, we would also like to ask you: why do you think that there has never been a female V8 Supercar series champion?

MM: A great question. I think that, to this point, female drivers haven't been given enough chances. We have Leanne Tander racing this year in V8 Supercars and she does a great job, but you need a lot of time in a V8 Supercar. No one can simply get into a V8 Supercar and be fast. Not even Michael Schumacher would be fast in a V8 Supercar without putting the time in. In my view, it takes between 3 and 5 years to get on top of a V8 Supercar and to have a chance to win the championship.

RLR: When you look back on your career after you retire (whenever that may be), what will you be most proud of?

MM: I'll be most proud of how I started my career - by working my butt off, buying a Formula Ford racecar and learning the hard way how to make a career out of being a racing driver. Deciding that this was the career for me was the best decision I ever made.

RLR: Thank you Marcus. It has been our pleasure to spend 5 minutes with you. We wish you every success in securing a drive at Bathurst this year and for 2010.

FINAL SCORE

Sport: 2 Vs ATO: 1

Spriggs and Riddell v Commissioner of Taxation of the Commonwealth of Australia [2009] HCA 22 (18 June 2009) (“Spriggs and Riddell”)

Dean Lockwood*

Key takeaways

- An Australian Football League (“AFL”) player, Mr. Spriggs and a National Rugby League (“NRL”) player, Mr. Riddell (“the Players”) joined leagues to appeal an ATO decision not to allow the payment of their management fees as a tax deduction under section 8-1(1) of the Income Tax Assessment Act 1997 (Cth) (“ITAA”).
- The ATO won the first round before the Federal Court, the Players beat the ATO on appeal to the Full Federal Court, but the final victory went to the Players in the High Court of Australia
- In a unanimous decision, their Honours held that:
 - (1) There was a sufficient connection between the management fees (the “outgoing”) and the gaining or producing of assessable income from “the business of exploiting sporting prowess and associated celebrity”; and
 - (2) The management fees were “appropriate and adapted for the carrying on of the appellants’ businesses [and] were necessarily incurred in carrying on those businesses.”

Background

Although the Players were involved with different leagues, they entered into essentially similar contracts with different management companies. Each company charged percentage-based fees to assist the Players to negotiate:

- Their contracts with the AFL or the NRL (the “Playing Contracts”); and
- Product endorsements and sponsorships.

The Playing Contracts incorporated other agreements which acknowledged that, aside from their employment with the clubs, the Players would earn ‘non-playing income’ from “sponsorships, endorsements and similar or related non-playing activities, whether carried out in conjunction with the club or independently of it.” (Spriggs and Riddell, para. 30)

The ITAA

Section 8-1(1) of the ITAA allows any outgoings to be deducted from assessable income to the extent that it is:

- (a) Incurred in gaining or producing your assessable income; or
- (b) Necessarily incurred in carrying on a business for gaining or producing assessable income.

Business includes a profession or employment but does not include occupation as an employee (section 995-1 of the ITAA).

An outgoing is disallowed if it is of a capital nature (section 8-1(2) of the ITAA).

The argument

The ATO argued that the Playing Contracts fell into one of two categories, both of which would prohibit the Players from claiming the fees as a deduction (sections 8-1(2) and 995-1 of the ITAA). Specifically, the ATO argued that the management fees:

- (a) Were assets of a capital nature; or
- (b) Were paid for procuring contracts solely of employment.

The Players countered that they were engaged in a business that generated two streams of income, ‘playing’ and ‘non-playing’ income. In the result, they were not simply ‘employees’ and the Playing Contracts were not exclusively contracts of employment.

The decision

The High Court essentially agreed with the Players, allowing the deduction for the following reasons:

- (1) The Playing Contracts were not exclusively contracts of employment. This prevented the ATO from relying on the limiting definition of “business” in section 995-1 of the ITAA to disallow the fees.
- (2) There was “a sufficient connection between the outgoing, the management fees and the gaining or producing of assessable income from the business of commercially exploiting their sporting prowess and associated celebrity.” (Spriggs and Riddell, para. 73)
- (3) That sufficient connection allowed the management fees to be deductible under section 8-1(1) of the ITAA.
- (4) The management fees (the outgoings) weren’t capital expenses as they were not lasting assets. Further, they were of a short-term nature and were subject to renewal.

Conclusion

The Court’s judgment acknowledged that entering into management contracts is a widespread practice, with 90% of AFL players and 90% of the 25 highest-paid players at any NRL club having managerial representation. The implications of this decision are

far-reaching, not only given the sheer number of professional sports people in Australia but also possibly, by extension, for other areas such as the Arts.

*Dean Lockwood is a Principal at Rotstein Lockwood Reddy’s Melbourne office.



Although the Players were involved with different leagues, they entered into essentially similar contracts with different management companies



Gentlemen, Start Your Searching...



Dean Lockwood*

"...over the last few months we have pounded pavements, knocked on doors and racked up as many dollars on the phone bill as frequent flyer points. To date our efforts have totalled zero in sponsorship revenue."
Dean Fiore, Co-owner, Triple F Racing.

