Chapter 4

Responding to the challenges of the new media environment

4.1 The committee heard a range of proposals seeking to maintain a balance between the right to report news and the right to sell exclusive broadcast rights on a variety of platforms. Some of these related to copyright, others to news media access to events.

Retain the status quo

4.2 Most media organisations, both news media and rights holders, recommended to the committee that the status quo be maintained.[1] Those submitters in support of maintaining the status quo argued that the current copyright laws, and particularly the fair dealing provisions, were working well, did not require amendment and were the best option for the future:

> This regime relating to the reporting of news is set out in sections 42 and 103B of the Copyright Act and has worked well in establishing the right balance between the commercial imperatives of the rights holders, and the public interest in ensuring the independent reporting of news.
>
> The fact that there are remarkably few instances of proceedings coming before Australian courts regarding the application of sections 42 and 103B of the Copyright Act confirms our view that the current regime of fair dealing exceptions is working well and that the principles underlying it should be preserved.[2]

4.3 The SBS was in agreement with this position:

> As digital media gains in popularity and relevance, it is vital that fair dealing conventions are extended and evolve to meet the needs of the community. SBS believes this process should be allowed to continue, free from regulation, as is currently the case. Status-quo arrangements represent the best possible model for the future.[3]

4.4 Some of the submitters in favour of the status quo did, however, acknowledge some difficulties with accreditation agreements:

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1 See, for example, Hutchison, *Submission 11*; PANPA, *Submission 14*; SBS, *Submission 19*; News Limited, *Submission 20*; and Fairfax Media, *Submission 21*.

2 The Associated Press, *Supplementary Submission*, p. 5.

3 SBS, *Submission 19*, p. 9.

> Beyond accreditation agreements, News is of the view that current laws work well for digital news reporting. There is no case for interfering with the current laws.[4]

And:

> Fairfax Media does not believe, at this time, that legislation is required to remedy this situation. However, we respectfully urge this Committee and the Parliament to continually monitor these developments, specifically by seeking from the relevant parties the formal accreditation terms proposed.[5]

4.5 Maintaining the status quo would leave news media organisations and sporting bodies to continue to act on their own interpretations of fair dealing. There may be future legal action and this would provide direction as to how current fair dealing provisions apply to the digital media environment. The Attorney-General's Department agreed that legal proceedings on fair dealing and its application to digital media would be useful.[6]

4.6 The committee is aware, however, that a number of witnesses to this inquiry considered litigation to be problematic. The AFL claimed that there was a 'high cost of policing infringement and enforcing copyright through litigation'[7] and stated 'litigation, which is too expensive and too grubby…is not something that we want to do'.[8] Cricket Australia agreed that litigation was 'expensive [and] time-consuming'.[9]

4.7 Keeping the situation as it currently stands means that the responsibility for negotiating media accreditation agreements – and resolving disputes – will remain with news media and sporting organisations. In some instances, parties may be comfortable with this (for example, the committee heard that News Limited had sufficient resources and expertise to manage accreditation negotiation disagreements on its own).[10] Other media organisations have been involved in disagreements over media accreditation by sporting organisations for a number of years and to date have been unable to reach satisfactory resolution. It is not clear whether these disputes can be satisfactorily resolved without some outside intervention in the negotiations.

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4 News Limited, *Submission 20*, p. 3.

5 Fairfax Media, *Submission 21*, p. 4.

6 Ms Helen Daniels, Assistant Secretary, Copyright and Classification Branch, Attorney-General's Department, *Proof Committee Hansard*, 5 May 2009, p. 20.

7 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 15 April 2009, p. 32.

8 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 15 April 2009, p. 28.

