

# INTERNATIONAL REGULATION OF FANTASY SPORTS: COMPARATIVE LEGAL ANALYSIS OF UNITED STATES, AUSTRALIAN, AND ASIAN LAWS

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## INTRODUCTION

As sports team fans, we often passionately criticize the decisions of coaches and managers with regards to team strategy. For example, most fans often engage in discussions with friends and colleagues on their personal take for team selection. That is their own “fantasy team” of players whom they believe have what it takes to win the match and indeed the championship. However, each of these assembled fantasy teams remains untested because there is simply no method to measure our ability to select the winning fantasy team. Thus, with each new sports season come the chats and critical appraisals of team selection all over again.

However, all of this changed in the 1960s. Since then, sports fans in the United States have had the opportunity to form such “fantasy teams,”<sup>2</sup> (albeit not in the mainstream way of today) and engage in “competition” with other “fantasy teams.” The winning fantasy team is determined by the actual performance of their players in real-life competition.<sup>3</sup> This has been made possible by the use of widely available performance statistics for players and teams.<sup>4</sup>

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<sup>2</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 4 (2012) [hereinafter Edelman, *A Short Treatise*].

<sup>3</sup> *Id.* at 6.

<sup>4</sup> Referred to as ‘sports analytics.’ This practice of using player statistics for team selection for actual professional teams was showcased in the movie ‘Moneyball.’ See Jay R. Wampler, *Every Time I Call It a Game, You Say It’s a Business. Every*

The concept of a fantasy team actually began within academic circles and is attributed to William Gamson,<sup>5</sup> a professor of psychology at Harvard University. Gamson organized the earliest fantasy competition among his peers.<sup>6</sup> Fantasy sports was later popularized by another academic, Daniel Okrant, in New York.<sup>7</sup> As interest in fantasy competitions increased, the practice evolved into a league called the Rotisserie League, named after the New York café where these fantasy team league discussions were held.<sup>8</sup>

The next evolution of fantasy sports occurred through newspapers which popularized sports amongst their readers.<sup>9</sup> Eventually, the advent of the internet in the mid-1990s led to the commercialization of fantasy leagues in the U.S.<sup>10</sup> Participants paid entry fees to fantasy team league operators and created one or several fantasy teams that competed with other participants.<sup>11</sup> The fantasy team operators pegged salary values for each player, which then became the basis of maximum salaries that can be paid for each fantasy sports team.<sup>12</sup> Winning fantasy teams (based on statistical calculations of the actual on-field player's performance) received prize money — sometimes in the millions.<sup>13</sup> In fact, as of 2015, 56.8 million people were registered to play in fantasy sport leagues in the U.S.<sup>14</sup> One of the largest U.S. fantasy sports operators, FanDuel, paid \$564 million in winnings in 2014.<sup>15</sup> There are also reports of people playing fantasy sports full-time with multiple fantasy teams in multiple competitions.<sup>16</sup> The single largest sports league played in fantasy sports is the National Football League (NFL).<sup>17</sup>

The quantum leap in the rate of fantasy sports participation on the internet,

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*Time I Say It's a Business, You Call It a Game.*, 42 N. KY. L. REV. 529, 532 (2015).

<sup>5</sup> Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 120 (2016) [hereinafter Edelman, *Navigating*].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Edelman, *A Short Treatise*, *supra* note 2, at 6-7.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> Edelman, *Navigating*, *supra* note 5, at 121.

<sup>11</sup> Edelman, *A Short Treatise*, *supra* note 2, at 16-17.

<sup>12</sup> Edelman, *Navigating*, *supra* note 5, at 127.

<sup>13</sup> Edelman, *A Short Treatise*, *supra* note 2, at 20-21; Edelman, *Navigating*, *supra* note 5, at 128.

<sup>14</sup> Fantasy Sports Trade Association, *Fantasy Sports Demographic Information*, <http://fsta.org/research/industry-demographics/> (last visited Mar. 16, 2018).

<sup>15</sup> Eric Fisher, *Daily Fantasy Pushes to Continue Growth Streak*, STREET & SMITH'S SPORTS BUS. J. (Mar. 16, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/03/06/Marketing-and-Sponsoring/Daily-fantasy.aspx?hl=youth%20sports&sc=0>.

<sup>16</sup> Doree Lewak, *The Men Who Make Six Figures Off Fantasy Football*, N.Y. POST (Nov. 20, 2014), <https://nypost.com/2014/11/20/meet-the-men-who-make-a-luxe-living-off-fantasy-football/>.

<sup>17</sup> Edelman, *A Short Treatise*, *supra* note 2, at 12.

combined with the availability of fantasy league operators, quickly resulted in a new industry.<sup>18</sup> Many of these operators began capitalizing on the massive growth of the industry in a relatively short time, and started to offer even more prize money and variations of player selection in fantasy sports teams.<sup>19</sup> Operators then moved to variations of the fantasy league format, ranging from those mimicking actual leagues (lasting an entire season) to those that lasted for just a single day (statistics derived from a single match).<sup>20</sup> The latter came to be widely known as Daily Fantasy Sports (“DFS”).<sup>21</sup> Before long, DFS competitions began to resemble games of chance rather than games that purely required a participant’s skilled player selection. For instance, some operators started offering “event” based DFS that offered prize money if a particular event occurred on the playing field.<sup>22</sup> Such outcomes were seemingly far more dependent on luck rather than any form of team selection strategy.

As DFS moved into the gray area between games of skill and games of chance, U.S. lawmakers and gambling regulators started to take notice.<sup>23</sup> Subsequent entry of more fantasy sports operators offering even more myriad forms of fantasy competition forced regulators to consider legislation to curb practices that appeared to be new forms of internet-based gambling.<sup>24</sup> The widely-held definition that most regulators used for gambling was, and continues to be “an agreement between two or more parties to deliberately stake something of value (typically money) with intent to profit from the outcome of an event that is determined wholly, or partially by chance.”<sup>25</sup>

As such, the current legal climate for fantasy sports law in the U.S. is one largely characterized by uncertainty. This is evidenced by regulations at the state level. As this article will discuss, it appears that state lawmakers remain unconvinced that fantasy sports can be separated from online gambling. Another legal concern is that fantasy sports involve wagering based on sports event outcomes, which is prohibited in all but four American states — Nevada, Oregon, Montana, and Delaware.<sup>26</sup>

Legal regulatory responses to fantasy sports in the U.S. is closely monitored across the globe, since sports betting (both legal and illegal) is an

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<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 11.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> Edelman, *Navigating*, *supra* note 5, at 127.

<sup>22</sup> *Id.* at 129.

<sup>23</sup> *Id.* at 133.

<sup>24</sup> *Id.* at 134-35.

<sup>25</sup> Dylan Pickering et al., *Fantasy Sports: Skill, Gambling, or Are These Irrelevant Issues?*, 3 CURRENT ADDICTION REPORTS 307, 309 (2016).

<sup>26</sup> Will Hobson, *Sports Gambling in the U.S.: Too Prevalent to Remain Illegal?*, WASH. POST (Feb. 27, 2015), [https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c\\_story.html?utm\\_term=.6c1f8d5ad526](https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html?utm_term=.6c1f8d5ad526).

industry estimated to be worth \$3 trillion.<sup>27</sup> Three countries in the Asia-Pacific region — Australia, Hong Kong, and Singapore — have particular interest in U.S. regulations, because all three have legalized sports betting. Therefore, overlaps between fantasy sports and gambling are of keen interest to these countries. In fact, Australians are arguably some of the world's biggest gamblers,<sup>28</sup> while Hong Kong has the world's largest horse betting industry.<sup>29</sup> Singapore, which aspires to be an Asian sports hub, has been actively regulating gambling since it issued two casinos licenses in 2006.<sup>30</sup> For these three markets, the U.S. experience is paramount for regulating their own markets. That fact is the focus of this article. In particular, what can Australian, Singaporean, and Hong Kong lawmakers learn from the U.S. experience in regulating fantasy sports?

Part I of this article discusses the rise of fantasy sports across the U.S., while Part II examines the laws that attempt to regulate them. Part III discusses fantasy sports in Australia and the country's existing laws that may be used to regulate fantasy sports. Part IV examines the state of fantasy sports in the Asian sports markets, with a particular focus on Singapore and Hong Kong. Finally, Part V uses the U.S. experience in regard to regulating fantasy sports to offer possible future strategies for effective regulation in the Australia, Singapore and Hong Kong markets.

## I. FANTASY SPORTS LAW IN THE UNITED STATES

### A. *Fantasy Sports Industry in the United States*

Sports occupy a special cultural role in U.S. society. As such, Congress has historically taken great pains to ensure that athletes are not unduly influenced by external factors that may affect their on-field performance.<sup>31</sup> One leading concern has been the influence of betting on the outcome of a sports match. It was feared that if betting on sports events were sanctioned, it would open up possible manipulation of the game to meet the interests of those wagering on the game.<sup>32</sup>

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<sup>27</sup> See AFP, *Global Sports Gambling worth up to 3 trillion*, DAILY MAIL AUSTRALIA (Apr. 16, 2015), <http://www.dailymail.co.uk/wires/afp/article-3040540/Global-sports-gambling-worth-3-trillion.html>.

<sup>28</sup> Jonathan Horn, *Caught in the Game: The Rise of the Sports Betting Industry*, THE MONTHLY (Nov. 2011), <https://www.themonthly.com.au/issue/2011/november/1320384446/jonathan-horn/caught-game>.

<sup>29</sup> Frederick Balfour, *Hong Kong Horse Racing Is Serious Business*, BLOOMBERG (Feb. 22, 2016, 2:19 PM), <https://www.bloomberg.com/news/photo-essays/2016-02-22/hong-kong-horse-racing-is-serious-business>.

<sup>30</sup> Joan Henderson, *Developing and Regulating Casinos: The Case of Singapore*, 12 TOURISM & HOSP. RES. 139, 141-43 (2012).

<sup>31</sup> Sean Gregory, *The Case for Sports Gambling in America*, TIME (Mar 12, 2015), <http://time.com/3741836/the-case-for-sports-gambling-in-america/>.

