

‘A SPECTACLE CANNOT BE OWNED’: A HISTORY OF THE UNEASY RELATIONSHIP BETWEEN COPYRIGHT AND SPORT IN AUSTRALIA

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The relationship between copyright and sport has attracted much media and legal attention in the 2012 to 2013 period, with changes in the reporting of control and access to sports content. Limited Olympic coverage; reported arguments during the re-negotiation of television, radio, online and mobile broadcasting arrangements; and the Singtel Optus v National Rugby League Investments litigation have highlighted for the Australian public the complex and expensive difficulties that arise in the interaction between copyright law and sport. However, this article illustrates that this is not a modern phenomenon: copyright and sport in Australia have always had an ‘uneasy’ relationship, with sporting organisations regularly demanding more from copyright law than that area was willing to provide. Through an exploration of case law, archival materials and government reports, this article considers two examples – copyright in sports information and compilations, and copyright in sporting events – in a historical context. This examination demonstrates that, despite this tension, copyright and sport have always had a symbiotic relationship and each has had an impact on the development of the other in Australia.

Introduction

Over the previous few years, the relationship between copyright and sport has attracted much attention, arguably as a result of a number of developments. During the 2012 London Olympic Games, Australian viewers may have been confused as to why, when tuning into Channel Ten News at 5pm and then The Project, the latter program aired past footage of Australian athletes currently competing or making headlines at the Games, rather than the actual race or match. The explanation is the ‘3 x 3 x 3’ rule – a media undertaking that

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means non-rights holder television channels are permitted to include only three minutes of the protected footage in a program; the footage must then not appear again for three hours; and the footage can only appear three times in the one day.¹ The application of this rule to the 2012 Olympic coverage meant that Australian television channels that did not have the right to broadcast Olympic content (ie, any channel other than Channel Nine), were highly restricted in what footage could be shown.² This was despite the existence of provisions in the *Copyright Act 1968* (Cth) that provide for fair dealing of audio-visual materials (eg, television or film content) for the purpose of reporting news.³

Further, during 2012 to 2013 a number of sporting organisations re-negotiated their existing television, radio, online and mobile broadcasting arrangements.⁴ While, for many consumers of sports, these negotiations may only have attracted their attention when they realised that their favourite sport was now on a different television channel, these rights attracted much press for both the sporting bodies and media companies involved. A sledging match, as might normally occur on the cricket pitch, subsequently began between Brad McNamara, a Channel Nine executive and cricketer George Bailey, with Bailey claiming that McNamara was talking down Australian cricket to secure a more financially attractive package for Channel Nine during the broadcasting negotiations.⁵ In turn, McNamara said that '[w]ithout the TV rights deal [under negotiation], George is probably working in a coalmine or flipping burgers at McDonald's'.⁶

How those rights deals may affect sports viewing was highlighted for consumers in the *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)*⁷ decision and the subsequent overturning of that decision in the Full Federal Court.⁸ The case involved a new product developed by Singtel Optus, called TVNow, that allowed subscribers to record free-to-air television programs and play them back later on different devices (eg, an Apple or Android device).⁹ This was in direct competition with the fact that the Australian Football League and National

¹ '3 minutes in a program, separated by 3 hours, 3 times a day': see David Knox, 'Networks Stick to Tight Olympic Rules', *TV Tonight* (online), 31 July 2012 <<http://www.tvtonight.com.au/2012/07/networks-stick-to-tight-olympic-rules.html>>.

² *Ibid.*

³ See *Copyright Act 1968* (Cth) s 103B.

⁴ See, eg, James Chessell and John Stensholt, 'Seven Wants Open, Case Closed', *The Australian Financial Review* (online), 18 June 2012 <http://www.afr.com/p/lifestyle/sport/seven_wants_open_case_closed_5nlfwAr6ZrJKjPXOcLoAN>; Mitchell Bingemann, 'Telstra Targets Sports Rights', *The Australian* (online), 3 December 2012 <<http://www.theaustralian.com.au/media/digital/telstra-targets-sports-rights/story-fna03wxu-1226528453528#>>.

⁵ Greg Buckle, 'Mac Attack: George Bailey Would Be "Flipping Burgers" without Nine's Money', *The Sydney Morning Herald* (online), 17 January 2013 <<http://www.smh.com.au/sport/cricket/mac-attack-george-bailey-would-be-flipping-burgers-without-nines-money-20130117-2cvpe.html>>.

⁶ *Ibid.*

⁷ *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* (2012) 199 FCR 300 ('*Singtel*').

⁸ *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* (2012) 201 FCR 147 ('*National Rugby League*').

⁹ *Singtel* (2012) 199 FCR 300, 303 [2]–[3] (Rares J).

Rugby League, who owned copyright in the broadcasts of their matches, had given Telstra an exclusive licence for these broadcasts to be made available online via phone and other Internet-accessible devices.¹⁰ At first instance, Rares J found no infringement of copyright had occurred as section 111 of the *Copyright Act 1968* applied, which provides for the domestic recording of television programs to watch at a later time.¹¹ That decision was described as ‘a win for consumers’,¹² but it was later overturned by the Full Federal Court.

In these examples, copyright and sport came into conflict, with consequences for, in various ways and at different times, the rights of consumers, news and home media companies, and sporting organisations. Yet, despite the outcry and calls for reform and readjustment of rights and laws that occurred during this period, conflict between copyright and sport is not a recent development. Indeed, as this article will demonstrate, copyright and sport in Australia have always had an uneasy relationship. However, rather than focus on these more recent areas where the relationship has come into conflict – eg, online and digital media rights – this article focuses on two aspects in a historical context: copyright in sports information and copyright in sporting events.

