



AUSTRALIAN ASSOCIATED PRESS PTY LTD

**AUSTRALIAN ASSOCIATED PRESS PTY LIMITED'S
SUPPLEMENTARY SUBMISSION TO THE SENATE STANDING
COMMITTEE ON ENVIRONMENT COMMUNICATIONS AND THE
ARTS INQUIRY INTO THE REPORTING OF SPORTS NEWS AND THE
EMERGENCE OF DIGITAL MEDIA**

1. EXECUTIVE SUMMARY

Australian Associated Press Pty Limited (**AAP**), in its primary submission dated 6 April 2009 and during the additional evidence provided on its behalf on 16 April 2009, has submitted that the most effective way to protect the public interest in receiving news about sporting and related events is to have a legislated right of access to sporting events for news media.

Following AAP's evidence, it has given consideration as to how the provision of a right of access could best be achieved. AAP has investigated a number of possible approaches and submits that the most appropriate method of achieving a right of access would be the prescription of a mandatory industry code under section 51AE of the *Trade Practices Act 1974* (Cth) (**TPA**).

AAP submits that such a code would:

- appropriately protect news organisations such as AAP from the misuse of market power by sporting organisations;
- ensure the public interest in sporting events is protected by ensuring they receive the best possible news coverage of sporting events;
- achieve this goal with the least interference with and cost to industry players; and
- meet all or most of the criteria for the mandating of such an industry code set out the document "*Policy Guidelines on Making Industry Codes of Conduct enforceable under the Trade Practices Act*", produced by the Department of Treasury, May 1999.

2. POSSIBLE APPROACHES TO A RIGHT OF ACCESS

AAP considers that there are four possible approaches to implementing a right of access for sporting events:

- amendments to the *Copyright Act 1968* (Cth);
- special purpose legislation;
- amendments to the TPA; or
- a mandatory industry code under the TPA.

In evaluating, which of these possible approaches is the most appropriate, AAP has considered which would be the least costly for the industry and which would impose the least regulation on industry participants. Each is discussed below:

2.1 Amendments to the *Copyright Act*

AAP does not consider that mandating an access right within the *Copyright Act* is appropriate. This Act deals with rights in intellectual property, not rights of physical access. Inserting this kind of right would be inconsistent with the purpose of the Act and the nature of the rights granted under it.

Additionally, the *Copyright Act* represents a balance of interests between copyright owners and copyright users, which has been carefully considered and evolves as new technology is developed. The issues which are being considered by the Senate Committee in terms of intellectual property rights have been considered in broader contexts by various reviews of the *Copyright Act*. AAP does not believe that wholesale changes to the balance achieved by the *Copyright Act* is justified within the relatively narrow confines of the issues raised by reporting of sporting news in the era of digital media.

By way of example, a number of suggestions have been made to the Senate Committee to the effect that a type of intellectual property right should attach to the conduct of sporting events so that such a right came into existence as the event was conducted. AAP submits that the *Copyright Act* currently recognises the appropriate intellectual property rights at the appropriate time, being the point at which either the event is recorded in a material form, namely where a cinematograph film is made, or at the point of broadcast of the coverage of a sporting event. Similarly it has been suggested to the Senate Committee that sporting organisations should own still images captured of such sporting events by third parties.

Simply, these suggested "rights" do not exist and are entirely at odds with any recognised intellectual property right in this country. Modification of the *Copyright Act* in the ways suggested would constitute a wholesale restructure of intellectual property rights in this country. Such a change is unwarranted.

Further, recognition within the *Copyright Act* of a right of access would be incongruous with the schema contained in that Act.

2.2 Special purpose legislation

While this is clearly an available method, AAP is of the view that special purpose legislation should be considered only if there is no other appropriate method of implementing the right of access.

2.3 Amendments to the Trade Practices Act

AAP regards the issues faced by it and other news organisations as evidence of market failure and misuse of market power by sporting organisations. In making this submission AAP relies on the instances of effective "lock out" referred to in its primary submission and the evidence given on its behalf to the Senate Committee.

Sporting organisations have complete control over access to the facilities where sporting matches are held. As a primary collector and disseminator of news of sporting events, AAP has no substitutable, alternate source of collecting this information. In this sense, for each sporting event the relevant sporting organisation has complete monopolistic control over permitting access to venues at which those events are conducted and the opportunity to gather first hand, original, unadulterated news content.

As demonstrated to the Senate Committee, sporting organisations currently exploit this monopoly power to dictate terms on which news media may access venues to produce content for their news programs by imposing restrictions on use of news content, imposing editorial restrictions and seeking to alter ownership of intellectual property.

The TPA provides for regimes to reduce misuse of market power and correct market failure.

For example, in the telecommunications arena, the ACCC has the power to "declare" services. If a telecommunications provider provides a declared service to itself, it must also provide an equivalent service to others on terms as agreed or determined by the ACCC.