9 Mr James Sutherland, Chief Executive Officer, Cricket Australia, *Proof Committee Hansard*, 15 April 2009, p. 13.

10 Ms Creina Chapman, Manager, Corporate Affairs, News Limited, *Proof Committee Hansard*, pp 53 & 56.

4.8 Some submitters believed, however, that the costs of changing the status quo and attempting to regulate news reporting would outweigh the benefits, and that:

> …this area of dispute between sports and media should be settled under existing laws. We do not believe that regulating news coverage or imposing artificial definitions of what constitutes news is in the public interest. Regulation of something as complex as news reporting is very difficult and could lead to unintended consequences.[11]

Right of access

4.9 AAP recommended that a guaranteed right of access for the news media at sporting and related events would be 'the most effective way to protect the public interest in receiving news'.[12] AAP suggested that this right of access could be achieved by the creation of:

> …a legislative provision for a right of access for news media to sporting and related events for general news reporting and editorial purposes including the taking of pictures. The provision must provide that terms and conditions of accreditation cannot include "revoke at will" arrangements and which do not impose restrictions on the frequency and manner of legitimate news reporting…[13]

4.10 The proposal is intended to remove the ability of sporting organisations to control news media's access to sporting events through accreditation. Certainly, this proposal might prevent sporting organisations from discriminating between news media organisations with respect to granting access to a sporting event.

4.11 The proposal does not, however, specifically address the issue raised by a number of sporting organisation where news media organisations use images they have gathered at sporting events not only for the purposes of news reporting but also for other contested non-news purposes.

4.12 The committee notes that this proposal would be likely to have implications for other situations in which event organisers control access to venues. The Attorney-General's Department advised the committee that it would be incongruous for the Copyright Act to contain clauses specifically pertaining to the media's right of access to sporting events. Rather, the department indicated that a general clause guaranteeing the media's right of access would be necessary and that this would apply equally to art exhibitions, musical and theatrical performances, and other instances relevant to the Copyright Act in which access to a venue is controlled:

> **Ms Daniels**—The other thing I would add in looking at that issue, if that change were put forward, is that there would be no justification for the

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11 Agence France-Presse, *Submission 17*, p. 8.

12 AAP, *Submission 24*, p. 2.

13 AAP, *Submission 24*, p. 18.

> galleries, museums and everybody else having a similar no-opt-out provision. Therefore, galleries and museums could no longer prevent anybody from coming in and taking whatever photograph they wished to. Why limit it to sport? How I am reading your question is that you are not being allowed to exercise all your copyright exceptions because you are not allowed access to a venue.
>
> **Senator LUNDY**—That is right.
>
> **Ms Daniels**—Then I would query: why limit it to only sport?
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> **Senator LUNDY**—That is one of the issues that has been put to us. So you tell me: why would that or why could that only apply to sport? Or are you saying to me that that would have the effects of also changing the parameters or arrangements by which photographers or news reporters could also access other places other than sporting venues? Is that what you are saying?
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> **Ms Daniels**—That is right. I guess the point I am making is it would be unusual for the Copyright Act, for example, to, all of a sudden, start talking about sport or sporting bodies. It is an act of much more general application, including in the exceptions area, which ultimately is about the public interest. So you would have to be talking about entities or anybody who is holding an event.[14]

4.13 It was not clear to the committee how such a right of access would be legislated, or how it would co-exist with existing legislation. Proponents of change did not make satisfactory arguments as to why sports events should be treated in a different manner to cultural events.

Enhanced fair dealing provisions

4.14 Current copyright law permits the use of copyrighted material without the right holder's permission for a limited number of exceptions, including for the purposes of reporting news. This is referred to as 'fair dealing'.

4.15 Some submitters suggested to the committee the need for guidance as to what constitutes fair dealing, with particular regard to its application in the digital media environment. The ABC indicated:

> …that it is appropriate for time or quantity limitations to be applied to material on websites or other digital platforms, to ensure that rights holders continue to get value for the rights fees they have paid. For instance, sporting bodies are probably entitled to guard against “semi-streaming” of live sport by non-rights holders.[15]

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14 Ms Helen Daniels, Assistant Secretary, Copyright and Classification Branch, Attorney-General's Department, *Proof Committee Hansard*, 5 May 2009, p. 27.