An examination of these two areas, where copyright law and sport have generally conflicted, reveals much about the development of this relationship in Australia. Employing a combination of case law, committee reports and archival documents, this article suggests that while this has been a troubled relationship it has also been a symbiotic one, with both copyright and sport influencing and impacting upon the development of the other. First, throughout the previous century, sporting organisations in Australia have regularly demanded more protection from copyright law than that area was willing to provide. This is highlighted by the fact that sporting organisations – whether race courses or football clubs – regularly petitioned the courts and legislature during the 20th century for copyright protection for information and facts. Later, these sporting bodies requested copyright law be extended to protect ‘sporting events’. The realities of copyright law have therefore shaped how sports organisations organised themselves – if copyright does not protect a ‘spectacle’, or sporting event, then greater attention needs to be paid to what copyright will protect at that time – eg, compilations of information, as was argued poorly in the *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (‘*Victoria Park Racing*’) litigation.¹³

Second, and arguably more surprisingly, these areas illustrate how sport has shaped copyright law, beyond the specific facts of a case or cases. As will be

¹⁰ Ibid 303 [1] (Rares J).

¹¹ Ibid 324–7 [72]–[85].

¹² John McDuling, ‘Optus TV Copyright Ruling Raises Alarm’, *The Australian Financial Review* (online), 3 February 2012 <http://www.afr.com/p/business/companies/optus_tv_copyright_ruling_raises_1ln7vbuhvjOvHqhNk0uIQO>.

¹³ See *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1936) 37 SR (NSW) 322; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

considered below, the impact of a series of sports-information based cases had serious, long-term ramifications for the development of copyright at common law in Australia. What began as a desire of horse racing clubs to prevent publication of horse names in a newspaper resulted in copyright being found to protect a broad range of information, arguably beyond what copyright was intended to protect.

This article examines the history of copyright in sports-based information through a series of cases that emerged in the 1925 to 1950 period that gave greater copyright protection to that information than it arguably deserved. It then argues how these sports cases impacted upon the long-term development of copyright law in Australia, with negative consequences. Then, the article explores an argument originally raised to a government copyright committee in 1959 – that sporting events should be protected under copyright law – and subsequently illustrates how this argument was revisited in 2009, and the difficulties that such a suggestion pose for copyright law.

Copyright in Sports-Based Information

To understand the relationship between information, copyright and sport during the first half of the 20th century, a brief history of copyright law during this period is required. In the immediate post-Federation period, the Federal Parliament introduced the *Copyright Act 1905* (Cth) as part of a suite of Commonwealth intellectual property laws designed to bring jurisdiction for intellectual property ('IP') issues into the Commonwealth sphere. This 1905 statute was rigorously debated and was a source of pride for its drafter, Senator John Keating, who in 1912 described the statute as 'perfectly clear. It is lucid. It has been accepted. It has been acted upon. There has been no difficulty.'¹⁴ However, in 1912 the Federal Parliament decided to abandon and repeal its 1905 legislation in favour of introducing the *Copyright Act 1911* (Imp), which had recently been passed in the United Kingdom ('UK').¹⁵ That statute, incorporated into schedule 1 of the *Copyright Act 1912* (Cth), set the foundation for copyright law in Australia until 1968, and provides the basis for the case law that emerged on information, copyright and sport, to be discussed.

Pursuant to section 1 of the 1911 Act, copyright subsisted in every original literary work. This was the first time that an Australian or UK copyright statute included a requirement that a literary creation needed to be *original* in order to receive copyright protection.¹⁶ Copyright would subsist in that work throughout the British dominions in two instances, where:

¹⁴ Commonwealth, *Parliamentary Debates*, Senate, 23 October 1912, 4512 (John Keating).

¹⁵ For an examination of the reasons why the Australian Parliament decided to introduce this statute, see Robert Burrell, 'Copyright Reform in the Early Twentieth Century: The View from Australia' (2006) 27 *Journal of Legal History* 239, 257–64; Benedict Atkinson, *The True History of Copyright: The Australian Experience 1905-2005* (Sydney University Press, 2007) 94–7.

¹⁶ See, eg, *Robinson v Sands & McDougall Pty Ltd* (1916) 22 CLR 124, 131 (Barton J).

1. 'in the case of a published work, the work was first published within such parts of His Majesty's dominions';¹⁷ or
2. 'in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions'.¹⁸

Section 35(1), the interpretation provision of the 1911 statute, defined the term 'literary work' non-exhaustively to include 'maps, charts, plans, tables, and compilations'. It is in relation to that latter term, 'compilations', that cases involving copyright and sport arose. Indeed, the majority of Australian cases on what constituted both an 'original literary work' and a 'compilation' for the purposes of protection under the *Copyright Act 1911* concerned a quite limited publishing niche: horse racing information and programs.

Between 1925 and 1947 Australian courts decided seven cases where the plaintiff claimed copyright in horse racing information and these cases ultimately had an impact on the development of copyright law in Australia. When viewed against the development of the racing industry in Australia, this plethora of horse racing cases is not particularly surprising, as that sport – and the gambling often associated with it – had been a popular pastime long before Federation.¹⁹ The first novel of noted colonial author Marcus Clarke, *Long Odds*, in part concerned horse racing, although Clarke was criticised for being 'no authority on racing, in a country where racing was taken very seriously'.²⁰ In 1914, popular Australian author Banjo Patterson wrote in an Australian 'Declaration of Independence' that 'All men are born free and equal; and each man is entitled to life, liberty and the pursuit of horse racing.'²¹ Horse racing became a particularly prominent pastime in the 1920s and 1930s, as it was during this period that one of Australia's most iconic sporting figures – Phar Lap – dominated races and headlines in Australia and abroad.²²

¹⁷ *Copyright Act 1911* (Imp) 1 & 2 Geo 5, c 46, s 1(1)(a). 'Publication' was further defined as the 'issue of copies of the work to the public': at s 1(3).

¹⁸ *Copyright Act 1911* (Imp) 1 & 2 Geo 5, c 46, s 1(1)(b).

¹⁹ See Wayne Peake, *Unregistered Proprietary Horse Racing in Sydney 1888-1942* (PhD Thesis, University of Western Sydney, 2004) 29–42; Jill McKeough, 'Horses and the Law: The Enduring Legacy of *Victoria Park Racing*' in Andrew T Kenyon, Megan Richardson and Sam Ricketson (eds), *Landmarks in Australian Intellectual Property Law* (Cambridge University Press, 2009) 53, 55.

