



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION  
TECHNOLOGY AND THE ARTS LEGISLATION COMMITTEE

**Reference: Broadcasting Services Amendment (Anti-Siphoning) Bill 2004**

MONDAY, 21 FEBRUARY 2005

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BY AUTHORITY OF THE SENATE



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**SENATE**  
**ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY**  
**AND THE ARTS LEGISLATION COMMITTEE**

**Monday, 21 February 2005**

**Members:** Senator Eggleston (*Chair*), Senator Lundy (*Deputy Chair*), Senators Cherry, Conroy, Santoro and Tchen

**Senators in attendance:** Senator Eggleston (*Chair*), Senators Conroy, Santoro and Tchen

**Terms of reference for the inquiry:**

Broadcasting Services Amendment (Anti-Siphoning) Bill 2004

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**Committee met at 9.08 a.m.**

**GREINER, The Hon. Nick, Chairman, Australian Subscription Television and Radio Association**

**MALONE, Mr David John, Chief Executive Officer, Premier Media Group/Australian Subscription Television and Radio Association**

**MARQUARD, Mr Jon, Chief Operating Officer, Premier Media Group**

**RICHARDS, Ms Debra Shayne, Executive Director, Australian Subscription Television and Radio Association**

**CHAIR**—I declare open this public meeting of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee and I welcome everybody here today. The committee is examining the Broadcasting Services Amendment (Anti-Siphoning) Bill 2004, which the Senate referred to the committee on 8 December 2004 on the recommendation of the Selection of Bills Committee. The committee has received 10 submissions, which have contained an interesting range of views for the committee's consideration. The committee is due to report to the Senate on 7 March 2005. For the benefit of all witnesses I note that the committee prefers all evidence to be given in public but should you at any stage wish to give your evidence, part of your evidence or answers to specific questions in private you may ask to do so and the committee will consider that request.

I welcome our first witnesses, the Hon Nick Greiner and other representatives of the Australian Subscription Television and Radio Association, or ASTRA. I also welcome members of the Premier Media Group. I thank you all for your appearance today. It is very much appreciated. The committee has received ASTRA's submission, No. 5, and the Premier Media Group's submission, No. 3. Do you wish to make any alterations, additions or amendments to your submissions?

**Mr Greiner**—No.

**CHAIR**—You are reminded that evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I now invite you to make an opening statement before we move to questions.

**Mr Greiner**—ASTRA welcomes the opportunity to be part of a broader review of the antisiphoning scheme. First let me deal briefly with the bill, which, I suspect, may not be the main focus of the committee. ASTRA, obviously, supports the bill strongly. When it was mooted a year or so ago the bill enjoyed universal support, with the exception of one stakeholder group, across the political spectrum and from all of the other stakeholders. It is really just a practical administrative change which is intended to provide greater certainty. It is intended to make the existing scheme work better. It does not change the regime in any fundamental way; it is simply an administrative improvement. We strongly support it. We would note that, really, since the delisting procedure started, there has been no suggestion of any inappropriate behaviour or problems with delisting other than the practical ones which the scheme seeks to address. I would have to say that we do not believe this bill is controversial in any way. We would hope that the committee would urge its adoption.

Let me turn briefly to some of the broader issues which I think the committee is keen to get to. Firstly, let me say that ASTRA is very much of the view that regular reviews and regular independent monitoring of the antisiphoning scheme are essential. That has not happened. The truth is that the scheme has been reviewed once since it was brought in in 1994. We think the nature and essence of it is that it is a living document, one that changes as markets and events change. So we do believe that regular reviews and, in a sense more importantly, regular and independent monitoring of how the scheme is working in practice are very important. It is fair to say that such monitoring was promised by both sides of the parliament under the previous minister and shadow minister, and we would urge that on the committee. The truth at the moment is that the only monitoring is done by ASTRA. Whilst we are the epitome of fairness and objectivity, I think it is obvious that someone like ACMA ought to be doing the monitoring in order to make it meaningful for the minister, the government and decision-makers to contemplate.

Especially for Senator Conroy's benefit, I thought I might read a couple of very short quotes from Michael Lee, the Minister for Communications and the Arts at the time the antisiphoning scheme was brought in. One regularly hears furrphies about the intention of the scheme and what it was meant to do. I hope the committee will bear with me as they are very short quotes. Then Minister Lee said:

This is not a list of events that are reserved solely for free to air television. Rather, it is a list of events for which pay TV licensees cannot acquire exclusive rights. It does not mean that these events cannot be broadcast on pay TV.