15 ABC, *Submission 26*, p. 5.

4.16 Cricket Australia provided the committee with the following list of items which they believed required further clarity under the Copyright Act:

> - A better understanding of what is "news reporting" (not what is "news" as this is not CA's role) and what constitutes bona fide reporting of information against what constitutes the provisions of a significant depth and breadth of coverage that is created to draw eyeballs and to monetise content.
> - The appropriate use of news; what is editorial use and what is commercial use?
> - How long should copyright material remain accessible as "news" and continue to be monetised without any recognition or benefit to the copyright owner?
> - Who are bona fide news organisations?
> - Are content aggregators bona fide news organisations?
>
> Specifically, CA requests that:
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> - The fair use exceptions under the Copyright act be given greater clarity and definition to accommodate the expansion from traditional to digital mediums.[16]

4.17 The AFL also believed that there needed to be 'leadership in a legislative form on this issue'.[17]

4.18 Guidelines and / or definitions to provide clarity around the application of fair dealing in the digital media environment could be achieved via legislation or regulations to the Copyright Act, or could be developed as non-binding explanatory advice issued by government.

4.19 The committee notes that the Copyright Act is intended to be platform neutral and that this was reflected in the Digital Agenda amendments moved in 2000 which sought to replicate "hard copy" rights and exceptions under the Act in the online environment:

> The Copyright Act was amended years ago to deal with the online environment. The government’s overall intention was that we should try to replicate what happens in the hardcopy world to the online world to the extent that you can. Again, Australia was not unusual in that regard; it really was an approach by other countries to cope with the emerging technology and how what exists under the hard copy should, where possible, translate to the online environment. So when amendments were made to the act many years ago to introduce the communication right and

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16 Cricket Australia, *Submission 35*, p. 9.

17 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 15 April 2009, p. 30.

> all the online rights, there was a replication that the relevant exceptions would also apply in that area.[18]

4.20 Whilst legislation or regulation providing guidelines and / or definitions such as those requested by Cricket Australia and the AFL would provide greater clarity to stakeholders, they would sacrifice flexibility.

4.21 The committee acknowledges the difficulties with defining what constitutes fair dealing, news and news reporting. The committee is particularly aware of the flexibility required in this area and that the use of material for the reporting of news under the fair dealing provisions will be guided by the nature and context of the newsworthy event in question.

4.22 It is not possible to predict with certainty future technological changes. Legislation or regulations under the Act that refer specifically to particular digital platforms may be superseded and become irrelevant over time.

4.23 The committee also notes that copyright and fair dealing is not relevant to still images and text created by journalists, as the copyright in this material rests with the journalist or their employer. Since much of the material used by news media organisations is their own, enhancing fair dealing provisions would not make a significant difference to the current situation.

Code of conduct

4.24 A number of submitters recommended that a code of conduct be developed. These proposals were focussed on accreditation agreements and intended to 'cover both the practical elements of applying for accreditation and the negotiation process, as well as setting ideal or minimum levels for specific issues which frequently arise in the accreditation discussions'.[19] A code was suggested by Cricket Australia:

> that provides guidelines addressing duration, frequency, volume, context, archiving and dissemination of news content to complement a sports organisation's right to enjoy the benefit of its copyright.[20]

4.25 The News Media Coalition was of the opinion that 'Codes of practice which support the free flow of news and described agreed procedures would…bring much needed transparency'.[21] It was suggested to the committee that such guidelines 'could be developed either in conjunction with the Australian Government or by a working group representing both sports bodies and news agencies'.[22]

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18 Ms Helen Daniels, Assistant Secretary, Copyright and Classification Branch, Attorney-General's Department, *Proof Committee Hansard*, 5 May 2009, p. 19.

19 Reuters Thomson, *Submission 10*, p. 7.

20 Cricket Australia, *Submission 35*, p. 9.

21 News Media Coalition, *Submission 13*, p. 7.

22 Reuters Thomson, *Submission 10*, p. 6.

4.26 There are a number of ways in which guidelines for the negotiation of media accreditation agreements between news media organisations and sporting organisations could be instituted. These range from informal agreements between interested parties – like the 3x3x3 ' agreement' between television rights holders and television news media[23] – as to expectations for the negotiation process and terms of accreditation, through to more formal mechanisms such as a code of conduct.