²⁰ Brian Elliott, *Marcus Clarke* (Clarendon Press, 1958) 119.

²¹ A B Patterson, quoted in David Headon, 'Given by God, Sport of Kings, or A Mug's Game: Horse Racing in Australian Literature' (1988) 5 *Sporting Traditions: The Journal of the Australian Society for Sports History* 30, 30 <<http://www.la84foundation.org/SportsLibrary/SportingTraditions/1988/st0501/st0501f.pdf>>.

²² See, eg, Trentham, 'The Melbourne Cup – Phar Lap's Stupendous Task', *The Argus* (Melbourne), 3 November 1930, 9; 'Phar Lap's Triumph – Melbourne Cup Victory', *The Argus* (Melbourne), 5 November 1930, 9. Phar Lap narrowly avoided a murder attempt prior to the race: see Gunmen in Car, 'Cup Favourite – Attempt to Harm', *The Canberra Times* (Canberra), 3 November 1930, 3.

Thus, in an industry that made its money on the basis of fluctuation of odds, starting times, and horse weights, these types of basic information held significant commercial value. As noted by Wolff J in one of the later decisions on horse racing information, *Winterbottom for the Western Australian Turf Club v Wintle*:²³

To conduct a race club it is necessary, amongst other things, to compile and keep an elaborate system of records of horses, form, pedigree, and to administer rules relating to the eligibility of owners, trainers, and the qualifications of horses for entry to races; to fix the conditions of entry for races, the details of the race, stakes, and suchlike.²⁴

Plaintiffs – predominantly newspapers and racing clubs – sought to invoke copyright law to protect this information from reproduction, either by rival newspapers, clubs, or competitors. In each case, the plaintiff claimed that the information was a 'compilation' and therefore an 'original literary work', satisfying the subsistence criteria of section 1 of the *Copyright Act 1911*. Plaintiffs enjoyed mixed results – in some cases, the action failed, but in others, even where the factual circumstances were similar to where a plaintiff had lost, the plaintiff succeeded, though arguably on the basis of incorrect judicial reasoning, as will be established below.

The first case on horse racing information, *Smith's Newspapers Ltd v The Labor Daily*,²⁵ featured predictions of the winners of a number of horse races, published in the plaintiff's newspaper. The day after these predictions were printed, the defendant would include the selection in its own newspaper, as a point of comparison with the predictions made by other metropolitan newspapers.²⁶ The plaintiff claimed that this was an infringement of copyright; however Harvey CJ in Eq found that what the defendant had copied was not a literary work under the *Copyright Act 1911*. His Honour stated that 'the defendant in this case has not taken from the plaintiff's paper more than the names of the several horses he has selected. The names of the races are common to all.'²⁷ Chief Judge in Equity Harvey dismissed the action, repeating and reaffirming the common copyright maxim that 'it is clear that what the plaintiff is trying to protect in this case is the opinion expressed and not the form of words in which the opinion is expressed.'²⁸

²³ *Winterbottom for the Western Australian Turf Club v Wintle* (1947) 50 WALR 58 ('*Winterbottom*').

²⁴ *Ibid* 65–6 (Wolff J).

²⁵ *Smith's Newspapers Ltd v The Labor Daily* (1925) 25 SR (NSW) 593 ('*Smith's Newspapers*').

²⁶ *Ibid* 594–5 (Harvey CJ in Eq).

²⁷ *Ibid* 596.

²⁸ *Ibid* 597.

In contrast, and despite the correct interpretation of the law in the *Smith's Newspapers* case, in the next three decisions on copyright and horse racing information the plaintiffs succeeded. In *Canterbury Park Race Course Co. Ltd v Hopkins*,²⁹ the defendant published in its newspaper, *Turf Life*, the names and weights of horses that were going to be run at the Canterbury Park racecourse.³⁰ This information had been previously published in *The Sun* newspaper, with the permission of the racecourse.³¹ In granting a perpetual injunction against the defendants, Long Innes J held that the compilation of these names and weights was an original literary work. His Honour found:

that a considerable amount of ingenuity, industry, and mental effort has been required for the production of this article, and that, assuming that all the parties in whom the copyright could possibly be vested are on the right side of the record as plaintiffs, it is a compilation in respect of which copyright can exist.³²

Canterbury Race Course established a precedent for the pursuit of legal action, either civil or criminal, against individuals who published racing information without the permission of the plaintiff. In *Moorefield Race Club Ltd v Longfield*,³³ the plaintiff sought an injunction on similar grounds to those in *Canterbury Park Race Course*. The plaintiff succeeded in establishing one occurrence of copyright infringement, though Long Innes J declined to grant an injunction against future, potential infringements that had not yet occurred.³⁴

In a similar vein, in *Mander v O'Brien*,³⁵ Mander was the publisher of a racing booklet, *The Turf Review*, which included information on races to be run at Morphettville Race course, collated by the South Australian Tattersalls Club into a 'race meeting programme'. The information was also previously published in *The Advertiser* newspaper.³⁶ One of the sellers of *The Turf Review* was arrested on the basis of knowingly selling copyright-infringing material and *Mander* was an appeal against this conviction.³⁷

The issue before the court was whether the race meeting programme was a copyright work and whether infringement had in fact occurred; if these two points could not be satisfied, the charges could be dropped.³⁸ Chief Justice

²⁹ *Canterbury Park Race Course Co. Ltd v Hopkins* (1932) 49 WN (NSW) 27 ('*Canterbury Park Race Course*').

³⁰ *Ibid* 27.

³¹ *Ibid* 28.

³² *Ibid*.

³³ *Moorefield Race Club Ltd v Longfield* (1932) 49 WN (NSW) 102 ('*Moorefield Race Club*').

³⁴ *Ibid* 102–3.