<sup>32</sup> Jay Caspian Kang, *Could Legalized Gambling Save Us From the Insufferability*

In the U.S., fantasy sports legislation is subject to both state and federal laws.<sup>33</sup> The differing stances taken by states has resulted in a variety of fantasy sports legislation across the country.<sup>34</sup> One can argue that regulation of fantasy sports in U.S. states has been largely demand-driven. In other words, states that have seen a proliferation of fantasy league competition have had to accelerate their responses in their respective legislatures. Furthermore, there have been some cases of arguably hasty and reactive regulations, which have created new risks for existing fantasy sports operators. This section first discusses, in chronological order, the history of sports gambling regulation at the federal level — in particular, the three existing pieces of legislation that curb sports betting.<sup>35</sup> It then follows with a discussion of statewide regulation in the American states.

### 1. *Interstate Wire Act (1964)*

Congress has historically been motivated to control illegal sports gambling — in particular betting on horse races — through the regulation of communications between interested wagering parties.<sup>36</sup> At the time of the Interstate Wire Act's ("Wire Act") enactment, telegraphs and telephones were the two widely used communication methods. Transmission was from pole to pole through telephone wires, and although wires crisscrossed several U.S. states, such transmissions were regulated by federal law.<sup>37</sup>

Under the Wire Act, it is illegal to place bets or wagers interstate.<sup>38</sup> Clearly, the objective of the Wire Act was to regulate illegal sports betting.<sup>39</sup> Despite this, for almost forty years, there was confusion as to whether the act included forms of gambling that were not sports related.<sup>40</sup> For instance, could a person purchasing lottery tickets in a neighboring state receive the results in the person's home state through the internet? In 2011, the Department of Justice (DOJ) finally clarified that the Wire Act does not cover other forms of legal gambling.<sup>41</sup>

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*of Fantasy Sports?*, N.Y. TIMES (April 25, 2017), <https://www.nytimes.com/2017/04/25/magazine/could-legalized-gambling-save-us-from-the-insufferability-of-fantasy-sports.html>.

<sup>33</sup> Edelman, *Short Treatise*, *supra* note 2, at 26, 34.

<sup>34</sup> *Id.* at 31-34.

<sup>35</sup> *See infra* Part I.A (i).

<sup>36</sup> Edelman, *Navigating*, *supra* note 5, at 136.

<sup>37</sup> *Id.* at 135-36.

<sup>38</sup> *Id.*

<sup>39</sup> *See* 18 U.S.C. § 1084 (2012).

<sup>40</sup> I. Nelson Rose, *Gambling and the Law: An Introduction to the Law of Internet Gambling*, 10 UNLV GAMING RES. & REV. J. 1, 4-5 (2005).

<sup>41</sup> Nathan Vardi, *Department of Justice Flip Flops on Internet Gambling*, FORBES (Dec. 23, 2011, 3:56 PM), <https://www.forbes.com/sites/nathanvardi/2011/12/23/departement-of-justice-flip-flops-on-internet-gambling/#13d24927600e>.

## 2. *Professional and Amateur Sports Protection Act (1991)*

In the U.S., university or college level sports is a large industry.<sup>42</sup> University sports is governed by the National Collegiate Athletics Association (NCAA).<sup>43</sup> The NCAA classifies universities and colleges into tiers of competition (called divisions) based on geography and level of sports participation. Under NCAA regulations, university sports remain amateur pursuits.<sup>44</sup> Athletes cannot be paid a working wage for their participation in their university teams and they remain full-time students.<sup>45</sup> However, they can receive athletic scholarships that reimburse the cost of tuition.<sup>46</sup> Further, athletes may not receive any other forms of rewards such as endorsements, appearance fees or sponsorship.<sup>47</sup>

Given the large number of teams and multiple sports in NCAA competitions, it was not surprising that NCAA matches were targeted by illegal bookies.<sup>48</sup> As such, the NCAA has been reluctant to endorse any kind of fantasy sports given traces of links to gambling. Even in U.S. states that have licensed fantasy sports, college sports (including NCAA sports) are prohibited from its roster of offerings. The NCAA is capable of being forceful in this regard, largely because Congress enacted the Professional and Amateur Sports Protection Act (“PASPA”) in 1991.<sup>49</sup> PASPA was designed to combat the surge in U.S. states attempting to legalize sports-related betting.<sup>50</sup> The act prohibits

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<sup>42</sup> Steve Berkowitz, *NCAA Nearly Topped \$1 billion in Revenue in 2014*, USA TODAY (Mar. 11, 2015 4:59 PM), <https://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/>.

<sup>43</sup> See Bill King, *At 100, NCAA Still Defining its Role*, SPORTS BUS. J. (Jan. 9, 2006), <https://www.sportsbusinessdaily.com/Journal/Issues/2006/01/09/SBJ-In-Depth/At-100-NCAA-Still-Defining-Its-Role.aspx> (discussing NCAA’s early years).

<sup>44</sup> Ben Strauss, *N.L.R.B Rejects Northwestern Football Players’ Union Bid*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html?mcubz=0>.

<sup>45</sup> *Id.*

<sup>46</sup> Andy Staples, *The NCAA Needs to Start Planning for a World Where Sports Betting is Widely Legal*, SPORTS ILLUSTRATED (June 30, 2017), <https://www.si.com/college-football/2017/06/30/ncaa-gambling-paspa-sports-betting-compensation>.

<sup>47</sup> Gary Parrish, *Everybody Wins if the NCAA Will Allow Players to Accept Endorsements*, CBS SPORTS (Apr. 12, 2016), <https://www.cbssports.com/college-basketball/news/everybody-wins-if-the-ncaa-will-allow-players-to-accept-endorsements/>.

<sup>48</sup> Staples, *supra* note 46.

<sup>49</sup> Matthew Tsai, *Fantasy (E)Sports: The Future Prospect of Fantasy Sports Betting Amongst Organized Multiplayer Video Game Competitions*, 6 UNLV GAMING L. J. 393, 396 (2016) (discussing another form of fantasy sports, electronic sports or eSports, which further blurs the line between fantasy sports and traditional sports for regulators, since eSports requires actual physical participation in video game like environments, though elements of chance may be present).

<sup>50</sup> *Id.* at 405.

any form of gambling that has links to the outcomes of any sports events or matches in all but four states — Nevada, Montana, Oregon and Delaware — largely not to cause revenue shortfalls to the state economies, since sports betting had been long permissible before the act.<sup>51</sup> Congress also granted four of the professional sports leagues — the National Basketball Association (“NBA”), NFL, Major League Baseball (“MLB”), and National Hockey League (“NHL”) — the power under PASPA to take direct legal action for any forms of infringement.<sup>52</sup>

### 3. *Unlawful Internet Gambling Enforcement Act (2006)*

Congress initially grappled with regulating gambling on the internet. Although the Wire Act can be interpreted to include internet transmissions, Congress realized that other forms of legalized gambling may not fall under the act’s expanded interpretation. Therefore, the Unlawful Internet Gambling Enforcement Act (“UIGEA”) was enacted in 2006 to specifically counter illegal internet gambling sites.<sup>53</sup> The UIGEA targeted firms that facilitated payments and operated in the U.S., and effectively cut off the pipeline to overseas websites.<sup>54</sup>

The UIGEA specifically exempted seven different forms of activity that closely resembled “legalized gambling,” such as commodity trading, insurance, share trading, and fantasy sports.<sup>55</sup> The exemption for fantasy sports was unusual in the sense that Congress was effectively recognizing it as a form of gambling.<sup>56</sup> However, the exemption strengthened the arguments by pro-fantasy sports stakeholders that fantasy games were no more gambling than buying a share of IBM in the securities markets. This was also an open admission that fantasy sports involve a fair share of skillful decisions — akin to share trading or commodity trading — compared to pure chance outcomes.<sup>57</sup> However, the subsequent cautious and often negative reaction of U.S. states to fantasy sports proved that the UIGEA exemption was not intended to shield fantasy sports, especially because it could not be foreseen to be a future legal issue at that time.<sup>58</sup>

<sup>51</sup> *Id.*

<sup>52</sup> Edelman, *Navigating*, *supra* note 5, at 140.

<sup>53</sup> Dennis Halcoussis & Anton D. Lowdenberg, *All in: An Empirical Analysis of Legislative Voting on Internet Gambling Restrictions in the United States*, 33 CONTEMPORARY ECON. POL’Y 17, 17 (2015).

<sup>54</sup> *Id.*

<sup>55</sup> 31 U.S.C. §5362 (1)(E)(i)-(viii) (2012).

<sup>56</sup> Jeffrey Standen, *The Special Exemption for Fantasy Sports*, 42 N. KY. L. REV. 427, 433, 436 (2016).

<sup>57</sup> Edelman, *Short Treatise*, *supra* note 2, at 38.

<sup>58</sup> FanDuel was originally formed in Scotland and moved headquarters in New York, while DraftKings is based in Boston. FanDuel is the market leader with six million registered users as of December 11, 2016. *See* Zachary Shapiro, *Regulation*,

In the midst of federal and state lawmakers observing, reacting, and enacting limited legislation to separate fantasy sports from gambling, several entrepreneurs risked legal test cases by launching fantasy-sports-based websites. The first two pioneering companies were Fan Duel and Draft Kings.<sup>59</sup> However, while these two companies initially appeared to satisfy regulator concerns, they soon faced strong, and at times brutal, resistance.<sup>60</sup> As such, legislation at the state level has been more complex and uncertain. Such an industry predicament has cost fantasy sports businesses significantly, while lawmakers decide whether fantasy sports is a form of gambling, and should therefore be subject to bans or licensing.<sup>61</sup> In a few states, FanDuel and DraftKings have had to cease recruiting new participants, while they wait for clearer laws before restarting their sites.<sup>62</sup>

Across the U.S., there are forty-eight states that allow for some form of gambling — the two exceptions being Utah and Hawaii.<sup>63</sup> In states where gambling is a large industry, fantasy sports regulations have been slow and confusing. The motivation of regulating fantasy sports depends on whether it is considered by respective state legislatures as gambling under a predominant purpose test,<sup>64</sup> material element test,<sup>65</sup> or any chance test.<sup>66</sup> As fantasy sports participation increased dramatically, U.S. states became very cautious and even began to halt existing operations until the appropriate regulations could be put into place.<sup>67</sup>

Until the end of 2015, the uncertainty of regulation — coupled with very few test cases in court — arguably damaged the future of the industry. For example, take the response of New York, where a recent case study observed overzealous regulators using current laws to halt and even prosecute fantasy sports operators.<sup>68</sup> Such moves forced lawmakers to act swiftly to mitigate damage to potential revenue and business reputations. In December 2015, the

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*Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENTMT'L 277, 277, 283-84, 288, 290, 292-96 (2016).