4.27 The committee is aware that there are three different types of codes of conduct in Australia and that the legal standing of each of these differs.

4.28 A non-prescribed voluntary industry code sets out specific standards of conduct for an industry about the manner in which it deals with its members and customers. The requirements of such a code are voluntarily agreed to by its signatories.[24]

4.29 Such a code would be an industry initiative and need not have any particular status under the Trade Practices Act. It would be a code administered by the relevant industry itself.[25] For example, Medicines Australia – the industry association for the innovative pharmaceutical industry – administers a code of conduct that 'sets the standards for the ethical marketing and promotion of prescription pharmaceutical products in Australia'.[26]

4.30 Although such a code could be a purely voluntary arrangement between sporting and media organisations, the committee notes that non-prescribed voluntary codes of conduct can be endorsed by the Australian Competition and Consumer Commission (ACCC), where the Commission believes the non-prescribed voluntary code is of a high quality.[27] The ACCC Chairman Mr Graeme Samuel has stated, with regard to endorsement of industry regulated codes, that:

- The industry needs to demonstrate that its code is achieving its objectives
- Endorsement will be hard to obtain and easy to lose
- Endorsement should provide the consumer with some reassurance that the business they are dealing with operates in a fair, ethical and lawful manner

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23 Ms Stephanie Beltrame, General Manager, Media Rights, Cricket Australia, *Proof Committee Hansard*, Wednesday 15 April 2009, p. 15.

24 ACCC, Non-prescribed voluntary industry codes of conduct, available http://www.accc.gov.au/content/index.phtml/itemId/783116 (accessed 8 May 2009).

25 ACCC, Prescribed industry codes of conduct, available http://www.accc.gov.au/content/index.phtml/itemId/783097#h2_17 (accessed 8 May 2009).

26 Medicines Australia, Code of Conduct, available: http://www.medicinesaustralia.com.au/pages/page5.asp (accessed 11 May 2009).

27 Len Gainsford, 'The Australian Competition and Consumer Commission's proposed industry codes of conduct – a compliance solution?', *Journal of Law and Financial Management*, vol. 3, no. 2, pp 8-13.

- Endorsement will provide the business operator with a degree of confidence that they are applying industry best practice
- If the ACCC assesses that an industry code is not achieving its objectives, the Commission will recommend possible changes to the code to ensure all essential criteria are met
- If the industry fails to adopt the Commission's recommendations, the endorsement may be withdrawn, and
- Industry groups who achieve endorsement can advertise it but the ACCC will also advertise the removal of endorsement if an industry group fails to maintain the effectiveness of the code.[28]

4.31 In contrast with non-prescribed voluntary codes of conduct, prescribed codes of conduct are a co-regulatory mechanism administered by government. Unlike non-prescribed codes of conduct, prescribed codes have standing under the Trade Practices Act.

4.32 The ACCC is responsible for administering prescribed industry codes of conduct under section 51AE of the *Trade Practices Act 1974*.[29] The ACCC promotes compliance with prescribed codes of conduct by providing education and information, and where necessary, taking enforcement action.[30]

4.33 A prescribed *mandatory* industry code of conduct is binding on all industry participants.[31] Mandatory industry codes are implemented where 'a systemic enforcement issue exists' and / or where 'inadequate industry coverage…fails to address industry problems'.[32] There are currently three prescribed mandatory industry codes under the Trade Practices Act for franchising, oil and horticulture.[33]

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28 Len Gainsford, 'The Australian Competition and Consumer Commission's proposed industry codes of conduct – a compliance solution?', *Journal of Law and Financial Management*, vol. 3, no. 2, pp 8-13.

29 ACCC, Prescribed industry codes of conduct, available http://www.accc.gov.au/content/index.phtml/itemId/783097#h2_17 (accessed 8 May 2009).

30 ACCC, Prescribed industry codes of conduct, available http://www.accc.gov.au/content/index.phtml/itemId/783097#h2_17 (accessed 8 May 2009).