Key takeaways

- A number of V8 Supercar teams have faced sponsorship challenges during the 2009 championship season.
- For some teams this season, the financial strain has proven to be too much - one team folded and another team was sold.
- The recent global financial crisis ("GFC") should be embraced as an opportunity, rather than be seen as a problem. By taking an innovative approach to securing sponsorship, and by properly and professionally documenting the arrangements, we consider that a team will position itself well for the future.

Background

V8 Supercars is easily the largest motorsport category in Australia, attracting an average attendance of more than 100,000 fans at each series event and, during 2008, an Australian television viewing audience of approximately 12 million people. V8 Supercar races are also telecast to more than 850 million viewers in 130 different countries. That is huge exposure for sponsors.

Notwithstanding the above, the current championship season has seen a number of teams scrambling to secure sponsors. Of course, the GFC has been a significant contributing factor. However, in our view, there are other reasons why a number of teams have found it difficult to secure sponsors.

Recent examples

According to information that is in the public domain,

at least the following teams have faced sponsorship challenges and/or funding shortfall this year:

- **Team Kiwi Racing:** the team's licence was sold to Triple F Racing in May 2009 after Team Kiwi Racing's owner was declared bankrupt.
- **Ford Performance Racing:** the team's naming rights sponsor, Castrol Lubricants, recently withdrew its sponsorship of the team for reasons that are rumoured to have included a clash of team and sponsor colours.
- **Triple F Racing:** the team has acknowledged that the GFC has significantly hindered its efforts to secure a naming rights sponsor and has instead looked to its fans to secure funding. An initiative known as 'GFC 1200. The Go Fiore Club', offers fans the following for a membership fee of \$1,200.00: two race passes, a team hat, SMS updates during each event, a photo diary at the end of each event, a hi-resolution digital image and an 18cm by 7cm space on the race car's side skirts to display the fan's business or personal name.

In addition to the above, four months after the withdrawal of its naming rights' sponsor (Access Cash), Team IntaRacing folded. In the lead up to the collapse, Team IntaRacing failed to field a car at Townsville or Sandown, exposing the team to two fines from AVESCO of \$150,000.00 each.

In July this year, the number of V8 Supercar teams that were racing without a sponsor promoted AVESCO to state that it has *"...no issues with teams running blank cars so long as they comply with the category rules."* We wonder:

- Whether other sponsors of V8 Supercars, including corporate giants such as Telstra, Vodafone and Bridgestone, share AVESCO's view, or whether those companies have concerns that the inability of some teams to secure sponsors stands to dilute the value

of the investment those companies have made in the sport.

- What changes AVESCO may seek to make to the category rules in the future to reduce the risk of teams' sponsorship difficulties damaging the V8 Supercar brand.

On a more positive note, this season has also heralded some positive sponsorship news, including:

- **Team Vodafone:** the team recently re-signed Vodafone as naming rights' sponsor until 2012.
- **Wilson Security Racing:** the team recently announced a partnership with breast cancer charity, the McGrath Foundation. That innovative move may help the team capture a share of the substantial female fan base for V8 Supercars (particularly because the team is the only one in the championship that has a female driver, Leanne Tander).

What can teams do to improve their chances of securing sponsorship?

Some suggestions for teams include:

- **If possible, take a long term view:** you may need funding now, but if you simply go out and 'look for dollars' (rather than take a strategic, long term approach to identifying, securing, working with and achieving mutual success with a sponsor), you will be merely repeating the mistakes of other teams before you who have disappeared from the sport.
- **Be an innovator, not an imitator:** it may be tempting to approach other teams' sponsors to try to 'poach' team, but again, such an approach will merely repeat the mistakes of others. Innovation is the key to success in every business - the business of a race team is no different.
- **Fill the pipeline:** don't wait until you need a sponsor

before you look for one. If you do, you are more likely to look (and be) desperate. A sponsor, with whom it is worth building a long term relationship, is unlikely to find desperation attractive.

- **Identify your unique value proposition:** what does your team offer a sponsor that no other sport property, including any other V8 Supercar team, can offer? If you don't know exactly what you are selling, you can't expect a potential sponsor's money.
- **Identify target sponsors:** given your unique value proposition, what type of industry (and which specific players within that industry) best fits with your team? Don't approach this question with 'motor industry blinkers' on. A brand of baby oil may well be a better fit for your team than a brand of motor oil.
- **Understand what the sponsor wants and how it will measure value:** with the battle for sponsorship dollars incredibly fierce, any sponsor worth having will not only have a clear picture of what it seeks from the relationship, but will also carefully measure the value to be derived from the arrangement. Listen very carefully to what the sponsor wants and how it will determine success.
- **Clearly document the sponsorship arrangement:** it is critical for both parties to enter into an appropriately detailed sponsorship agreement (that's where the lawyers come in). Don't make the mistake of thinking that you don't need a written agreement, or that you and the sponsor can prepare it yourselves. Countless businesses have failed or suffered significant losses because they decided to be penny wise and pound foolish. Obtaining the right professional assistance should be viewed as an investment.

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¹ see http://www.v8supercars.com.au/content/hero_news/july_2009/v8_supercars_can_run_blank/

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