³⁵ *Mander v O'Brien* [1934] SASR 87 ('*Mander*').

³⁶ *Ibid* 88–9. O'Brien was the Secretary of the SA Tattersalls Club.

³⁷ *Ibid* 87, 90.

³⁸ *Ibid* 88–90.

Murray found that the race meeting programme was an original literary work,³⁹ stating that:

The names of the horses must have been the subject of some thought, for they were not the names of any horses, but of those only which had been entered for the particular races. The weights were the result of careful consideration by the handicapper in the light of the horses' condition at the time and their previous performances. The barrier positions, though determined by lot, had to be arranged in their proper places against each horse. No such compilation for the same meeting had been made before.⁴⁰

The conviction was therefore upheld.⁴¹

In the post-war decision of *Winterbottom*, the plaintiff successfully established the subsistence of copyright in a racebook prepared by the Western Australian Turf Club.⁴² The defendant had published information contained in this racebook in his sport-based newspaper *Fairplay*.⁴³ Justice Wolff noted that copyright had previously been found to protect 'lists of this nature' and that '[t]he compiling of the lists here, I think, calls for skill and judgment'.⁴⁴ His Honour dismissed the need to discuss the argument 'that the sheet [the racebook] is not compiled as a list, or for the purpose of a list, but it merely "eventuates" after certain work, necessarily preliminary to the conduct of a race meeting, has been performed, and, therefore, there is nothing original in the work in the literary sense.'⁴⁵ That is, that the skill and judgment goes into creating and compiling the information, before it is reduced to its material form.

The comments made by Long Innes J, Murray CJ and Wolff J, extracted above, are significant for the result that these sport-based decisions had on the development of concepts of authorship and originality under Australian copyright law. Indeed, when viewed in light of recent case law it is arguable that *Canterbury Park Race Course*, *Mander* and *Winterbottom* are where Australian law concerning copyright, compilations, originality and authorship began to go very wrong.

Several themes can be drawn from these cases. Under these decisions, copyright could subsist where a compilation was the result of, to use the words of Long Innes J, 'a considerable amount of ingenuity, industry, and mental effort' or, to quote Wolff J, 'skill and judgment'. The compilation was still simply a collection

³⁹ Ibid 92 (Murray CJ).

⁴⁰ Ibid.

⁴¹ Ibid 95 (Murray CJ).

⁴² *Winterbottom* (1948) 50 WALR 58, 65–6 (Wolff J).

⁴³ Ibid 66 (Wolff J).

⁴⁴ Ibid 67.

⁴⁵ Ibid.

of public domain-based horse racing information that was publicly available and, to quote Harvey CJ in Eq, ‘common to all’. At the same time, those authors did not have to be identified, nor does it appear that the author had to directly contribute to the creation of the compilation, so long as the owner of copyright was likely to be the plaintiff. This was despite the fact that these ‘authors’ could therefore include, to name those ‘authors’ that would correspond to the roles identified by Murray CJ, the owner of the horse, who would have originally named the horse; and the handicapper who weighed the horses. These were antecedent events to the actual creation of the Tattersalls Club race meeting programme, the compilation in question in *Mander*, or the Western Australian Turf Club race book in *Winterbottom*, where this issue was directly dismissed.⁴⁶

As a result, compilations created through ‘skill and labour’ were subsequently protected under Australian law, mostly notably in relation to telephone directories. In both the first instance decision *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd*⁴⁷ and the subsequent Full Federal Court appeal *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd*⁴⁸ it was found that copyright would subsist in a compilation that was a result of labour, skill or judgment.⁴⁹ Infringement would occur where that labour, skill, or judgment was appropriated by the defendant.⁵⁰ *Smith’s Newspapers, Canterbury Park Race Course, Mander* and *Winterbottom* and the two *Victoria Park Racing* cases, discussed below, were all referred to in the decisions.⁵¹ In his judgment in the Full Federal Court, Lindgren J went so far as to hold that Chief Justice Murray’s comment that ‘[n]o such compilation for the same meeting had been made before’ was applicable to the *Desktop Marketing* case.⁵²

Smith’s Newspapers and the exception to the ongoing success in horse racing-based cases, the two *Victoria Park Racing* cases,⁵³ were distinguished in *Desktop Marketing*.⁵⁴ Indeed, Lindgren J stated that those two decisions gave ‘little guidance’ to the facts of the latter case, but both warrant exploration here.⁵⁵ The facts of the case are well known: George Taylor, the defendant, owned a block

⁴⁶ For a similar point about the decision of Long Innes J in *Canterbury Park Race Course* and the antecedent nature of the information included in a compilation, see: *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491, 520 [102] (Lindgren J).

⁴⁷ *Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd* (2001) 181 ALR 134 (‘*Telstra*’).

⁴⁸ *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491 (‘*Desktop Marketing*’).

⁴⁹ See *ibid* 497 [10]–[12] (Black CJ); 517 [87], 519 [96], 535 [166]–[169] (Lindgren J); 558 [275]–[276], 599–600 [431]–[433], [435]–[436] (Sackville J).

⁵⁰ See *ibid* 548 [223]–[225] (Lindgren J).

⁵¹ See *Telstra* (2001) 181 ALR 134, 158 (Finkelstein J); *Desktop Marketing* (2002) 119 FCR 491, 496–7 [7] (Black CJ); 499–500 [23], 519–20 [101]–[103], 523 [117], 532–3 [160] (Lindgren J).

⁵² See *Desktop Marketing* (2002) 119 FCR 491, 520 [103] (Lindgren J).

⁵³ See *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1936) 37 SR (NSW) 322; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

⁵⁴ See *Desktop Marketing* (2002) 119 FCR 491, 499 [23], 521–2 [106]–[109] (Lindgren J).