31 ACCC, Prescribed industry codes of conduct, available http://www.accc.gov.au/content/index.phtml/itemId/783097#h2_17 (accessed 8 May 2009).

32 The Treasury, *Prescribed codes of conduct, Policy guidelines on making industry codes of conduct enforceable under the Trade Practices Act 1974*, May 1999, p. 8.

33 ACCC, Prescribed industry codes of conduct, available http://www.accc.gov.au/content/index.phtml/itemId/783097#h2_17 (accessed 8 May 2009).

4.34 A prescribed *voluntary* industry code of conduct is binding only on those members of an industry who have formally subscribed to the code.[34] At present, there are no prescribed voluntary industry codes in Australia.[35]

4.35 Non-compliance with a prescribed industry code, mandatory or voluntary, is a breach of section 51AD of the Trade Practices Act. The ACCC may take action where a breach has occurred, however, industry participants can also take their own private action for a breach of a prescribed code.[36]

4.36 Remedies for a breach of a prescribed code of conduct may include:

- declarations that particular conduct is in breach of the Trade Practices Act
- injunctions to stop the prohibited conduct continuing, or to require some action to be taken
- damages
- recision, setting aside or variation of contracts
- community service orders, and
- corrective advertising.[37]

4.37 During the course of this inquiry, AAP suggested 'a mandatory industry code under the TPA' as their 'preferred approach to introducing a right of access to sporting events'.[38] AAP recommended that an 'Access to Sporting Events Code' should be based on 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

34 The Treasury, *Prescribed codes of conduct, Policy guidelines on making industry codes of conduct enforceable under the Trade Practices Act 1974*, May 1999, p. 4.

35 ACCC, Prescribed industry codes of conduct, available http://www.accc.gov.au/content/index.phtml/itemId/783097#h2_17 (accessed 8 May 2009).

36 ACCC, Prescribed industry codes of conduct, available http://www.accc.gov.au/content/index.phtml/itemId/783097#h2_17 (accessed 8 May 2009).

37 ACCC, Prescribed industry codes of conduct, available http://www.accc.gov.au/content/index.phtml/itemId/783097#h2_17 (accessed 8 May 2009).

38 AAP, *Supplementary Submission*, pp 2 & 4.

- o must not require news organisations to assign or otherwise limit their use of their intellectual property for the purposes of news reporting.[39]

4.38 AAP believed that a prescribed mandatory code of conduct was applicable because:

> i. …in addition to the market failure referred to in this submission, a mandatory code would support the social policy objective of ensuing that the public receives quality, unbiased information about significant cultural and social events;
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> 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;
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> 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;
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> 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
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> 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.[40]

4.39 In-principle support for AAP's recommendation for a prescribed mandatory industry code of conduct was offered by West Australian Newspapers Ltd, PANPA, Getty Images and News Limited.[41]

4.40 The committee sought the advice of Treasury on the use of prescribed codes of conduct. Treasury advised that it would be necessary to determine:

> …whether a code of conduct would be appropriate in the circumstances raised in this inquiry…if a proposal were to be brought forward for a code of conduct in this area, it would likely come from the Department of

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39 AAP, *Supplementary Submission*, pp 5-6.

40 AAP, *Supplementary Submission*, p. 5.

41 West Australian Newspapers Ltd., *Supplementary Submission*; PANPA, *Supplementary Submission*; Getty Images, *Supplementary Submission* and News Limited, *Supplementary Submission*.