<sup>59</sup> *Id.* at 278.

<sup>60</sup> *Id.* at 288.

<sup>61</sup> See generally Ryan Rodenberg, *Daily Fantasy Sports State-by-state Tracker*, ESPN.COM, [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legal-your-state-state-state-look](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legal-your-state-state-state-look) (last visited Mar. 25, 2018) (discussing states' efforts to legislate or ban fantasy sports).

<sup>62</sup> Shapiro, *supra* note 58, at 291.

<sup>63</sup> Matt Villano, *All In: Gambling Options Proliferate Across USA*, USA TODAY (Jan. 26, 2013, 5:00 PM), <https://www.usatoday.com/story/travel/destinations/2013/01/24/gambling-options-casinos-proliferate-across-usa/1861835/#>.

<sup>64</sup> Edelman, *Navigating*, *supra* note 5, at 130.

<sup>65</sup> *Id.* at 134.

<sup>66</sup> *Id.* at 130 n. 73, 134.

<sup>67</sup> See Rodenberg, *supra* note 61.

<sup>68</sup> Shapiro, *supra* note 58, at 292.



New York Attorney General ordered both FanDuel and Draftkings to stop operating in the state, and later took legal action that sought the return of all monies paid by participants.<sup>69</sup> The Attorney General cited allegations of deceptive practices on the part of both companies, because in his view, the core premise of fantasy sports was one of chance.<sup>70</sup> The New York Supreme Court agreed with the New York Attorney General, and while the companies appealed the detrimental judgment, they also continued to lobby lawmakers.<sup>71</sup> Their effort paid off in August 2016, when New York legislators approved a new law that defined fantasy sports as more skill-based than chance-based, and thus approved licensed operations.<sup>72</sup> This was a landmark change (and reversal) of fantasy sports regulation in the U.S., as New York is a major sporting hub that hosts numerous sports franchises, including among others, the New York Yankees, New York Mets, and New York Jets.

The New York fantasy sports case study had a significant impact. Since early 2016, several states began to introduce and pass new bills regarding fantasy sports.<sup>73</sup> For instance, states like Nevada that derive significant gambling tax revenue, chose to license rather than ban fantasy sports.<sup>74</sup> Moves in this direction implicitly acknowledged that fantasy sports outcomes were more like games of chance, and thus subject to gambling laws.<sup>75</sup> Predictably, the larger fantasy sports companies were skeptical to create legal precedent by challenging such a bill, but continue to lobby Nevada lawmakers to exclude fantasy sports from gambling.<sup>76</sup>

Despite the introduction of bills regarding fantasy sports, as of March 2018, the state of fantasy sports legislation in the U.S. is not very promising.<sup>77</sup> Forty-two states have introduced bills to regulate fantasy sports, but twelve of these forty-two states failed to pass bills for various reasons.<sup>78</sup> Moreover, only eighteen of the forty-two states have now passed laws either regulating fantasy

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<sup>69</sup> *Id.* at 292-93.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 293.

<sup>72</sup> Dustin Gouker, *Daily Fantasy Sports is Back in Business in New York: Governor Cuomo Signs Bill*, LEGAL SPORTS REPORT (Aug. 3, 2016, 3:53), <http://www.legal-sportsreport.com/10890/ny-enacts-dfs-law>.

<sup>73</sup> See Rodenberg, *supra* note 61.

<sup>74</sup> See Matt Youmans, *Fantasy Sports Again a Reality in Nevada*, L.V. REV-J. (June 23, 2016, 10:56 PM), <http://www.reviewjournal.com/opinion/columns-blogs/matt-youmans/fantasy-sports-again-reality-nevada>; see also Rodenberg, *supra* note 61.

<sup>75</sup> See Rodenberg, *supra* note 61.

<sup>76</sup> Daniel Rothberg, *Daily Fantasy Sports Could Make a Comeback in Nevada*, L.V. SUN (Aug. 23, 2016, 4:05 PM), <http://lasvegassun.com/news/2016/aug/23/daily-fantasy-sports-could-make-a-comeback-in-neva/>.

<sup>77</sup> Legislative Tracker, *Daily Fantasy Sports: Sports Tracker* (online), <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Mar. 25, 2018) [hereinafter *Daily Fantasy Sports: Sports Tracker*].

<sup>78</sup> *Id.*

sports or excluding it from gambling laws.<sup>79</sup> There is continued uncertainty in the other remaining twenty states, including highly-populated states like Florida and Texas.<sup>80</sup> However in these twenty states, lawmakers seem to be sending a message that fantasy sports is a form of illegal gambling.<sup>81</sup>

To address this issue, one possibility for fantasy sports operators is to form joint ventures with any of the major sports leagues (and maybe even the NCAA) to offer fantasy sports competitions. Such a strategy is possible because PASPA accords the sports leagues authority for legal proceedings against betting operators using sport performance outcomes.<sup>82</sup> If such a joint venture was formed, scholars are of the view that fellow sports leagues would be reluctant to initiate legal action that would essentially curtail their own future revenue generation.<sup>83</sup> There are also studies to offer empirical support to the notion that fantasy sports actually creates more fans for sports leagues' respective markets.<sup>84</sup> Indeed this theory has been proven with the largest fantasy sports operator, FanDuel, having business ventures or partnerships with the NBA, NBA member clubs, and the NFL.<sup>85</sup>

Irrespective of loopholes such as those in PASPA and improving legislative responses, as of December 2016, fantasy sports remains at an uncertain legal juncture in the U.S.<sup>86</sup> Federal laws, and especially various state laws, have largely been cautious when recognizing the existence of fantasy sports industries. Even though improved sentiments in states like New York have given fantasy sports a lifeline for the interim, the continuing legal impasse in the U.S. has motivated both FanDuel and Draftkings to expand overseas where fantasy sports are not licensed or regulated, and where sports betting is welcome.<sup>87</sup> One such overseas market is Australia.<sup>88</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> That is these twenty-six states are leaning towards "material element test" or "any chance test." The underlying concern of lawmakers in states that have predisposition to these two tests are that skill plays minimal or no part in outcomes (no skill in selection) of fantasy sports team selection.

<sup>82</sup> Edelman, *Navigating*, *supra* note 5, at 140.

<sup>83</sup> *Id.* at 140-41.

<sup>84</sup> See Andrew L. Goldsmith & Matthew Walker, *The NASCAR Experience: Examining the Influence of Fantasy Sport Participation on 'Non-fans'*, 18 SPORT MGMT. REV. 231, 232 (2015).

<sup>85</sup> Austin Carr, *Twisted and Mischaracterized: How FanDuel's CEO is Fighting Back Against Detractors*, FAST COMPANY (April 18, 2016), <https://www.fastcompany.com/3058506/twisted-and-mischaracterized-how-fanduels-ceo-is-fighting-back-against-detractors>.

<sup>86</sup> See Rodenberg, *supra* note 61.

<sup>87</sup> Darren Heitner, *Diagnosing Draft Kings' Spread into the United Kingdom*, FORBES (Feb. 24, 2016), <https://www.forbes.com/sites/darrenheitner/2016/02/24/diagnosing-draftkings-spread-into-the-united-kingdom/#aed8cac4c88c>.

<sup>88</sup> See discussion *infra* Part III.

## II. FANTASY SPORTS LAW IN AUSTRALIA

A. *Fantasy Sports Industry in Australia*

Similar to the U.S., Australian society is very sports centric.<sup>89</sup> Despite just having 7.1% of the population of the U.S., Australian sports teams and athletes regularly feature in the finals of many sporting competitions like rugby, cricket, hockey, soccer, and tennis.<sup>90</sup> As a result, the sports industry dominates national conversations and is regular front-page news in Australian media.<sup>91</sup>

Historically, the Australian government's legal position regarding betting on sports events has been very liberal.<sup>92</sup> This policy differentiates Australian and U.S. sports gaming regulations. Across Australia, it is legal to place bets on sports events.<sup>93</sup> In fact, Australia has very liberal policies for gambling in general, which has resulted in the growth of a large gambling industry.<sup>94</sup> For the period 2014-2015, the Australian legal gambling market revenue was a reported A\$29 billion.<sup>95</sup> Of this revenue, sports wagering had a twenty-percent share of turnover for the same period, with racing-based betting (horse, greyhound) dominating turnover.<sup>96</sup>

<sup>89</sup> See AUSTL. SPORTS COMM'N, AUSPLAY PARTICIPATION DATA FOR THE SPORTS SECTOR SUMMARY OF KEY NATIONAL FINDINGS OCTOBER 2015 TO SEPTEMBER 2016 DATA (2016), [https://www.ausport.gov.au/\\_\\_data/assets/pdf\\_file/0007/653875/34648\\_AusPlay\\_summary\\_report\\_accessible\\_FINAL\\_updated\\_211216.pdf](https://www.ausport.gov.au/__data/assets/pdf_file/0007/653875/34648_AusPlay_summary_report_accessible_FINAL_updated_211216.pdf).

<sup>90</sup> *United States vs. Australia – Country Comparison*, INDEX MUNDI, <https://www.indexmundi.com/factbook/compare/united-states.australia> (last visited Mar. 24, 2018); Allie Schratz, *Top 10 Most Successful Australian Sports Teams*, BUS. CHIEF (June 11, 2012), <http://anz.businesschief.com/top10/1178/Top-10-Most-Successful-Australian-Sport-Teams>.