⁵⁵ *Ibid* 522 [109] (Lindgren J).

of land and house adjoining the Victoria Park Racing and Recreation Grounds.⁵⁶ With his permission, a 16-foot tower was built on the front lawn of the property and, from there, Cyril Angles, an employee of the radio station 2UW, would sit and via telephone, broadcast the races and the result of each.⁵⁷

At first instance, Nicholas J noted that the claim relating to copyright 'was not clearly set up' and appeared to be based on an argument 'that the publication by 2UW ... of information collated by the plaintiff ... should be restrained as either an infringement of copyright, a misuse of the plaintiff's property or a wrongful interference with the plaintiff in its business.'⁵⁸ His Honour dismissed this argument, stating that there was 'a lack of any compilation and because of the evanescent character of the information, which is posted up to be pulled down after a few minutes exposure.'⁵⁹

On appeal, the majority of the High Court were more critical in their dismissal of the copyright issue, which Latham CJ noted was argued but not pleaded as a cause of action before the Court.⁶⁰ Latham CJ stated '[t]his argument lacked precision in every respect'⁶¹ and:

It has not been proved that the plaintiff has copyright in anything. There may possibly be copyright in a race book, but it is not shown that the plaintiff has such copyright in this case, or, if the plaintiff has copyright, that the defendant has infringed it. Even if the defendant Angles used the race book for the purpose of obtaining information, he did no more than state facts which were recorded in the race book. ... The law of copyright does not operate to give any person an exclusive right to state or to describe particular facts. A person cannot by first announcing that a man fell off a bus or that a particular horse won a race prevent other people from stating those facts.⁶²

That, however, is entirely what *Canterbury Park Race Course, Mander* and *Winterbottom* established. The plaintiffs in each of those cases were able to stop the defendants from stating facts previously recorded in a race book. While these cases were originally decided in relation to horse racing information, these

⁵⁶ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1936) 37 SR (NSW) 322, 331 (Nicholas J).

⁵⁷ *Ibid.* A picture of the house and tower can be seen at Jock Given, "'A Limit to This Right of Overlooking'", *Inside Story* (online), 29 July 2011 <<http://inside.org.au/a-limit-to-this-right-of-overlooking/>>.

⁵⁸ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1936) 37 SR (NSW) 322, 335.

⁵⁹ *Ibid.* 344.

⁶⁰ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 497.

⁶¹ *Ibid.*

⁶² *Ibid.* 497–8 (Latham CJ). See also: at 510–11 (Dixon J), 527 (McTiernan J). Neither Rich nor Evatt JJ commented on copyright in their judgments. For a more complete analysis of the judgments: see McKeough, above n 19, 56–61.

sports cases had a broader impact on the development of Australian copyright law, as highlighted in the *Telstra* and *Desktop Marketing* cases. It was only recently, in *IceTV Pty Ltd v Nine Network Australia Pty Ltd*⁶³ and both of the *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* decisions⁶⁴ that the findings of these cases were overturned, but only in relation to the subsistence of copyright in compilations and the issue of authorship.⁶⁵

Horse racing was not the only area, however, where it was argued that copyright protection should be extended to lists of sport-related information and the information itself. While the law protecting horse racing compilations was based in the common law, in a 1959 joint submission to the Copyright Law Review Committee, chaired by Sir John Spicer ('the Spicer Committee'), the Australian National Football Council and Victoria Football League argued that statutory copyright should extend to lists of sporting information.⁶⁶ This Committee was established in 1958 with the task of considering the state of Australian copyright law and recommending reform.⁶⁷ At the time, the *Copyright Act 1911*, despite its earlier repeal in the UK under the *Copyright Act 1956* (UK) 4 & 5 Eliz 2, c 74, was still in operation. Substantial technological and social changes had also occurred during this period. With that UK statute as its guide, the Committee examined all then-current and proposed changes to Australian copyright and the *Copyright Act 1968* (Cth) was, eventually, introduced as a result of the findings of the Spicer Committee. This Committee was therefore the perfect opportunity for sporting organisations to propose favourable changes to the law.

In its joint submission, the Australian National Football Council and Victoria Football League stated that, just before the beginning of the coming football season, lists of clubs and players, and the numbers assigned to players, were created by each of the senior clubs.⁶⁸ These lists were then sold by the clubs, and were therefore a source of revenue each season.⁶⁹ Thus, at the conclusion to its joint submission, the Australian National Football Council and Victorian Football League posited 'that there should be copyright in those lists of players and numbers just as, it is suggested, there should be similar copyright in the

⁶³ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458.

⁶⁴ *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 264 ALR 617; *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 194 FCR 142.

⁶⁵ See *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* (2010) 264 ALR 617, 621–2 [5], 684 [337]–[338] (Gordon J). The findings of Gordon J are directly at odds with the dismissal of these facts by Wolff J in *Winterbottom*.

⁶⁶ National Archives of Australia: Attorney General's Department, Central Office; A432, Correspondence files, annual single number series, 1901–; 1958/2338, 'Copyright Law Review Committee – proposals and representations', 1958–1962; 'Australian National Football Council and Victorian Football League. Submission to Copyright Law Review Committee, 8 January 1959.

⁶⁷ Copyright Law Review Committee, *Report of the Committee Appointed by the Attorney-General to Consider What Alterations Are Desirable in the Copyright Law of the Commonwealth*, Report No 4531/36 (1959) 7 [1] ('Spicer Report'); see also Atkinson, above n 15, 282–8.

⁶⁸ NAA: A432, 1958/2338, Australian National Football Council and Victorian Football League, above n 66, 7.

⁶⁹ *Ibid.*

numbers given horses in horse racing and competitors in athletic events such as foot running and bicycle races.⁷⁰

The suggestion was dismissed in the final report of the Spicer Committee. In a section entitled, 'Sporting Spectacles', the Spicer Committee stated:

We are unable to see how copyright can be conferred merely in respect of the name of a player associated with his football number. It has been held that copyright may exist in various compilations such as an alphabetical list of railway stations, a list of fox-hounds and hunting dogs and lists of stock exchange prices and football fixtures. In all these cases the question whether copyright exists depends to a large extent on the amount of labour, capital or skill expended in making the compilation. We think that the law in this regard should not be changed.