I put the next one in only for good humour. Mr Lee said:

The government expected the broadcasting industry to act in a mature and responsible manner and not use the list as a mechanism for anticompetitive behaviour such as hoarding of rights.

If I might interpolate, you would have to say that in some ways his expectations have not been met. Finally, and importantly, the then minister said:

The list is not a set of commandments cast in stone. If the events on the list are not being acquired or shown, I can remove them. Similarly, if other events of importance to consumers emerge and are at risk, I can include them.

That last one, which is effectively the ministerial safety net, is a very important provision that tends to get glossed over in some of the political argy-bargy that goes on.

Not surprisingly, ASTRA would urge on the committee an acknowledgment of the fact that it is really market reality and not regulation that determines what happens to the broadcasting of sporting events and indeed the sale of sporting rights. ASTRA consistently has argued that cooperation and commonsense between free-to-air and subscription television is the most effective approach in terms of the public interest, and I am sure my colleague Mr Malone will give you some examples during the course of this morning of how in practice the best result often happens when there is cooperation between the two sectors. I urge the committee to judge on what actually happens rather than on the rhetoric from all sides. I think if you look at what actually happens in the marketplace you get a much more meaningful view of reality.

In terms of the reforms, part of the notion of the committee is to see how the scheme can be made to work better. It is well known that ASTRA has two principal views on this. The first

has become known as the ‘use it or lose it’ scheme. It is again fair to say that that concept has had wide support across the political spectrum and from all stakeholders bar one. The public interest is best served by an effective use it or lose it scheme. Some of those quotes from Michael Lee from 11 years ago effectively suggest that what he had in mind was a living document and living ministerial activity which actually saw what was happening and what was in the public interest. We think the use it or lose it scheme has some basic fairness to it. As I say, there is a large amount of agreement with the concept. What it needs fairly urgently is implementation. That goes to the question of monitoring and reviewing what is really happening, which I mentioned earlier.

The same applies to what has rather mistakenly become known as the ‘whole-of-competition’ issue. Really, the issue is more a point about taking it by match, not by event. It is the argument that says that nobody can show all of Wimbledon or all of the Australian Tennis Open, to take a recent example. It would be sensible to not have a single set of rules that governs 500 or 600 matches, because that clearly cannot be in anyone’s interest and certainly it is not in the public interest. We think that with both of those—the use it or lose it scheme and the need to change from a whole-of-competition to a more selective approach—what is really required is a willingness by the government to move to implement those reforms, which I do think have basic fairness, are certainly in the public interest, and are not that difficult either intellectually or in practice.

In terms of the current controversies it is intended that David Malone, the chief executive of the Premier Media Group, might deal with those. But let me just say from an umbrella point of view that ASTRA absolutely rejects the assertions that have been made about the forthcoming Ashes tour. They are fictitious, they are a furphy and they are based on what could only be called absolute untruths—I say that advisedly. They are simply not based on fact. I would also like to say that the minister—and she made the point to the estimates committee last week, I think—has the power to not delist. She effectively has a safety net position. That is an important thing which is again overlooked in much of the discussion. Finally, in terms of football or soccer—which we know Senator Conroy has no interest in!—we simply argue that there is no public interest in further government intervention. At both a national level in Australia and a global level, Premier Media Group is able to exemplify that very clearly. That is what I want to say by way of introduction. If it is all right, I would like to throw to David Malone.

**Mr Malone**—In my opening statement I would like to address two issues: the Australian soccer broadcast rights and the 2005 Ashes cricket rights. Senator Conroy asked the chair of the ABA last week about the status of Australian soccer television rights. I am happy to confirm that Premier Media Group has invested in the development of a domestic national soccer competition, which commences in August this year, called the A-League. The league promises a new beginning for Australian soccer and we look forward to working closely with the Australian soccer community to build a world-class national soccer competition.

As for the Socceroos rights, the live rights to the national team have been licensed by the Football Federation Australia to SBS, with Fox Sports showing delayed coverage of these matches. This is an excellent example of the market operating effectively without the interference of the antisiphoning regulations. As you know, the Socceroos matches are not

included on the antisiphoning list, but the FFA deliberately pursued free-to-air broadcast coverage for its national matches because it deemed this to be in the best interests of the game.