<sup>91</sup> See generally David Davutovic, *Asian Cup 2015: Over 800 Million People Expected to Tune Into 2015 Tournament*, HERALD SUN (Jan. 8, 2015, 7:21 PM), <http://www.heraldsun.com.au/sport/football/asian-cup/asian-cup-2015-over-800-million-people-expected-to-tune-in-to-2015-tournament/news-story/22f1b667c92683c2e841e8fc0bd93804>; see also Emma Kemp, *'FFA land \$346 million A-League broadcast deal with Fox Sports'*, SYDNEY MORNING HERALD, (Dec. 20, 2016), <http://www.smh.com.au/sport/soccer/ffa-land-346m-a-league-broadcast-deal-with-fox-sports-20161220-gteyq4.html>; Max Mason & John Stenshoff, *'AFL signs \$2.5 bil. broadcast deal'*, SYDNEY MORNING HERALD (Aug. 18, 2015), <http://www.smh.com.au/business/media-and-marketing/afl-to-announce-2b-broadcast-deal-20150818-gj1ppz.html>.

<sup>92</sup> *Gambling in Australia - A Complete Breakdown of Their Gambling Laws*, GAMBLING SITES.COM, <https://www.gamblingsites.com/online-gambling-jurisdictions/australia/> (last visited Feb. 20, 2018).

<sup>93</sup> *Id.*

<sup>94</sup> Horn, *supra* note 28.

<sup>95</sup> Adele Ferguson, *Turnbull Government Must Be Game to Overhaul Online Gaming*, AUSTL. FIN. REV. (Jan. 18, 2016, 12:00 AM), <http://www.afr.com/business/gambling/turnbull-government-must-be-game-to-overhaul-online-gambling-20160117-gm7mil>.

<sup>96</sup> *Id.*

However, there have been concerns that the major downside to a favorable attitude towards sports gambling has been far-ranging and unobservable illegal sports betting.<sup>97</sup> Despite such reservations about gambling, every Australian state or territory has a casino, run their own state lotteries, or permits many forms of machine based gambling (e.g., poker machines) in select venues (e.g. pubs, hotels, clubs).<sup>98</sup> That being said, there has been active regulation within the Australian states and territory to keep the significant gambling activities in Australian society in check. Each Australian state and territory has enacted its own gambling-related laws, primarily allowing single-licensed operators for specific gambling (i.e., TAB for sports betting outlets).<sup>99</sup> The Northern Territory<sup>100</sup> and Norfolk Island<sup>101</sup> have issued multiple *online* operator licenses. As a result, most of the online sports wagering operators are licensed in these two jurisdictions.<sup>102</sup>

Liberal gambling policies have resulted in many Australian companies with links to sports betting like TAB Sports and Crownbet, which in turn have had significant leverage to lobby Australian lawmakers to regulate online gambling to protect the local betting markets.<sup>103</sup> The first legislation passed by the Australian Federal Parliament was the Interactive Gambling Act of 2001.

### 1. *Interactive Gambling Act of 2001*

The Interactive Gambling Act (“IGA”) was enacted in response to issues created by internet based casinos.<sup>104</sup> As online-based games of chance (most

<sup>97</sup> See Reynald Lastra, et al., *Sports Betting-Motivated Corruption in Australia: An Under-Studied Phenomenon*, 4 INT’L J. SOC. SCI. RES. 61, 68 (2016), <http://www.macrothink.org/journal/index.php/ijssr/article/view/8563/7178>.

<sup>98</sup> *Australian Casinos - Gambling Laws and Venues by State in Australia*, AUSTRALIAN GAMBLING.LV, <https://www.australiangambling.lv/casinos/> (last visited Feb. 20, 2018).

<sup>99</sup> See *Casino Control Act 2006* (Austl.); *Casino Control Regulation 2006* (Austl. Cap. Terr.) (Austl.); *Gambling and Racing Control (Code of Practice) 2002* (Austl. Cap. Terr.) (Austl.); *Betting and Racing Act 1998 No. 114* (N.S.W.) (Austl.); *Racing and Betting Act 2004* (N. Terr.) (Austl.); *Bookmakers and Betting Exchange Act 1998* (N.I.) (Austl.); *Racing Act 2002* (Queensl.) (Austl.); *Gaming Control Act 1993* (Tas.) (Austl.); *Gambling Regulation Act 2003* (Vict.) (Austl.); *Gaming and Wagering Commission Act 1987* (W. Austl.) (Austl.).

<sup>100</sup> *Racing and Betting Act 1983* (N. Terr.) (Austl.).

<sup>101</sup> *Bookmakers and Betting Exchange Act 1998* (N.I.) (Austl.).

<sup>102</sup> Jamie Nettleton et al., *Australia in 2* THE GAMBLING LAW REVIEW 56 (Carl Rohsler ed., 2017).

<sup>103</sup> See Jasmine Solana, *Aussie Gambling Giants Kicks Up In-Play Betting War a Notch with Intensified Lobbying Efforts*, CALVINAYRE.COM (Feb. 8, 2016), <https://calvinayre.com/2016/02/08/business/aussie-gambling-giants-kicks-up-in-play-betting-war-a-notch-with-intensified-lobbying-efforts/>.

<sup>104</sup> See *Interactive Gambling Act 2001* (Austl. Cap. Terr.) s 3 (Austl.); see also *Interactive Gambling Act Reforms*, AUSTL. COMM’N AND MEDIA AUTH., <https://www.acma.gov.au/Industry/Internet/Internet-content/Interactive-gambling/>

notably those based overseas) were made available to Australians in the late 1990s, the federal government worked with Australian states and territories to regulate internet-based casinos.<sup>105</sup> The Australian Communication and Media Authority (ACMA) is the government body charged with regulating internet gambling.<sup>106</sup> As of September 2017, internet-based casino gambling is illegal in Australia.<sup>107</sup> However, the IGA has several key exemptions, including the placement of bets through wagering services related to a sporting event.<sup>108</sup> These exemptions ensure that sports and racing related betting conducted online remains legal under Australian law.<sup>109</sup> There is also legal precedent that the IGA does not prohibit betting operators licensed in one state to offer their betting services in other states.<sup>110</sup>

Over the years since its enactment, the IGA was overtaken by new technologies and Australian gamblers' increased access to overseas, illegal gambling websites. For example, an estimated 2,300 overseas online gambling sites offer services to Australians.<sup>111</sup> This led to pressure from legal betting operators in Australia like SportsBet and TabCorp, which forced the federal government to undertake two reviews of the IGA in 2012 and 2015.<sup>112</sup>

One of the main controversies of online betting was "in-play" betting (illegal under the IGA to be offered online) that took bets during a sports event. This service circumvented the restrictions under the IGA for bets made after the

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interactive-gambling-act-reforms, (last visited Feb. 27, 2018) [hereinafter *Interactive Gambling Act Reforms*].

<sup>105</sup> *Gambling in Australia*, ONLINE CASINOS ELITE, <https://www.onlinecasinoselite.org/online-casinos/worldwide/australia> (last visited Feb. 18, 2018).

<sup>106</sup> *See Interactive Gambling*, ACMA, <https://www.acma.gov.au/Industry/Internet/Internet-content/Interactive-gambling/Internet-gambling> (last visited Feb. 18, 2018).

<sup>107</sup> *Interactive Gambling Act 2001* (Austl. Cap. Terr.) s 3 (Austl.).

<sup>108</sup> *Id.* at 9.

<sup>109</sup> The recently passed Interactive Gambling Amendment Bill 2016 has banned 'in-play' or 'live' sports betting, in order to curb sport match related corruption. *See* Josh Butler, *Australia Just Banned Online Poker and Live Sports Betting*, HUFFINGTON POST (Mar. 21, 2017), [http://www.huffingtonpost.com.au/2017/03/20/australia-just-banned-online-poker-and-live-sports-betting\\_a\\_21903788/](http://www.huffingtonpost.com.au/2017/03/20/australia-just-banned-online-poker-and-live-sports-betting_a_21903788/).

<sup>110</sup> *See Betfair Pty Ltd and Anor v. Western Australia* (2008) 244 ALR 32, ¶ 69 (Austl.).

<sup>111</sup> Perry Williams, *Scott Morrison to Spearhead New Online Gaming Review*, SYDNEY MORNING HERALD (Sept. 2, 2015), <http://www.smh.com.au/business/scott-morrison-to-spearhead-new-online-gambling-review-20150831-gjbjqoc.html>.

<sup>112</sup> *See generally* Australian Gov't, Dep't of Broadband, Communications and the Digital Economy, *Final Report 2012: Review of the Interactive Gambling Act 2001* (2012), [https://www.responsiblegambling.vic.gov.au/\\_\\_data/assets/pdf\\_file/0003/23718/Final\\_Report\\_-\\_Review\\_of\\_the\\_Interactive\\_Gambling\\_Act\\_2001-2012.pdf](https://www.responsiblegambling.vic.gov.au/__data/assets/pdf_file/0003/23718/Final_Report_-_Review_of_the_Interactive_Gambling_Act_2001-2012.pdf) (last visited Mar. 18, 2018); Australian Gov't, *Government Response to the 2015 Review of the Impact of Illegal Offshore Wagering* (2016), [https://www.dss.gov.au/sites/default/files/documents/04\\_2016/government\\_response\\_review\\_illegal\\_offshore\\_wagering.pdf](https://www.dss.gov.au/sites/default/files/documents/04_2016/government_response_review_illegal_offshore_wagering.pdf) (last visited Mar. 5, 2018).

start of the event, which are required to only be placed by telephone or in-person at legal betting outlets.<sup>113</sup> In response, the 2012 IGA review recommended continuing the ban on in-play online betting.<sup>114</sup> However, resistance from Australian states prevented such amendments to the IGA.

Despite the lack of amendments, the Northern Territory forged ahead and allowed “in-play” betting, creating an unusual scenario by effectively creating a loophole around the IGA’s restrictions.<sup>115</sup> Facing threats from possible federal responses to plug this loophole, the Northern Territory halted this practice in July 2016.<sup>116</sup> Unfortunately, while the reviews and consultations were being conducted, the sport betting industry was caught in the crossfire between ambiguous legislation, new digital technologies, and an uncertain interpretation of the existing IGA. As a result, two leading sports betting companies in Australia have been subject to legal action.<sup>117</sup> The first was the U.K. based William Hill, which was soon followed by Sportsbet, for offering “in-play” betting.<sup>118</sup>

The legal uncertainty can be said to have dampened investor interest in introducing new forms of digital based fantasy sports in Australia. The IGA’s implication for fantasy sports relates to its definition of gambling services, which includes that “the game is a game of chance or of mixed chance and skill.”<sup>119</sup> However, three fantasy sports investors embraced the risk to test the legal framework in Australia. The first Australian fantasy sports company — Moneyball — began operations in 2015.<sup>120</sup> Its formation and subsequent launch did not attract adverse regulatory scrutiny, which lead one to speculate that Australian lawmakers were open to the eventual establishment of a full-fledged fantasy sports industry.