It seems that the football clubs may have copyright in the lists they prepare as published in the various football publications (see *Football League Ltd. v. Littlewoods Pools Ltd.*, (1959) 3 W.L.R. 42). Such copyright, however, does not prevent a person making his own list by attending a match. In the field of copyright there is not, in our view, any way to legislate against this. Indeed, no proposal on how this could be achieved was submitted to us. We, therefore, reject the submissions in this regard.⁷¹

It is surprising that the Spicer Committee did not mention the four Australian cases discussed above – *Canterbury Park Race Course*, *Moorefield Race Club*, *Mander* and *Winterbottom* – where it was established that copyright could subsist in compilations of horse racing information, similar to what the Australian National Football Council and the Victorian Football League were seeking to protect in their submission. Those organisations had another suggestion for the Spicer Committee, however, as will now be discussed below.

Copyright in Sporting Events

That horse racing provided a 'spectacle' and concurrently that 'a "spectacle" cannot be "owned"' was highlighted at both instances of the *Victoria Park Racing* decision.⁷² This has not stopped sporting organisations arguing both in the past and today that copyright should subsist in a sporting 'spectacle', without every properly defining what that term really means.

⁷⁰ *Ibid.*, 8.

⁷¹ *Spicer Report*, above n 67, 89 [483]–[484]. See also McKeough, above n 19, 62, who considers this quotation in relation to developments in the US relating to fantasy baseball.

⁷² *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1936) 37 SR (NSW) 322, 328 (Watt KC) (during argument); *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 496 (Latham CJ).

Indeed, the Australian National Football Council and Victorian Football League also proposed this in their submission to the Spicer Committee. In addition to arguing for copyright in football lists, the submission also suggested that ‘an appropriate section’ be added to Australian copyright law, ‘[providing] that there is copyright in a spectacle shown or exhibited in a place to which a charge is made for admission and that that copyright should be vested in the promoters of the spectacle.’⁷³ The submission both noted and extracted the existence of section 115 of the *Broadcasting and Television Act 1942* (Cth), as introduced and re-numbered under the *Broadcasting and Television Act 1956* (Cth). This section provided that a commercial television station could not televise any sporting event held in Australia, where admission was charged, and the footage was captured from outside the place the event was being held.⁷⁴ It was recognised in the submission that section 115 ‘was obviously inserted to give some property in a spectacle to the proprietors of it’⁷⁵ and to avoid a repeat of the *Victoria Park Racing* litigation, in a television format. However, the Australian National Football Council and Victorian Football League felt that the realities of live sport – ‘particularly in the case of football clubs which play on grounds not controlled by them’ and the increased growth of television justified the introduction of the provision.⁷⁶ Thus, while it was recognised that a right to broadcast already existed, it was argued that copyright should be extended to protect the *spectacle of the sporting event itself*. How such a provision would be phrased, or would interact with other provisions of any subsequent copyright law, was not discussed in the submission.

The Spicer Committee did not devote much space to this submission in its final report. It provided the facts of the *Victoria Park Racing* litigation;⁷⁷ extracted section 115 in whole;⁷⁸ and commented that:

We agree with the reasons of the Gregory Committee for rejecting the creation of a copyright in a sporting spectacle. That Committee pointed out the practical difficulties that would arise from such a copyright and also stated that such a copyright could hardly be confined to sporting spectacles. Also, in Australia there exist the same constitutional difficulties as are referred to above in relation to performers.⁷⁹

⁷³ NAA: A432, 1958/2338, ‘Australian National Football Council and Victorian Football League, above n 66, 6.

⁷⁴ *Broadcasting and Television Act 1942* (Cth) s 115, as inserted by the *Broadcasting and Television Act 1956* (Cth); see also McKeough, above n 19, 64.

⁷⁵ NAA: A432, 1958/2338, ‘Australian National Football Council and Victorian Football League, above n 66, 6.

⁷⁶ *Ibid* 7.

⁷⁷ *Spicer Report*, above n 67, 88 [478].

⁷⁸ *Ibid* 88–9 [479].

⁷⁹ *Ibid* 89 [480].

There are two aspects identified in that quotation that warrant exploration. The first relates to the reference to the Gregory Committee. That Committee, similar in function to the Spicer Committee but preceding it by 17 years, examined the state of copyright law in 1952 and recommended a number of changes that led to the passing of the *Copyright Act 1956* (UK) 4 & 5 Eliz 2, c 74.⁸⁰ Like its Australian successor, the Gregory Committee received a number of submissions arguing that copyright should subsist in a sporting event,⁸¹ though most of what was discussed in its final report was already protected in Australia pursuant to section 115 of the *Broadcasting and Television Act*, as amended in 1956. The report of the Gregory Committee did, however, provide a good working definition of what was meant by a 'spectacle' in these circumstances, as proposed by the Association for the Protection of Copyright in Sport: 'any exhibition, display, sporting contest, entertainment or parade organised by any person, firm or company with a view to its being seen by members of the public'.⁸²

Second, the comments of the Spicer Committee on the constitutional issues that could have prevented the introduction of such a right are also interesting. At that point in time the 1908 decision of the High Court, *Attorney-General (NSW) v Brewery Employees Union of New South Wales*⁸³ remained the pre-eminent decision for interpretation of both section 51(xviii), the IP provision of the *Australian Constitution*, and constitutional interpretation more generally. In that case, a majority of the High Court found that a narrow interpretation of section 51(xviii) was preferred. This restricted the interpretation of each of the heads of power referred to in that provision – copyrights, patents of invention, designs and trade marks – to what characteristics that type of IP exhibited at the passing of the Australian Constitution in 1900.⁸⁴ On that basis, given that performer rights, moral rights, sound recordings and copyright protection for sporting events did not exist at 1900, the Spicer Committee expressed concern that introducing copyright protection in these areas would be unconstitutional.⁸⁵

⁸⁰ See generally Board of Trade (UK), *Report of the Copyright Committee*, Cmd 8662 (1952) ('*Gregory Report*').