> Broadband, Communications and the Digital Economy. The way that would happen is that the minister would give consideration to types of regulation that might be appropriate—or to not regulating, as the case may be—and discuss them with the Treasury, as the Treasury plays in effect a gatekeeper role with respect to the regime, and other ministers that would have a responsibility for areas touched on by this regime. Because it is a code of conduct, it is often referred to as a coregulatory regime. It is not self-regulation nor is it the traditional direct regulation by government. It is meant to be coregulatory. What that means is that the proposal for developing a code may come from the minister or it might be proposed from the industry itself and the development of the code takes place on a coregulatory basis…The idea is that the government would work very closely with the industry, through developing draft proposals, roundtables discussing draft codes and setting up processes for the further management of the code into the future. The idea is that issues that arise under the code, including disputes, are resolved through the code process rather than by having to rely on enforcement by government.
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> …
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> The other thing to keep in mind is that, although it is a co-regulatory approach, it is regulation so it would potentially involve costs to industry. Any proposal for a code of conduct would have to comply with the best practice regulation requirements, including consideration for alternative means of dealing with the problem—whether that involves self-regulatory or non-regulatory measures or other forms of intervention that might be better able to address the problem.
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> …
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> One comment I will make about existing codes is that they commonly appear to put in place a process for resolving issues, particularly where there are bargaining imbalances between parties, or perceived bargaining imbalances…[42]

4.41 The committee is aware that a bargaining imbalance, or a perceived bargaining imbalance, between the parties may exist in the case of news media and sporting organisations in respect of accreditation agreements. Treasury advised the committee that prescribed codes of conduct can be used to address this issue. The committee recognises it would be necessary to develop a prescribed mandatory code of conduct in collaboration with both news media and sporting organisations, rather than a code being imposed on either party without input.

4.42 A prescribed code under the Trade Practices Act has the potential to result in a resolution of the kinds of disputes that currently exist between some sporting organisations and some sporting bodies. However, the committee notes that many stakeholders remain optimistic that current disagreements may be able to be worked

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42 Mr James Chisholm, Manager, Consumer Policy Framework Unit, Competition and Consumer Policy Division, Department of the Treasury, *Proof Committee Hansard*, 5 May 2009, pp 30–31.

out through less intrusive mechanisms. A proposal such as AAP's for an 'Access to Sporting Events Code', while always an option, is never desirable if voluntary, negotiated arrangements are possible. The committee returns to this option in the final chapter.

Copyright in sport

4.43 The copyright in a sporting event or performance under existing law rests in the film on which the event is recorded and in the broadcast of the event. No copyright currently exists in the sporting event or performance itself:

> **Ms Daniels**—No, not per se. There would be copyright in the broadcast of an event; that is a separate copyright. In the underlying film, if it is not live, and in any underlying works, yes, definitely—but in an event per se, no.
>
> **CHAIR**—That is fine. So there is no copyright inherent in a sporting event?
>
> **Mr Bowman**—No. Copyright only subsists in certain forms of protected expression. Those forms of protected expression are literary works, musical works, artistic works and also in film, sound recordings and broadcasts. So, if a footballer wanted to write their autobiography, there would be copyright in the book as a literary work, but there is no copyright in any event.[43]

4.44 Lander & Rogers Lawyers recommended to the committee that the Copyright Act be amended so that a copyright lay with a sporting event or performance in itself:

> The athletes, clubs and sporting organisations put on the 'show'. It is our submission that they should be rewarded by ensuring the Copyright Act protects their performance. That is, that there should be copyright in the performance of sport. Sporting organisations should be able to use and commercialise this intellectual property in the same way they can with other intellectual property assets. Whilst some discussion will need to be had to properly define this right, we submit that the government should recognise ‘sporting works’ as a category of protected works under the Copyright Act. Using this approach, the rights of news agencies would still be protected under the fair dealing for news reporting provisions of the Copyright Act.[44]

4.45 Lander & Rogers Lawyers further submitted that this could be achieved by 'a clear distinction and protection of the rights in the event belonging to the event owner'.[45] It was proposed that such a definition include:

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43 Ms Helen Daniels, Assistant Secretary and Mr Norman Bowman, Acting Principal Legal Officer, Copyright and Classification Branch, Attorney-General's Department, *Proof Committee Hansard*, 5 May 2009, p. 17.