A second fantasy sports related operator, TopBetta Holdings, then tested the financial regulators when it performed a reverse takeover of an Australian

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<sup>113</sup> *Id.*

<sup>114</sup> Steven Stradbroke, *Australian Government Balks at Legal Online Poker, In-Play Betting*, CALVINAYRE.COM (Mar. 12, 2013), <https://calvinayre.com/2013/03/12/business/australian-government-balks-at-legal-online-poker-in-play-betting/>.

<sup>115</sup> *Id.*

<sup>116</sup> Rick Wallace, *NT Reluctantly Bans In-Play Gambling to Head Off Canberra*, AUSTRALIAN (June 11, 2016), <http://www.theaustralian.com.au/news/nation/nt-reluctantly-bans-inplay-gambling-to-head-off-canberra/news-story/9dda7f47fd92f8eedd08ffa504a48dbd>.

<sup>117</sup> Sarah-Jane Tasker, *ACMA Refers Sportsbet to AFP Over Live Sports In-Play Wagering*, AUSTRALIAN (July 14, 2016, 12:00 AM), <http://www.theaustralian.com.au/business/companies/acma-refers-sportsbet-to-afp-over-live-sports-inplay-wagering/news-story/c51caffbbe4ed7e4dc57dd8366668bbe>.

<sup>118</sup> Both companies are licensed in the Northern Territory. *Id.*

<sup>119</sup> *Interactive Gambling Act 2001* (Austl. Cap. Terr.) s 3 (Austl.).

<sup>120</sup> Tony Boyd, *Moneyball the New Sporting Fantasy*, AUSTL. FIN. REV. (Sept. 4, 2015), <http://www.afr.com/brand/chanticleer/moneyball-the-new-sporting-fantasy-20150904-gjfk5>.

Securities Exchange (ASX) listed company, and later began trading on the ASX in December 2015.<sup>121</sup> Both its listing and trading required approval of its listing prospectus from the Australian Securities and Investment Commission (ASIC), and also required compliance with ASX's listing rules.<sup>122</sup> The approvals obtained from ASIC and ASX served as strong endorsements for the notion that fantasy sports should be considered as sports betting (legal under IGA) and not online gambling (prohibited under IGA). Interestingly, TopBetta was approved for listing despite having a license from the Norfolk Islands, less than a year before Norfolk Island reverted to Australian Federal Parliament rule.<sup>123</sup> The foreseeable event meant TopBetta's license as a sport wagering operator may cease to exist once the new laws took effect.<sup>124</sup> This posed significant risks for TopBetta, but the company instead hedged this risk by also applying for a license from the Northern Territory, which it obtained in August 2016.<sup>125</sup>

A third fantasy sports website, Draftstars, launched in April 2016 and received far more publicity and financial backing than its predecessors.<sup>126</sup> For a start, it was a proven platform used in the U.S. from the established American company Draftday.<sup>127</sup> Further, Draftstars had equity investments from Crownbet, FoxSports, and Seven West Media — three large and influential Australian gambling and sports broadcasters.<sup>128</sup> This outpour of backing and support allowed Draftstars to eventually be licensed by the Northern Territory Racing Commission.<sup>129</sup>

Sports leagues in Australia (unlike those in the U.S. empowered by PASPA) appear to welcome fantasy sports to boost participation in traditional competition.<sup>130</sup> In contrast with the U.S., Australian sports personalities do not

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<sup>121</sup> See Press Release, TopBetta, *TopBetta - Australia's First Fantasy Wagering Business to List on ASX* (Dec. 11, 2015), [http://om-corporate.mugbookie.com/wp-content/uploads/2016/11/TopBetta\\_Lists\\_on\\_ASX.pdf](http://om-corporate.mugbookie.com/wp-content/uploads/2016/11/TopBetta_Lists_on_ASX.pdf).

<sup>122</sup> ASIC is given power under the *Corporations Act 2001 (Cth)* to regulate Australian corporations.

<sup>123</sup> TopBetta, *TopBetta Listing Prospectus* (Nov. 25, 2015), <http://www.asx.com.au/asxpdf/20151211/pdf/433qs813pgmc74.pdf>.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Joss Wood, *Major Australian Broadcaster Invests in DraftStars Daily Fantasy Sports Platform*, LEGAL SPORTS REPORT (Sept. 15, 2016, 10:45 PM), <http://www.legalsportsreport.com/11552/seven-west-media-invests-in-draftstars>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Wood, *supra* note 126.

<sup>130</sup> Daniel Cherny, *AFL Players Unlikely to Follow NFL Player's Lead with Lawsuit Against Fantasy Sports Site, Says Legal Expert*, THE AGE (Nov. 4, 2015, 5:19 PM), <http://www.theage.com.au/afl/afl-news/afl-players-unlikely-to-follow-nfl-players-lead-with-lawsuit-against-fantasy-sports-site-says-legal-expert-20151104-gkqmte.html>.

have image rights protections,<sup>131</sup> which allows for fantasy sport operators to use actual names of current players in traditional leagues. However, the early investors in Australian fantasy sports have teamed with sports governing bodies<sup>132</sup> to lend credibility with participants, and perhaps to appease law makers. Sports governing bodies like the Australian Football League (AFL) have moral obligations to ensure illegal sports betting is curbed within its members' clubs and players.<sup>133</sup>

Meanwhile, the ever increasing barrage of illegal overseas internet gambling sites, and the inability to legislate "in-play" betting at the state level, created significant legal uncertainty in the gambling market, leading the federal government to intervene in 2015 by conducting a second review of the IGA.<sup>134</sup> Headed by former New South Wales Premier Barry O'Farrell, the Review of Illegal Offshore Wagering ("O'Farrell Review") was aimed at addressing the significant competitive imbalance created by offshore operators that offered online betting to Australian consumers.<sup>135</sup>

The O'Farrell Review recommended that offshore betting operators be regulated, and that the Australian regulator (ACMA) be given more power to prosecute with enhanced penalties.<sup>136</sup> In terms of fantasy sports, the O'Farrell Review defined them as "a game where participants assemble imaginary or virtual teams of real players of a professional sport . . . [t]hese teams compete based on the statistical performance of those players in actual games."<sup>137</sup> Therefore, fantasy sports by itself was defined as a game of skill, while betting on the *results* of fantasy sports was defined as gambling.<sup>138</sup> Before fantasy sports could claim victory, the O'Farrell Review recommended that "the treatment of fantasy sports under the IGA be the subject of further consultation with the Coalition of Major Professional and Participation Sports (COMPPS), state and territory governments, and the promoters of fantasy sports

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<sup>131</sup> Tony Conaghan, *When is an Image Right Not a Right? A Look at the Big Business of Sport Stars' Image Rights in Australia*, THOMSON GEER LAWYERS (Sept. 7, 2017), <http://www.tglaw.com.au/ip-blog/2017/09/07/image-right-not-right-look-big-business-sport-stars-image-rights-australia/>.

<sup>132</sup> Ben Lisson, *Concerns Fantasy Sports Could Create New Generation of Gamblers*, ABC NEWS (June 26, 2016, 11:54 PM), <http://www.abc.net.au/news/2016-06-26/fantasy-sports-could-create-new-generation-of-gamblers/7544882>.

<sup>133</sup> Jesse Hogan, *Rules on Sex, Drugs and Life for AFL Draftees*, THE AGE (January 15, 2015), <https://www.theage.com.au/sport/afl/rules-on-sex-drugs-and-life-for-afl-draftees-20150116-12s4ko.html>.

<sup>134</sup> Australian Gov't Dep't of Social Services, *Review of Illegal Offshore Wagering* (Dec. 18, 2015), <https://www.dss.gov.au/communities-and-vulnerable-people/programmes-services/gambling/review-of-illegal-offshore-wagering> [hereinafter *Review of Illegal Offshore Wagering*].

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*



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competitions.”<sup>139</sup>

The O’Farrell Review prompted the federal government to introduce the Interactive Gambling Amendment (Sports Betting Reform) Bill 2015 to the Australian Federal Parliament in November 2016.<sup>140</sup> One of the distinct features of the bill is that it classifies offshore betting as either “regulated interactive gambling” (licensed by Australian States or Territory) or “prohibited interactive gambling.”<sup>141</sup> The bill did not seek to restrict access to offshore sites, but required that “regulated interactive gambling” be offered through onshore Australian betting providers.<sup>142</sup> The Australian Senate passed this bill as the Interactive Gambling Amendment Act of 2017, which came into effect on September 13, 2017.<sup>143</sup>

### III. FANTASY SPORTS LAW IN ASIA

The Asian sports market, which has massive potential given its population size, has nonetheless suffered from lack of impetus for growth.<sup>144</sup> Take for example the most followed sport, football; studies have shown that the Asian football market value is just over ten percent of the European market.<sup>145</sup> At the same time, the Asian sports market is notorious for match fixing scandals.<sup>146</sup> Such predicament is a direct result of the proliferation of illegal gambling. For instance, the size of the illegal betting markets for Asian football<sup>147</sup> dwarfs the official market rights value held by the Asian Football Confederation.<sup>148</sup> These

<sup>139</sup> *Id.*

<sup>140</sup> Paul Farrell, *Australia Introduces Bill to Restrict Online Gambling Operations*, *THE GUARDIAN* (Nov. 9, 2016, 7:36 PM), <https://www.theguardian.com/australia-news/2016/nov/10/government-introduces-bill-to-restrict-online-gambling-operations>.

<sup>141</sup> *Interactive Gambling Act Reforms*, AUSTRL. COMM’N AND MEDIA AUTH., <https://www.acma.gov.au/Industry/Internet/Internet-content/Interactive-gambling/interactive-gambling-act-reforms>, (last visited Feb. 27, 2018) [hereinafter *Interactive Gambling Act Reforms*].