⁸¹ *Ibid* 58 [160].

⁸² *Ibid* 59 [162]. See also: at 66–9 [183]–[192]. The Association for the Protection of Copyright in Sport had a long involvement with negotiating sports broadcasts in the UK: see generally Brad Sherman, 'Public Ownership of Private Spectacles: Copyright and Television' in Brad Sherman and Leanne Wiseman (eds) *Copyright and the Challenge of the New* (Kluwer Law International, 2012) ch 9. Sherman's chapter provides a detailed and insightful analysis of the development of sports broadcasting in the UK. See also Atkinson, above n 15, 267–9.

⁸³ *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 ('*Union Label*').

⁸⁴ See *Union Label* (1908) 6 CLR 469, 501 (Griffith CJ), 521 (Barton J), 538 (O'Connor J).

⁸⁵ *Spicer Report*, above n 67, 45–6 [234] (sound recordings); 88 [477] (performer rights); 89 [480] (sporting events); 90 [489] (moral rights).

Since making these comments, Australian constitutional interpretation has broadened considerably, including in the areas of intellectual property.⁸⁶ Of the four areas listed above that the Spicer Committee felt may cause constitutional issues, three have been introduced: protection for the makers of sound recordings;⁸⁷ moral rights protection;⁸⁸ and performer's rights protection.⁸⁹ The reason that protection for sporting events has not been introduced, however, is arguably not a constitutional issue, but a copyright one; to introduce such a category would involve a revolutionary re-think of the traditional categories of copyright protection.⁹⁰ All works or subject matter other than works require some element of *fixation* and *expression in a material form* in order for copyright to subsist pursuant to the *Copyright Act 1968* (arguably with the exception of sound and television broadcasts, which are protected from fixation).⁹¹ A sporting event is, to use a term of Nicholas J in *Victoria Park Racing*, 'evanescent' in nature, just like the information captured on the track's result board in that case.⁹² Unless it is recorded – and copyright in that sound or film recording will vest in the appropriate sporting organisation regardless – then copyright cannot subsist.⁹³

Despite this inherent restriction, the argument that copyright should subsist in a sporting event has retained currency today, and has been put to the Federal Government for consideration within the last five years. In February 2009, the Senate requested that the Standing Committee on Environment, Communications and the Arts investigate and report upon the current position of '[t]he reporting of sports news and the emergence of digital media' in Australia.⁹⁴ Among the issues identified in the terms of reference was the development of sports news reporting; the commercial issues and interests at play between sporting organisations and sports media; and balancing rights of access with rights of control.⁹⁵

⁸⁶ See generally *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134; *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479.

⁸⁷ Introduced as part of the original *Copyright Act 1968* (Cth).

⁸⁸ See *Copyright Amendment (Moral Rights) Act 2000* (Cth).

⁸⁹ See *US Free Trade Implementation Act 2004* (Cth) sch 9.

⁹⁰ For a brief note on a series of cases on copyright and sporting events that have been decided post-*Victoria Park Racing*: see McKeough, above n 19, 64 n 65. The focus of this article is on the lobbying by sports organisations for a statutory right, and therefore these cases are not considered.

⁹¹ See *Copyright Act 1968* (Cth) s 22. It should be read with s 10 (definitions of 'adaptation', 'material form', 'work').

⁹² *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1936) 37 SR (NSW) 322, 344.

⁹³ See Senate Standing Committee on Environment, Communication and the Arts, Parliament of Australia, *The Reporting of Sports News and the Emergence of Digital Media* (2009) 42 [4.43] ('*Senate Standing Committee Report*').

⁹⁴ *Ibid* [1.1].

⁹⁵ *Ibid*.

Copyright was not specifically identified or mentioned in the terms of reference for the review, but it was raised as an issue in a number of submissions.⁹⁶ The majority of those submissions that mentioned copyright focused on the current state of the provisions for fair dealing for the reporting of news, and its appropriate application in a sports media context.⁹⁷ However, as part of its submission, Lander & Rogers Lawyers, whose submission represented both their own views and that of clients, including Surf Life Saving Australia, Badminton Australia and Softball Australia,⁹⁸ proposed the introduction of protection for a category of 'sporting works'.⁹⁹ It was stated in the submission, and as was extracted in the *Senate Standing Committee Report*, that:

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.¹⁰⁰

In response to a question by the Standing Committee as to how the category of 'sporting works' might be defined, Lander & Rogers Lawyers replied that it might '[include] 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.'¹⁰¹ It is arguable that such a definition is as 'evanescent' as the sporting events it is intended to capture.

Lander & Rogers Lawyers were not alone in this proposal; the Coalition of Major Professional Sports ('COMPS') made a similar suggestion in its submission to the Senate Standing Committee. In its submission, COMPS did not define its organisational role or purpose, beyond listing its members, who at the time of the Senate Standing Committee review included Australian Football League; Cricket Australia; Football Federation Australia; the National Rugby

⁹⁶ For the full list of submissions, see *Submissions Received by the Committee as at 26 Aug 2009* (26 August 2009) Parliament of Australia <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed%20inquiries/2008-10/sportsnews/submissions>.

⁹⁷ *Senate Standing Committee Report*, above n 93, 26 [3.47]–[3.48].

⁹⁸ Lander & Rogers Lawyers, Submission No 33 to the Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, *Inquiry into the Reporting of Sports News and the Emergence of Digital Media*, 9 April 2009, [2].

⁹⁹ *Ibid* 5 [26].

¹⁰⁰ *Ibid*, quoted in *Senate Standing Committee Report*, above n 93, 42 [4.44].

¹⁰¹ *Senate Standing Committee Report*, above n 93, 43 [4.45].