As we are all aware, the 2005 Ashes has received a great deal of public attention because of the lack of enthusiasm by the Australian free-to-air broadcasters to make a bid to acquire the rights. The free-to-air broadcasters have made a number of claims that the rights to the Ashes were only offered to them after they had been sold to Premier Media Group and that this is one of the reasons why they are reluctant to make a bid. I would like to set the record straight once and for all. Contrary to Free TV's claims in its submission to the committee and the ABC's subsequent follow-up, we now have irrefutable proof that the free-to-air broadcasters were offered the rights to the Ashes as far back as 2001 but all declined to take them up.

As the committee is aware, Premier Media Group have always understood that the free-to-air broadcasters had been offered the rights prior to our deal being finalised in 2002. In response to the public discussion of these matters we sought clarification from the ECB's broadcast rights agent, Octagon CSI. Octagon CSI has now confirmed what actually happened. I have here a letter for public distribution addressed to the committee from Octagon, which I would like to table. This letter confirms that Octagon approached all free-to-air broadcasters before the ECB finalised its subscription television deal with us. In particular it reveals that Octagon approached the free-to-air broadcasters on a number of occasions and that our deal was only concluded after all free-to-air broadcasters were given a full and final opportunity before our deal was concluded to make an offer or express some interest in the rights. The concluding paragraph in the letter states:

... we are surprised that the FTA broadcasters (through Free TV Australia) are now claiming that they were not given the opportunity to acquire rights to the Ashes and were only offered the rights to the Ashes series after the sale of such rights to FoxSports. The simple truth of the matter is that the FTA broadcasters were given several opportunities to acquire the rights to the 2005 Ashes series, but all declined to do so on numerous occasions for a variety of reasons.

I have the original letter dated 18 February and copies for each of the committee members. I would like to table it now.

**CHAIR**—Are the committee happy for that letter to be tabled? They are. I would like to ask the first question, which arises from both of your submissions. You have both referred to the need for a 'use or lose' mechanism which would automatically and permanently remove any event from the scheme if a free-to-air broadcaster did not broadcast that event in full. I suppose it also would apply to the issue of hoarding and free-to-air purchasing but not broadcasting. I wonder if you would like to give us some examples of hoarding and how commonly that practice is used.

**Mr Marquard**—Hoarding can occur on an event-by-event basis and it varies very much from event to event. Hoarding was one of the reasons that the government announced some changes to the scheme when it looked at this issue last year. To give an example of a few years ago, the Seven Network had the rights to the National Soccer League finals and only showed one out of 31 matches. That was probably one of the important reasons the finals were removed.

There are a number of other examples of hoarding. Hoarding can occur in some very subtle ways. Hoarding can occur where there is an unnecessary delay in using rights to broadcast. A recent example was the Australian Open tennis tournament. There was a lot of press coverage about the delayed coverage of the Australian Open into Brisbane. We say that a similar example of hoarding occurred in relation to the Australian Open tennis when the women's semifinal was in progress. The women's semifinal was only midway through the second set—it may have been the third set—when Channel 7 elected to cut out of that coverage to go to the news and *Home and Away*. That is an example, we say, of hoarding. If you have the live rights you should use them. If you do not use them then you should lose the regulatory protection that you have.

There are a number of other examples that we have articulated. I do not want to single out a particular network, so I will give you other examples in relation to the Nine Network. For many years now, the Nine Network has delayed its coverage of State of Origin matches into states other than Queensland and New South Wales. That causes a lot of angst amongst rugby league supporters in Victoria, South Australia and Western Australia in particular. So there are a number of examples on an event-by-event basis. It occurs regularly. For that reason, we say the scheme is still too broadly drafted. It really does go to the point made by Nick earlier that, if you reduce the scheme to not include whole tournaments or whole events, a lot of the problems of hoarding would go away because you reduce them down to the nub, which is the really critical matches. So you would have the AFL key matches and the NRL key matches, but with regard to those broader ones you would not have every single NRL match or every single match at Wimbledon covered. It is physically impossible, obviously, to cover all those. We say: why protect those?

**CHAIR**—Thank you. That is very interesting evidence. I will now pass to Senator Conroy. Senator Conroy, we started a bit late so we need to share the time between the other senators.

**Senator CONROY**—Sure. Hopefully, we will go until the evidence is completed.

**CHAIR**—We will do things in 10-minute batches and then rotate.

**Senator CONROY**—I think he is trying to admonish you for the length of your answers, Mr Greiner!

**Mr Greiner**—That was not my interpretation at all.

**Senator CONROY**—That is my interpretation.

**CHAIR**—We expect lucid answers which provide a good basis for the committee's report.

**Senator CONROY**—The Octagon CSI letter makes reference to the free-to-air. Does that include the ABC? Were they part of any discussions?