<sup>142</sup> *Id.*

<sup>143</sup> As an update for this article, the bill eventually passed and came into effect on September 13, 2017. See *Interactive Gambling Act Reforms*, *supra* note 141.

<sup>144</sup> See David Rowe & Callum Gilmour, *Sport, Media, and Consumption in Asia: A Merchandised Milieu*, 53 *AM. BEHAV. SCI.* 1530, 1531-32 (2010).

<sup>145</sup> A.T. Kearney, *Winning in the Business of Sports*, A.T. KEARNEY.COM, <https://www.atkearney.com.au/documents/10192/5258876/Winning+in+the+Business+of+Sports.pdf/ed85b644-7633-469d-8f7a-99e4a50aad8> (last visited Mar. 25, 2018).

<sup>146</sup> *Corruption “Has Harmed Asian Football”*, *AL JAZEERA* (June 16, 2011), <http://www.aljazeera.com/sport/football/2011/06/2011616133516707413.html>.

<sup>147</sup> See AFP, *Global Sports Gambling Worth ‘Up to 3 Trillion’*, *DAILY MAIL.COM* (Apr. 15, 2015, 2:01 PM), <http://www.dailymail.co.uk/wires/afp/article-3040540/Global-sports-gambling-worth-3-trillion.html>.

<sup>148</sup> The Asian Football Confederation (AFC), based in Kuala Lumpur, is the governing body for football in Asia. Ossian Shine, *Asian Billion-Dollar Rights Deal*, *REUTERS* (Nov. 24, 2009), <https://www.reuters.com/article/idINIndia-4419452>.

match fixing phenomena have resulted in the arrest and discipline of many players and officials over the years.<sup>149</sup> For instance, entire football leagues in Malaysia and Singapore were involved in match fixing in the 1990s, and some players remain banned from playing professional sports for life to this day.<sup>150</sup>

This context of sports in Asia naturally makes Asian legislators very cautious to liberalize sports gambling. Therefore, sports wagers are only available in four markets — Malaysia, Singapore, Macau, and Hong Kong.<sup>151</sup> Malaysia, Singapore, and Hong Kong were British colonies, and thus gambling has historic foundations from the U.K.<sup>152</sup> Macau, a former Portuguese colony, was the first market to legalize gambling.<sup>153</sup> In the 1980s, Malaysia began issuing lottery licenses to private firms,<sup>154</sup> and was the first among former British colonies in Asia to award a casino license.<sup>155</sup>

This article discusses Singapore and Hong Kong in particular, since the two markets are sports hubs that feature large gambling markets with existing legislation for sports gambling.<sup>156</sup> These three conditions create a future necessity to enact laws that regulate fantasy sports. The selection of these two

<sup>149</sup> Neil Humphreys, *Allardyce scandal sadly reinforces Singapore's dodgy football reputation*, FOURFOUR TWO (Sept. 27, 2016), <http://www.fourfourtwo.com/sg/features/allardyce-scandal-sadly-reinforces-singapores-dodgy-football-reputation>.

<sup>150</sup> See Vijay Vick, *FAM Forgive Scores Involved in 1994 Match-fixing Scandal*, FOURFOUR TWO (May 9, 2016), <https://www.fourfourtwo.com/my/news/fam-forgive-scores-involved-1994-match-fixing-scandal>; *Fixing football from Singapore: A timeline*, BBC (Oct. 28, 2013), <http://www.bbc.com/news/world-asia-24489526>.

<sup>151</sup> *Top countries offering legal betting in Asia betting market*, ASIABETBROKER (Sept. 19, 2016), <http://asiabetbroker.com/top-countries-offering-legal-betting-asia-betting-market/> (AsiaBetBroker is a Philippines licensed betting provider. Philippines was excluded in the article statement, as its gaming industry is in its infancy).

<sup>152</sup> That Malaysia (until 1957), Singapore (until 1957), and Hong Kong (until 1997) were British colonies are historical facts. Facts also show that all horse racing (jockey) clubs and betting in these three countries were established during the British rule. Horse racing in Europe, especially in England are part of societal norms, and clearly such norms were “exported” to these three colonies.

<sup>153</sup> James Fallows, *Macau's Big Gamble*, THE ATLANTIC (Sept. 2007), <https://www.theatlantic.com/magazine/archive/2007/09/macau-s-big-gamble/306131/> (stating that the Portuguese colonial government legalized gambling in Macau in the 1800's).

<sup>154</sup> Malaysia, a multi-ethnic nation, is a non-official Islamic country since Islam is the official religion. As gambling is not allowed in Islam, the government awarded lottery licenses to private companies that are owned by non-Muslims. The two companies, Berjaya Sports Toto, Pan Malaysian Pool and Magnum 4-D run weekly lottery draws. Pan Malaysian Pools took over the government run lottery that raised money for welfare needs.

<sup>155</sup> The first and only casino license was awarded to an ethnic Chinese owned company, Genting Group in 1974. Genting is now a public listed major international gaming company.

<sup>156</sup> See *infra* Sections II.A-B.

markets is further motivated by their city-state status, and for their English common law heritage.

#### A. *Fantasy Sports Industry in Singapore*

Singapore's foray into gambling has its roots in horse racing.<sup>157</sup> The government-run state lottery has also long been a staple of Singaporean society's way of raising funds for charitable purposes.<sup>158</sup> Curiously, while Singapore has been at the center of football match fixing scandals, the government is one of the very few in Asia that has actually legalized sports wagering.<sup>159</sup>

The landscape of gambling in Singapore shifted in 2006, when the parliament passed the Casino Control Act.<sup>160</sup> This opened the doors for table card games at full-fledged casinos.<sup>161</sup> The government promptly awarded two licenses to international gaming firms that began operations in 2010.<sup>162</sup> That same year, the Singapore Law Reform Committee was commissioned by the government to undertake the first review of online gaming in Singapore.<sup>163</sup> The report concluded by offering Singapore three models based on those of the U.S., U.K., and Australia to regulate internet betting.<sup>164</sup> In addition, it should be noted that while the committee report commented on fantasy sports regulation in the U.S., it concluded that U.S. regulators viewed fantasy sports as skill-based.<sup>165</sup> Nonetheless, the Singaporean government did not enact any legislation for fantasy sports from 2010-2015. Since then, in line with its ambitions to become a sports hub, Singapore lawmakers have been actively enacting sports betting legislation. In February 2015, the Remote Gambling Act took effect, prohibiting online and telephone betting.<sup>166</sup> The Remote Gambling

<sup>157</sup> See generally Bonny Tan, *Singapore Turf Club*, NAT'L LIBR. BOARD SING., [http://eresources.nlb.gov.sg/infopedia/articles/SIP\\_136\\_2004-12-30.html](http://eresources.nlb.gov.sg/infopedia/articles/SIP_136_2004-12-30.html) (last visited Feb. 19, 2018).

<sup>158</sup> *About Us*, SINGAPORE POOLS, <http://www.singaporepools.com.sg/en/ci/Pages/default.aspx> (last visited Feb. 19, 2018).

<sup>159</sup> See generally *Sports Betting*, SINGAPORE POOLS, <http://www.singaporepools.com.sg/en/faq/Pages/sports-betting.html> (last visited Feb. 25, 2018).

<sup>160</sup> Joan Henderson, *Developing and Regulating Casinos: The Case of Singapore*, 12 TOURISM & HOSP. RES. 139, 142 (2012).

<sup>161</sup> *Id.*

<sup>162</sup> The Singapore government organized a global tender process. The first tender was awarded to Las Vegas Sand which went on to build the Marina Bay Sands. The second tender was awarded to the Genting Group of Malaysia, which opened Resort World Sentosa.

<sup>163</sup> Joyce A. Tan, et al., *Report of the Law Reform Committee on Online Gaming and Singapore*, RES. COLLECTION SCH. L., iii (July 2010), [http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3918&context=sol\\_research](http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3918&context=sol_research).

<sup>164</sup> *Id.* at 39-40.

<sup>165</sup> *Id.* at 9.

<sup>166</sup> Remote Gambling Act 2014, Part I §§ 5(1)-5(2), Republic of Singapore

Act, similar to the previously discussed UIGEA and IGA, was passed in response to the illegal operation of overseas, online gambling websites.<sup>167</sup>

The impact of the Remote Gambling Act for fantasy sports operators will most likely play out in a scenario similar to that of the U.S. For example, Part 1-4 of the act defines game of chance as “(a) a game that involves both an element of chance and an element of skill or (b) a game that is presented as involving an element of chance.”<sup>168</sup> Part 1-4 (a) therefore signifies Singapore lawmakers did not want to *explicitly* exempt games such as fantasy sports. However, Part 1-4 also provided leeway for future exemptions by including the language “. . .but does not include any game, method, device, scheme or competition specified or described by the Minister, by order in the *Gazette*, as not to be a game of chance for the purposes of this Act.”<sup>169</sup>

In September 2016, the government exempted two state owned sports betting operators, Singapore Pools and the Turf Club, from the Remote Gambling Act, thus launching Singapore’s pioneering online sports betting operators.<sup>170</sup> Given the earlier discussed context of match-fixing, the Singaporean government explained the calculated move to legalize online sports betting: “A complete ban would only serve to drive remote gambling underground, making it harder to detect, and exacerbate the associated law and order, and social concerns.”<sup>171</sup>

#### B. Fantasy Sports Industry in Hong Kong

Hong Kong has historically had a very organized and large horse betting industry, which is likely due to its status as a former British colony.<sup>172</sup> However, another reason for its organization and scale is the acceptance of gambling across Chinese culture as a normative activity.<sup>173</sup> Gambling in Hong Kong is regulated by the Betting Duty Ordinance Cap. 108 and Gambling Ordinance Cap. 148.<sup>174</sup> Under the Gambling Ordinance Act Cap. 148, three betting activities — horse racing, lotteries, and soccer — are legal in Hong

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Government Gazette Acts Supplement, No. 37 (Nov. 26, 2014) [hereinafter Remote Gambling Act 2014].

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at Part I § 4(1).