League; and Tennis Australia.¹⁰² On its website, the organisation, which has subsequently become the Coalition of Major Professional and Participation Sports ('COMPPS') describes itself as 'provid[ing] a collective response on behalf of its member sports where their interests are aligned.'¹⁰³ Where a government inquiry is occurring, and a number of COMPS members agree on a position, COMPS will make a written submission to that inquiry, arguing that position. Here, COMPS argued that:

Whilst outside the current terms of reference of this inquiry, COMPS members believe that sporting organisations should be granted ownership of copyright in the key elements of the performance of the major events promoted by those sports organisations. This requires an enhancement of their intellectual property rights at law, although those rights will remain subject to fair dealing for the purpose of reporting current sports news[.]¹⁰⁴

The language used by COMPS illustrates in part why 'sporting works' will arguably never become a category of copyright-protected works. While it has been sporting organisations that have been arguing for copyright in this area, and for ownership of that copyright to vest in them, the magic of a sporting event comes from its 'performance' – that is, the performance of the players. Consider this in the context of Twenty20 cricket, for example. While Cricket Australia may provide the rules and venue for a match, the success of the match as a 'spectacle', as something worth seeing, regardless of who wins, rests with the performance of the players. The public comes to see these players perform – whether these are local Twenty20 successes such as David Warner or Aaron Finch, or international names like Chris Gayle. Given this reality, it is arguable that the players themselves should be granted performance rights, similar to those currently existing in the *Copyright Act 1968* that prohibit unauthorised recording and broadcasting of performances, rather than the sporting organisations.¹⁰⁵ A sporting organisation is, however, unlikely to either make such a suggestion or be amenable to the introduction of such rights.

¹⁰² COMPS, Submission No 31 to the Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, to the *Inquiry into the Reporting of Sports News and Emergence of Digital Media*, 4 May 2009, 1 [1.1] ('COMPS submission'). Some of those organisations made submissions in addition to the COMPS submission: see, eg, Cricket Australia, Submission No 35 to the Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, to the *Inquiry into the Reporting of News and the Emergence of Digital Media*, 8 April 2009.

¹⁰³ *The Coalition of Major Professional and Participation Sports – COMPPS* (2004) COMPPS <<http://www.compps.com.au/index.html>> (accessed 12 Nov 2014).

¹⁰⁴ COMPS submission, above n 102, 21 Table (i).

¹⁰⁵ See *Copyright Act 1968* (Cth) pts IX, XIA. See also Giuliana R Garcia, 'He Shoots, He Scores ... and Receives Copyright Protection? How the Current State of Intellectual Property Law Fumbles with Sports' (2011) 11 *University of Denver Sports & Entertainment Law Journal* 81.

The Senate Standing Committee ultimately dismissed the issue quickly in its final report. It stated that '[v]esting copyright in a sporting event or performance would not address the issue relating to the fair dealing provisions and the reporting of sports news.¹⁰⁶ However, given that this argument reappeared again exactly 50 years after it was first suggested in an Australia context in 1959, it is more likely than not that it will be proposed again by sporting organisations in the future.

Conclusion

Of the top 20 most-watched television broadcasts of 2013, sporting events comprised five of the top 10 broadcasts and seven of the overall total.¹⁰⁷ The enjoyment of sporting events – whether an AFL or NRL grand final; the Ashes; or the Melbourne Cup – and all that surrounds these competitions will continue to be a popular pastime for the Australian community so long as sport is so firmly ingrained in Australian culture. It will therefore also have the capacity to remain a lucrative area for those involved, including players, coaches, organisations and broadcasters.

Further, as technology develops, there will also be an increased capacity for the expansion of the consumption and interaction with sporting events across these new platforms and, with this, the potential for expansion into new categories of legal rights. Ten years ago, eg, the capacity to view replays on mobile phones was introduced, reducing the dependency on a television or news website to 'catch up' on sporting developments. More recently, the introduction of apps for smart phones has broadened both the content and information that is available – at the rate of 0s and 1s – to fans who want to keep up to date on favourite sports and teams. It is no longer about catching up on the day's play at the SCG after stumps; it is about being able to check in on a mobile phone as play is happening to get information, updates and predictions. In these cases, sporting organisations have had to be *reactive* in the negotiation of rights, tailoring existing agreements to new technological circumstances.

This article has examined how, outside of these spheres, sporting organisations have sought to be *proactive* in seeking to establish legal rights under copyright law, but how this has caused tension between these two areas. The historical analysis presented here, on copyright in sports information and copyright in sporting events, has revealed that in an attempt to proactively bolster legal rights,

¹⁰⁶ *Senate Standing Committee Report*, above n 93, 44 [4.48]. Although it will not be discussed in detail here, a number of sports organisations have subsequently relaunched criticisms of the reporting of news provision through submissions to the Australian Law Reform Commission's *Copyright and the Digital Economy* inquiry: see, eg, COMPPS, Submission No 634 to Australian Law Reform Commission, *Copyright and the Digital Economy*, 31 July 2013.

¹⁰⁷ Paul Kalina, 'The Ratings Reality Show: The Most Watched TV of 2013', *The Sydney Morning Herald* (online), 5 December 2013 <<http://www.smh.com.au/entertainment/tv-and-radio/the-ratings-reality-show-the-most-watched-tv-of-2013-20131204-2ypc6.html>>.

sporting organisations have regularly demanded more than copyright law was willing to provide. Over the course of the last century, sporting organisations regularly proposed that copyright law be extended to protect information and events. However, to do so would be against the fundamental principles of copyright law. At the same time, sport has also influenced the development of copyright at common law and thus a complex, multi-faceted relationship has emerged from this analysis.

Given this century-long history, this dynamic relationship will continue in the future and it may be that the areas discussed in this article also re-appear. As noted above, the introduction of apps that provide constant updates means that once again information itself is a lucrative commodity. At the same time, sporting organisations, despite the legal difficulties highlighted above, will also likely continue to campaign for protection of the 'spectacle'. However, as this article has highlighted, the relationship will not be one-sided; consider that the first case law on the 2006 time-shifting provisions, the *Singtel Optus v National Rugby League Investments* litigation, concerned football matches. Thus, as long as sport remains a part of Australian culture, it will also likely remain a part of Australian legal culture.