An available approach would be similar to the declared service access regime in the telecommunications industry. Sporting facilities could be declared by the ACCC and the sporting organisations could be obliged to give all media access on equal terms or such other terms as determined by the ACCC. This could also include a dispute resolution procedure by the ACCC regarding access and terms of access similar to what applies to the telecommunications industry.

While this approach directly addresses the nature of the conduct of the sporting organisations, it is relatively "heavy handed" and likely to impose unnecessary cost on the industry. Also, the key issue to be remedied, although serious, is relatively narrow in the sense that physical access is only one element of the media access arrangements.

Access arrangements of the kind that apply to the telecommunications industry under the TPA are appropriate where the full range of terms and conditions of access need to be regulated, which is not the case here. AAP is of the view that this would be the second most preferable course of action to resolve access rights to sporting events.

2.4 A mandatory industry code of practice under the Trade Practices Act

This is AAP's preferred approach to introducing a right of access to sporting events.

Section 51AE of the TPA provides for voluntary or mandatory industry codes to be prescribed in regulations. Section 51AD provides that a corporation must not contravene a mandatory industry code that applies to them or a voluntary industry code where the corporation has signed up.

AAP notes that mandatory codes in the franchising, horticulture and oil industries prescribe minimum terms and requirements for certain agreements between participants in those industries. Such prescription is almost always to correct an imbalance in the relative bargaining power between the participants. Those codes also provide for a mandatory dispute resolution process, keeping such disputes out of the courts.

As stated above, AAP submits that the recent conduct of some sporting organisations demonstrates a market failure and a misuse of a monopolistic position in respect of the conditions on which access is being granted to news organisations.

The document "*Policy Guidelines on Making Industry Codes of Conduct enforceable under the Trade Practices Act*" produced by the Department of Treasury in May 1999 sets out the criteria for prescription of a mandatory code, namely:

- the code would remedy an identified **market failure** or promote a **social policy objective**; and
- the code would be **the most effective means** for remedying that market failure or promoting that policy objective; and
- the **benefits of the code to the community as a whole** would outweigh any costs; and
- there are **significant and irremediable deficiencies** in any existing self-regulatory regime for example, the code scheme has inadequate industry coverage or the code itself fails to address industry problems; and
- a **systemic enforcement issue** exists because there is a history of breaches of any voluntary industry codes; and
- a range of self-regulatory options and 'light-handed' quasi-regulatory options has been examined and **demonstrated to be ineffective**.

The minister also needs to be satisfied that there is a requirement for a national application of the code, rather than a state-based application.

Addressing each of the above criteria, AAP submits:

- (i) that in addition to the market failure referred to in this submission, a mandatory code would support the social policy objective of ensuring that the public receives quality, unbiased information about significant cultural and social events;
- (ii) a mandatory code is preferable and is the most effective and simplest way to remedy the conduct of the sporting organisations. In particular, it represents the most light handed regulatory measure of the four alternatives considered in this submission;
- (iii) there would be little cost to the public or indeed to any of the relevant participants. The only cost which AAP foresees is that sporting organisations may claim a loss of revenue, however that loss is theoretical given that it is based on their assertion of legal rights which do not exist at law otherwise than by contract as a result of misuse of market power;
- (iv) as demonstrated by recent events, particularly with the AFL, self regulation has failed and sporting organisations are willing to dissemble. In AAP's view there is cogent evidence before the Senate Committee that the conduct of sporting organisations is clearly unacceptable and systematic and is likely to be irremediable; and
- (v) while there is currently no voluntary code, AAP submits that given the sporting organisations approach to the issue and their position before the Senate Committee, a voluntary code is unlikely to be effective.

Given the national nature of sports such as AFL, NRL and cricket, a state based approach is not appropriate.

AAP believes that the use of a prescribed industry code would not interfere with the ability of sporting bodies to make exclusive deals with media for the broadcast of a sporting event, however an industry code of this nature would prevent them from restricting access to news in such a way distorts the market for sporting news content.

In summary, similar anti-competitive power imbalance issues have been solved in the franchising, horticulture and oil industries through the use of mandatory codes. The legislative infrastructure is already in place and the financial impact will be low when weighed against the positive impact on competition.

3. WHAT SHOULD AN INDUSTRY CODE COVER

In AAP's view it is important that an industry code be short, succinct and clear.

In AAP's view, an Access to Sporting Events Code should reflect the following principles:

- All news organisations must be given access to all sporting events for the purposes of news gathering, including photographic news gathering; and
- The terms of such access must:
 - be fair and reasonable;
 - must not interfere with the editorial independence of the news organisation; and

- must not require news organisations to assign or otherwise limit their use of their intellectual property for the purposes of news reporting.

AAP also submits that it is unnecessary to define what "news" is, given that the term is contained in the *Copyright Act* and has been interpreted by the Courts.

AAP is also of the view that it is important that news organisations and sporting organisations have easy and quicker access to dispute resolution mechanisms. AAP is of the view that further consultation should occur with the industry to identify an appropriate dispute resolution mechanism.