<sup>170</sup> Danson Cheong, *Online Betting to be Allowed in Next Two Months via Singapore Pools and Singapore Turf Club*, STRAITS TIMES (Sept. 29, 2016, 6:00 PM), <http://www.straitstimes.com/singapore/online-betting-to-be-allowed-in-next-two-months-via-singapore-pools-singapore-turf-club> (last visited Feb. 14, 2018).

<sup>171</sup> *Id.*

<sup>172</sup> See generally Balfour, *supra* note 29.

<sup>173</sup> Evan Osnos, *The God of Gamblers*, NEW YORKER (Apr. 9, 2012), <https://www.newyorker.com/magazine/2012/04/09/the-god-of-gamblers>.

<sup>174</sup> *Hong Kong Gambling Laws*, ONLINEBETTING.COM, <https://www.onlinebetting.com/legal/hong-kong/> (last visited Mar. 25, 2018) [hereinafter *Hong Kong Gambling Laws*].

Kong.<sup>175</sup> In a response to regulate internet gambling, Hong Kong passed the Gambling (Amendment) Ordinance 2002.<sup>176</sup> To this day, Hong Kong's only online betting license holder is the Hong Kong Jockey Club.<sup>177</sup> Contrary to other countries, despite illegal sports betting on football alone reported to be HK\$500 billion, Hong Kong regulators do not want to block illegal websites from being accessed by Hong Kong residents.<sup>178</sup> The regulators confirm they do not intend to interfere with residents' freedom to access the internet.<sup>179</sup> This government policy is in direct contrast with Australian and Singapore regulations.<sup>180</sup>

Another interesting feature of Hong Kong's regulatory environment is that the Hong Kong Jockey Club regularly collects data on illegal betting.<sup>181</sup> Its Director of Security Martin Purbrick speaking at a recent conference said:

The global illegal betting market is likely to be as big as US\$500 billion in transactions, with Asia as the driver. The world's largest legal and illegal betting outlets worldwide are headquartered in Asia, and they are likely responsible for seventy to eighty percent of that illegal market.<sup>182</sup>

Hong Kong's Gambling (Amendment) Ordinance 2002 does not discuss exemptions, but regulators have continued to refrain from aggressive action against illegal online wagering,<sup>183</sup> allowing one to speculate that fantasy sports could be quasi-exempted. Moves for a specific exemption are premature considering the extremely liberal treatment (or non-regulation) of internet gambling at the present time. That being said, this paves the way for fantasy sports operators to offer their services to Hong Kong residents without any real

<sup>175</sup> See Gambling Ordinance, (2012) Cap. 148, 4-5, §3(5), 4 (H.K.); See also *What is Illegal Gambling?*, HONG KONG JOCKEY CLUB, <http://www.hkjc.com/responsible-gambling/en/anti-illegal/index.aspx> (last visited Oct. 3, 2017).

<sup>176</sup> See Gambling (Amendment) Ordinance, No. 12, (2002) 1 O.H.K., §2; see also *Hong Kong Gambling Laws*, *supra* note 167.

<sup>177</sup> Joyce Lim, *Much at Stake for HK Govt in Battle Against Illegal Sports Betting*, STRAITS TIMES (Oct. 11, 2016, 5:00 AM), <http://www.straitstimes.com/asia/east-asia/much-at-stake-for-hk-govt-in-battle-against-illegal-online-gambling>.

<sup>178</sup> Patrick Boehler et al., *Illegal Gambling Sites Will Not Be Blocked in Hong Kong, Says Regulator*, SOUTH CHINA MORNING POST (Sept. 21, 2014, 5:15 AM), <http://www.scmp.com/news/hong-kong/article/1597108/hong-kong-regulators-rule-out-blocking-access-illegal-gambling>.

<sup>179</sup> *Id.*

<sup>180</sup> *Interactive Gambling Act 2001* (Austl. Cap. Terr.) s 3 (Austl.); Remote Gambling Act 2014, *supra* note 166, at Part IV, Section 20(1).

<sup>181</sup> See generally AUST. HORSE INDUS. COUNCIL, *Illegal Gambling Markets Discussed at 36th Asian Racing Conference* (Feb. 10, 2016), <http://www.horsecouncil.org.au/news/illegal-gambling-markets-discussed-at-36th-asian-racing-conference/>.

<sup>182</sup> *Id.*

<sup>183</sup> A.T. Kearney, *supra* note 145.

risk of regulatory interference.

#### IV. STRATEGIES FOR LEGAL REGULATION OF FANTASY SPORTS FOR THE AUSTRALIAN, SINGAPORE, AND HONG KONG MARKETS

The U.S. experience with fantasy sports can offer Australian, Singaporean, and Hong Kong legislators many lessons. Inevitably, the most prudent way forward is to analyze such outcomes and craft strategies to use for their own jurisdictions. The author believes there are four such strategies: distinguishing fantasy sports from gambling, drafting new fantasy sports laws, establishing separate regulatory agencies for fantasy sports, and creating a transition window to implement a new fantasy law framework. The following sections will discuss each one of these four recommended strategies.

##### A. *Separate Fantasy Sports and Gambling*

The confusion that pre-dated active legislation in the U.S. can be traced to regulators' attempts to apply gambling laws to fantasy sports.<sup>184</sup> One reason for this was fantasy sports' association with games of chance.<sup>185</sup> U.S. lawmakers began to unravel this fallacy when they returned to the foundation of what fantasy sports truly entails — selecting a team of players, not chance events — and contrasted it with true games of chance. Gambling begins with mathematical chance related to the type of gambling, then descends into games with different risk appetites.<sup>186</sup> For example, it is well known that keno (a form of lottery) has lower odds of winning compared to the game of poker (which requires elements of skill).<sup>187</sup>

Granted, player performance in fantasy sports is still subject to a few chance occurrences, such as player fitness or penalties during the game (e.g., red card). But a major part of fantasy sports can still be attributed to one's skill in analyzing player performance and statistics on past on-field performance.<sup>188</sup> Australian lawmakers can refer to the O'Farrell Review of the Australian IGA that acknowledges this when defining fantasy sports teams as “[t]eams [that] compete based on the statistical performance of those players in actual

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<sup>184</sup> Shapiro, *supra* note 58, at 292 (discussing extensively that New York law that impacts fantasy sports, a good example of how legislators in other states may have been prompted to respond).

<sup>185</sup> Gouker, *supra* note 72.

<sup>186</sup> See Robert Hannum, *Casino Mathematics*, UNLV CTR. GAMING RES., <http://gaming.unlv.edu/casinomath.html> (last visited Feb. 14, 2018).

<sup>187</sup> *Id.* (stating that the house advantage for three-card poker is 3.4%, while for keno it is 27%).

<sup>188</sup> For example, five U.S. states (Indiana, Kansas, Maryland, Rhode Island and Virginia) that have passed fantasy sports legislation have explicitly acknowledged that fantasy sports are skill based. See Rodenberg, *supra* note 61.

games.”<sup>189</sup>

In line with this strategy, three legal interventions are recommended. The first is to amend current gambling laws to clarify definitions of gambling to exclude words to the effect of “gambling is a mix of games of chance and games of skill.” For example, Part 1-4 of Singapore’s Remote Gaming Act currently contains language that describes gambling as a “game that involves both an element of chance and an element of skill.”<sup>190</sup> To begin, a suggested change could be “gambling are games which pre-dominantly involve chance rather than skill.” Games like poker, which is widely acknowledged as involving a combination of luck and skill, may need a separate mention, so as to not fall out of this definition.<sup>191</sup> The effect of these amendments, would help position fantasy sports beyond the sphere of gambling. As guidance, regulators may be interested to study the fantasy sports bill in Missouri, which makes a distinction between fantasy sports regulation and gambling law with an exemption,<sup>192</sup> and the language of Section 12-15.5—102 of Colorado’s Bill Concerning the Regulation of Fantasy Contests defining fantasy sports:

All winning outcomes reflect the relative knowledge and skills of the participants and are determined predominantly by accumulated statistical results of the performance of athletes in fully completed sporting events; except that a sporting event that has been called or suspended due to weather of any other natural or unforeseen event is considered fully completed.<sup>193</sup>

Second, for any amendment to work effectively, the fantasy sports to be excluded by the any new amendments should only be outcome based. That is, fantasy sports should involve purely team selection competition (either DFS or full season) and not event type competition (e.g., number of fouls for a player in a game).

Third, fantasy sports should be prohibited from all outlets where gambling takes place like casinos or clubs. Moreover, online gambling operators who also offer fantasy sports (e.g., TopBetta in Australia) should offer games

<sup>189</sup> *Review of Illegal Offshore Wagering*, *supra* note 134, at 5.

<sup>190</sup> *See* Remote Gambling Act 2014, *supra* note 166.

<sup>191</sup> Mosi Secret, *Poker is More of Game of Skill Than of Chance, a Judge Rules* (Aug 21, 2012), N.Y. TIMES, <https://www.nytimes.com/2012/08/22/nyregion/poker-is-more-a-game-of-skill-than-of-chance-a-judge-rules.html>; Noga Alon, *Poker, Chance and Skill*, (Tel Aviv University Working Paper 2007), <http://www.cs.tau.ac.il/~nogaa/PDFS/skill.pdf> (stating that “[b]y analyzing simplified versions of poker we have seen that although like in essentially almost any other game there is some influence of chance in poker, the game is predominantly a game of skill”).

<sup>192</sup> Brian Feldt, *Daily Fantasy Sports Now Legal in Missouri*, BZI JOURNAL.COM (June 15, 2016), <https://www.bizjournals.com/stlouis/blog/biznext/2016/06/daily-fantasy-sports-now-legal-in-missouri.html>.

<sup>193</sup> *See* H.B. 16-1404, 70th Gen. Assemb., 2nd Reg. Sess. (Co. 2016).

through dedicated internet sites. In other words, fantasy sports should remain available strictly on its own digital platform, albeit one that is not shared with other options of online gambling. This venue specificity can be part of any amendments to existing gambling laws with suggested words to the effect of “no other forms of non-gambling related competition, can be made available at venues licensed for gambling activities. Exceptions are non-cash prize activities like darts, pools, etc.”<sup>194</sup>

These three proposed amendments to existing gambling laws may provide prosecutors and the judiciary with a clearer interpretation when investigating possible application of these laws to fantasy sports operators. Still, one can argue that the best route forward is to completely differentiate fantasy sports with dedicated legislation. Such moves could likely strengthen investor confidence, since it would lift the dark cloud currently engulfing fantasy sports laws.