44 Lander & Rogers Lawyers, *Submission 33*, p. 5.

45 Lander & Rogers Lawyers, *answers to questions on notice*, 29 April 2009 (received 8 May 2009).

> …the rules of the game, and the fact that the game is being played under the auspices of, or recognised by, the peak body for that sports in Australia. The right should recognise is a legal sense the recognition and sporting rights conferred on national sporting bodies be being a member of an international sports federation…the sporting body creates the event. It determines the rules, and generally provides the venue and the officials. It ensures and facilitates that the event actually proceeds.[46]

4.46 Such an amendment to the Copyright Act would give legislative effect to a claim made by sporting organisations during this inquiry that they are the intellectual property holders in a sporting event.[47]

4.47 The Attorney-General's Department informed the committee that under current copyright law, there is no intellectual property in a sporting event or performance per se. The department drew comparison with the current copyright in a musical or theatrical performance, advising that this copyright seeks to protect a performer from unauthorised recording of their performance and is acknowledgement of the copyright in the underlying written work, as well as Australia's international obligations:

> **Ms Daniels**—…The protection of performers derives from the close connection to either a choreographic work or a literary work or an artistic work. That is the creative input that you are protecting. The performers rights extend to singers et cetera, but they do not extend to actors in the Hollywood sense of the term. So performance protection is quite limited. And as you probably appreciate from your knowledge, Senator, most of this derives from international treaty. Australia’s approach to a lot of these issues derives from what our treaty obligations are. The World Intellectual Property Organisation’s relevant treaty on performers does not extend into the sporting area.
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> **Mr Bowman**—Within the Copyright Act there is copyright per se, which is basically economic rights, and then there are certain other rights recognised which are not part of copyright. They include performers’ rights as well as moral rights. The performers’ rights extend, at their most basic, to being able to prevent an unauthorised recording of a performance. The reason for that right being recognised was essentially to prevent bootlegging—where somebody could go to a concert, make a sound recording or a film of the performance and then sell the sound recording afterwards.[48]

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46 Lander & Rogers Lawyers, *answers to questions on notice*, 29 April 2009 (received 8 May 2009).

47 See COMPS, Submission 31; Mr James Sutherland, Chief Executive Officer, Cricket Australia, *Proof Committee Hansard*, 15 April 2009, p. 14; Mr Shane Mattiske, Director, Strategy and Special Projects, National Rugby League, *Proof Committee Hansard*, 15 April 2009, p. 24.

48 Ms Helen Daniels, Assistant Secretary and Mr Norman Bowman, Acting Principal Legal Officer, Copyright and Classification Branch, Attorney-General's Department, *Proof Committee Hansard*, 5 May 2009, p. 18.

4.48 Vesting copyright in a sporting event or performance would not address what some submitters have argued is the main problem: media organisations using the fair dealing exception for the reporting of news to protect what the sports organisations believe are non-news uses such as sport web pages.

Other copyright law reform

4.49 The AAP and Optus recommended that the Copyright Act be amended so as to invalidate contractual abrogation of the fair dealing exception for news reporting:

> AAP believes that the most effective way to protect the public interest in receiving independent and unbiased information about significant social and cultural events is to…provide expressly that sporting bodies can not "contract out" of and media organisations cannot be required to sign away the benefit of the fair dealing exception under the Copyright Act.[49]

And:

> Optus considers that the existing fair dealing principles may be undermined by restrictive coverage conditions and/or accreditation conditions of the kind that have been sought by some sporting organisations in recent times. Accordingly, Optus would support an amendment to the legislative framework to render of no effect any provision of an agreement or contract that would exclude or modify the terms of fair dealing rights as they relate to news reporting, criticism and review.[50]

4.50 In 2002 the Copyright Law Review Committee made recommendations for copyright law reform. Some of these recommendations related to whether it should be possible to abrogate one's legal rights under fair dealing exemptions, though the matter was raised in a different context at that time, and it is a legally complex area. The committee identified this policy option relatively late in its inquiry and unfortunately the Law Council of Australia, though willing to assist the committee, in the time available was unable to provide input. Correspondence with the Attorney General's Department raised queries as to whether it would in fact be of any assistance in dealing with the matters raised before the committee. The committee did not consider this issue in detail, but does return to it briefly in the final chapter.

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49 AAP, *Submission 24*, pp 17-18.

50 Optus, *Submission 18*, p. 2.