**Mr Greiner**—Yes, they were.

**Senator CONROY**—So they were also approached. The letter says:

With regard to the ABC and Channel 10 ... they had no interest ...

According to your calculations, what percentage of households have access to pay TV at present?

**Ms Richards**—The penetration rate is 23 per cent.

**Senator CONROY**—How has this number moved in recent years?

**Ms Richards**—The actual number of households has increased. We have probably been at that percentage point—between 20 and 23 per cent—over the last two to three years.

**Senator CONROY**—So it has been stable?

**Ms Richards**—It has been stable but also increasing, although not at an exponential rate.

**Senator CONROY**—What, in your view, have been the drivers of the take-up?

**Mr Greiner**—The conventional answer to that is a combination of movies, news and sport. It is probably not a particularly elucidating answer but normally the driver is one of those three categories. There are certainly the changes in technology. I think the move towards Sky News Active had an increasing effect, so the changes in technology periodically have a smallish to medium sized function of stepping up. I think they are generally regarded as the main drivers of the take-up of subscription television.

**Ms Richards**—Can I add that choice and diversity are also key, right across the genres of subscription television. Not only can subscribers choose when they watch it but now, moving towards digital, there is also the ability for the subscriber to actually become more like the programmer. They choose when they watch a program and how they watch the programming. So certainly choice and diversity are also key.

**Senator CONROY**—Who does ASTRA represent at the moment? You described yourself as an umbrella body before.

**Ms Richards**—ASTRA represents the subscription television operators and the channels that provide services on those platforms.

**Senator CONROY**—Who would that be?

**Ms Richards**—It would be, for example, Austar; Foxtel; Optus Television; channels such as Premier Media Group, Children's Channel, Disney and Nickelodeon; sports channels such as ESPN; and news channels such as Sky News and CNN. We represent that range of channels, and members of our board include Optus Communications and Telstra.

**Senator CONROY**—So it is not just the pay TV providers.

**Mr Greiner**—Not just the platform providers.

**Senator CONROY**—Yes, not just the platform providers; it is the content providers.

**Ms Richards**—It is also the content providers and other associated groups.

**Senator CONROY**—Do ASTRA and PMG accept the need for an antisiphoning list, given that only around a quarter of households have access to pay TV?

**Mr Greiner**—We said quite clearly during the government's reviews on this more than a year ago that we accepted the political reality that in Australia there would be protection of the original intent of genuine iconic schemes. So, whilst at a theoretical level we probably think the free market might produce the same or better outcomes, we do accept the reality of the scheme. We think the scheme ought to be changed fundamentally by reducing the size of the newly promulgated list and introducing a use it or lose it element to it, but we do state

categorically that we accept the reality that the major events—and I think we can all identify what they really are—ought to be protected by antisiphoning.

**Senator CONROY**—Thanks for that. What I was asking about was whether you accept the need, not whether you accept the reality or the political reality. Do you accept the need?

**Mr Greiner**—I do not want to quibble. I am happy to say yes if you want me to say yes, but it clearly is—

**Senator CONROY**—I am happy for you to give me the answer that you think.

**Mr Greiner**—We think that the need and the political views tend to be the same. We think you and your colleagues are a reflection of community opinion.

**Ms Richards**—It is fair to say that we have given examples of sports that are not on the antisiphoning list that have very good coverage both on free-to-air television and on subscription television—for example, the swimming and the Tour de France. They are key events that—

**Senator CONROY**—That are on par with the world cup soccer, according to the minister. I am sure you have read that as well.

**Ms Richards**—They are not on the list. That is what I am saying.

**Mr Marquard**—I think the point there is that there are events which some people in the community may regard as very iconic—and if you are a cycling fan you may regard the Tour de France in that way.

**Senator CONROY**—I am cycling fan and it is an iconic event.

**Mr Marquard**—It is an iconic event to you. Our point is that the Tour de France is not on the antisiphoning scheme and yet, once again, the market has delivered a result which sees SBS devote considerable resources to its coverage of that event. In fact, I believe SBS are increasing their coverage this year to cover the Tour de France live—it goes all day, so I may be wrong about that. They can fill you in on that. However, the really important point is that, in relation to the conceptual framework of having an antisiphoning scheme, you do not need one to deliver that sort of result on free-to-air television, if that is an event which a particular broadcaster will go after. Sports events are important to the free-to-air networks for a number of reasons and we say that, in the absence of an antisiphoning scheme, you will still get really important sports—a lot of sport—on free-to-air television. I do not think anybody would quibble with that view.