### *B. Two-tier Fantasy Sports Law*

Overzealousness in regulating fantasy sports will likely hurt the growth of the industry. Similar to any forms of games, there needs to be active grassroots that can eventually graduate to the “big leagues.” This grassroots pipeline requires relatively liberal rules or no regulation. Local clubs, university student clubs, and those that do not exceed a total value of prize money, should be in the first tier of any fantasy sports law rule. At the first tier, regulation should ensure that elements of gambling (such as pure event-centered games) are prohibited. Legislators could also restrict certain types of games that can encroach into gambling.

At the second tier, licensing would be necessary once the volume of transactions, participation numbers, or prize money reaches a prescribed ceiling. Legislation passed in the states of Colorado and Indiana may offer good examples.<sup>195</sup> Colorado only requires fantasy sports operators to require licenses for participation above 7,500 players, but requires player registration to ensure they are at least eighteen years of age.<sup>196</sup> Companies seeking licensing to launch commercial-scale fantasy sports sites would be automatically asked to comply with the second tier.

### *C. Separate Regulators for Fantasy Sports*

Once countries start regulating fantasy sports, they will be able to charge

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<sup>194</sup> Pennsylvania’s Bill on Fantasy Sports was unusual as it seeks to allow casinos to offer daily fantasy sports. See H.B. 271, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).

<sup>195</sup> See COLORADO DEPARTMENT OF REGULATORY AGENCIES, [https://www.colorado.gov/pacific/dora/Fantasy\\_Contests\\_FAQ](https://www.colorado.gov/pacific/dora/Fantasy_Contests_FAQ) (last visited March 25, 2018).

<sup>196</sup> *Id.*



licensing fees that can be utilized to create and train specialist regulators. This is suggested since placing regulatory overview within an existing gambling commission may create policing issues. Take for example, the insider trading practices in September 2015 detected at FanDuel and Draftkings in the U.S., which prompted the American Bar Association to share its concerns on policy issues facing fantasy sports.<sup>197</sup> Such illegal practices to use non-public information on player statistics to trade resembled insider trading in the stock markets.<sup>198</sup> That being said, how could a gambling regulator trained in detecting gaming violations be expected to be equally competent in detecting use of insider information?

There are other peculiarities like the diversity of fantasy games (in terms of diversity of sports leagues beyond the big players), variations within existing sports leagues (e.g., seven-a-side rugby), variations in scoring formats (e.g., fifteen v. twenty-one points badminton), and competition formats (e.g., league v. knockout for football) that can result in an array of sub-issues. In addition, regulators may not have to constantly monitor sports league governing bodies for changes that will have an impact on fantasy sports. Further, in future prosecution, specialist knowledge could naturally be a powerful advantage during investigations, filing charges, and in court as expert testimony.

Despite these foreseeable conflicts in law, almost all U.S. states that have passed fantasy sports bills have given existing gaming commissions (e.g., Nevada, Indiana, Missouri, Pennsylvania)<sup>199</sup> or other agencies the authority to be lead regulators.<sup>200</sup> The author, however, is strongly of the view that such a policy will have detrimental results in enforcement, and thus recommends a separate regulatory agency to oversee fantasy sports.

#### *D. Transition Period to Fantasy Sports Regulation*

The knee-jerk reaction to make fantasy sports illegal and halt operations, as initially seen in New York, should be avoided at all costs. FanDuel and Draftkings are companies with large participant pools and strong funding, and were thus available to withstand these kinds of poor enforcement responses while seeking judicial reviews, lobbying lawmakers, and hoping that their customers would return once they re-commenced operations. But the

<sup>197</sup> Richik Sarkar, *Daily Fantasy Sports: A Regulatory Dilemma Worth Resolving*, ABA CONSUMER FIN. SERVS. COMMITTEE NEWSL. (Mar. 2016), [http://apps.americanbar.org/buslaw/committees/CL230000pub/newsletter/201603/feature\\_3.pdf](http://apps.americanbar.org/buslaw/committees/CL230000pub/newsletter/201603/feature_3.pdf).

<sup>198</sup> Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct 5, 2015), <https://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html>.

<sup>199</sup> Rodenberg, *supra* note 61; Colorado Department of Regulatory Agencies, *supra* note 195.

<sup>200</sup> See TENN. CODE ANN. §3-17-103 (2016); *see also* VA. CODE ANN. §18.2-340.15 (2008); *see also* H.B. 16-1404, 70th Gen. Assemb., 2nd Reg. Sess. (Co. 2016).

Australian, Singaporean, and Hong Kong-based fantasy sports pioneers are nascent and have small domestic markets. These firms will likely not be able to be as resilient as FanDuel and Draftkings to survive an onslaught of short-term minded regulations. Consequently, the industry may suffer if the pioneers have to withdraw, giving other future investors little confidence to launch new services.

As an alternative, regulators attempting to draft new bills should indicate from the onset, that if passed, the law would provide an interim period for current operators to adopt and comply with the new regulations. This window may range from a minimum of twelve months to longer than a year. Such a transitionary period would allow for participants to become informed, educated and properly registered. For the smaller fantasy sports operators, such a window may be crucial to raise new funds in order to comply with licensing requirements that often levy licensing fees and force investments in new technology. At the same time, it allows operators opportunities to engage with regulators while licensing processes take shape.

#### CONCLUSION

An analysis of U.S. fantasy sports law reveals that although there has been momentum in addressing its legal status, there remains a disconnect between federal and state legislation across the country.<sup>201</sup> Following the passage of the UIGEA in 2006, and with it providing an unintended exemption for fantasy sports, Congress took a backseat on regulating fantasy sports any further.<sup>202</sup> Between 2009 and 2014, the nascent fantasy sports industry in the U.S. operated without clear regulation.<sup>203</sup> But as fantasy sports league participation surged dramatically, a few operators launched fantasy games that bordered more on games of chance.<sup>204</sup> Naturally, gambling commissions took notice and before long lawmakers started investigating.

State prosecutors quickly realized there were no existing laws that could effectively regulate the new industry, which led them to liberally interpret gambling laws. These prosecutors swiftly labelled all fantasy sports as games of chance (rather than skill), and therefore deemed fantasy sports as illegal sports betting.<sup>205</sup> A few states — New York and Nevada — even caused operators to halt their businesses in 2015.<sup>206</sup> When the industry and the millions of fantasy sports participants protested, lawmakers started introducing bills to

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<sup>201</sup> Philip Marcelo, *New Fantasy Sports Game Revives Sports Betting Concerns*, USA TODAY (Jan 12, 2018), <https://www.usatoday.com/story/sports/nfl/2018/01/12/new-fantasy-sports-game-revives-sports-betting-concerns/109402916/>.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Edelman, *Navigating*, *supra* note 5, at 129

<sup>205</sup> Shapiro, *supra* note 58, at 296.

<sup>206</sup> Shapiro, *supra* note 58, at 296-97.

provide clarity for regulators.<sup>207</sup> Despite this, the progress of bills in state legislatures is discouraging. As of March 2018, more than thirty-two states are without laws regarding fantasy sports.<sup>208</sup> Only eighteen states have passed some form of legislation.<sup>209</sup>

Nevertheless, the lead taken by U.S. lawmakers holds many strategic lessons for regulators in markets where sports betting is legal, all of which will very likely see growth in fantasy sports participation in the next five to ten years.<sup>210</sup> As discussed, these three markets are in the Asia-Pacific region, notably Australia, Singapore, and Hong Kong.<sup>211</sup> All three offer differing context related to sports betting. Australia is the stand out as sports betting is a large wagering market.<sup>212</sup> Further, Australia has recently grappled with regulating fantasy sports.<sup>213</sup> Singapore has taken recent steps to legalize online sports betting, with a new law that has a built in mechanism to tackle future fantasy sports issues.<sup>214</sup> Hong Kong is the clear outlier.<sup>215</sup> A super hub for illegal sports betting, Hong Kong gambling regulators have openly announced they will not deter or block illegal overseas internet gambling websites from offering services to local residents.<sup>216</sup> The result has been a thriving legal and illegal betting market.<sup>217</sup> Further the Hong Kong Jockey Club is one of the world largest sports betting operators.<sup>218</sup> Based on an analysis of the U.S. regulatory experience on fantasy sports, this article offered four strategic approaches for these three markets to appropriately address the issues of regulating fantasy sports.

Finally, the author wishes to recognize that fantasy sports regulation in Asia is still at its infancy.<sup>219</sup> Nonetheless, Australian and Singaporean based fantasy sports operators have targeted China and India as their next big markets.<sup>220</sup> The sheer number of possible participation in these two countries will require well drafted legislation and equally robust regulation. Furthermore, the levels of internet penetration rates (as well as broadband speed connectivity) in Asia is steadily rising, and together with new digital platforms,

<sup>207</sup> Gouker, *supra* note 72.

<sup>208</sup> *Daily Fantasy Sports: Sports Tracker*, *supra* note 77.

<sup>209</sup> *Id.*

<sup>210</sup> Shapiro, *supra* note 58, at 289.

<sup>211</sup> Rodenberg, *supra* note 61.

<sup>212</sup> *See generally supra* Part II.

<sup>213</sup> *See supra* Section III.A.

<sup>214</sup> *See supra* Section III.B.

<sup>215</sup> Gouker, *supra* note 72.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Nick Westra, *Fantasy Sports Firm Eye Billion-dollar Reality in Asia* (July 30, 2017), ASIA TIMES, <http://www.atimes.com/article/fantasy-sports-firms-eye-billion-dollar-reality-asia/>.

<sup>220</sup> *Id.*

fantasy sports in Asia may see an even more dramatic growth than that experienced in the U.S. markets.<sup>221</sup> With this context, in the near term, responses in Australia, Singapore, and Hong Kong will be closely monitored, and along with U.S. regulations will serve as useful references for future drafting of Asian fantasy sports law.

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<sup>221</sup> *Asia Internet, Facebook and Population Statistics*, INTERNET WORLD STATS.COM, <https://www.internetworldstats.com/asia.htm> (last visited Mar. 25, 2018).