**Mr Malone**—If I could just jump in, another good example is Australian swimming, where there has been a long-term deal done. Again, swimming is not on the list. That deal was brokered probably four years ago. It has seen swimming covered on free-to-air and subscription television. Swimming gets very good coverage on both platforms and, again, that deal was done in the absence of any sort of regulation. The point we are trying to make is that the sporting organisations do have their sports best interests at heart. They will structure deals to grow their sports and do the right thing by their sports, as in the example in my opening statement when I talked about the new soccer arrangements.

**Senator CONROY**—Take me through the swimming. I know that Channel 9 show highlights at what could be described as later at night.

**Mr Malone**—Channel 9 play some of the events live and Fox Sports plays delayed highlights of those events. In some cases Channel 9 do not choose to play those events live and then Fox Sports will play those events live and Channel 9 will provide free-to-air highlights.

**Senator CONROY**—Which ones do they show live?

**Mr Marquard**—They show live the Australian swimming championships, the Pan Pacific championships and the world long-course championships. Fox Sports will show live events such as the Qantas skins, the world short-course swimming championships and what are called the world cup events.

**Ms Richards**—Fox Sports may also do the heats during the day live, as opposed to—

**Mr Marquard**—We have done that in the past, yes.

**Senator CONROY**—Regarding the outcome in the UK around premier league, the regulators felt the need—because there was no premier league free-to-air in the UK—to break up the packages. There is now some premier league on free-to-air—is that right? Was that the sequence of events?

**Mr Marquard**—Sorry, the sequence of events in relation to the last—

**Senator CONROY**—BskyB bought premier league and there was none on free-to-air television. When that exhausted, the regulators forced a break-up into three packages—please help me out here; I am not an expert on what happened in the UK—and some soccer is now shown on free-to-air in the UK.

**Mr Marquard**—I am not sure whether it was a combination of the regulators or the FAPL itself deciding to sell a number of different packages. But it was not a dissimilar circumstance to that which the ECB have recently undertaken, in that they issued an invitation to tender for all of those packages. I think that in relation to BskyB they put in a bid for all three of those packages. As to what the exact outcome of those is, I am not 100 per cent familiar with that either.

**Mr Greiner**—We can no doubt provide you with that.

**Senator CONROY**—Yes, it is just out of interest. I am happy to break now and pass on to other members of the committee. I have many more questions, but I will defer.

**Senator SANTORO**—I will not take up too much of the committee's time, but I must admit I had a bit of a smile when we were giving Nick Greiner some advice on how to answer questions. You must have heard that so often in a past life, Mr Greiner—to keep it short and keep it relevant. You did not need that advice, did you?

**Senator CONROY**—He was a master of it.

**Senator SANTORO**—He was regarded as a master. I have a couple of questions. First of all, who is Octagon?

**Mr Malone**—They are a sports representation company that represent a number of sporting organisations in the negotiation and sale of sports rights.

**Senator SANTORO**—Was this letter—presumably based on research that you submitted to the committee—a spontaneous position that Octagon sought to establish in terms of

advising this committee, or was that research commissioned by ASTRA or other players in the pay TV world?

**Mr Malone**—My understanding is that Octagon were aware of the discussion that was developing in this market and wanted to set the record straight.

**Mr Greiner**—It was not commissioned by ASTRA.

**Senator SANTORO**—That is what I am trying to establish—Octagon did it off their own bat and therefore the document has been freely available to everybody who has an interest in it.

**Mr Marquard**—That is correct. Our understanding, as we said, has always been that free-to-air was offered it. That is a matter of commonsense, if you think about it. In the sports world what actually happens is that anybody selling sports rights—and Octagon are a seller of those rights on a worldwide basis—will go out and test the market. That is just a matter of commonsense. They were the ones selling the rights, so we thought we would approach them and say, ‘Can you shed some light on this in view of the public debate?’ That is what they have done. So, yes, they are aware of it and it is a public document.

**Senator SANTORO**—So you are confident that what is contained in that letter is in fact the way things developed in terms of interest expressed by free-to-air? You are confident that that is an accurate record of it?

**Mr Marquard**—Absolutely. Octagon themselves are not associated with us in any way. They are an independent organisation. They were the ones selling rights. They have informed us that one of the heads of sport, when they asked him back in 2001 whether he would acquire the rights, said, ‘Over my dead body will we bid for the Ashes in 2005.’

**Senator SANTORO**—Under no circumstances am I doubting Octagon’s bona fides. I just wanted it to go onto the record that in fact that was—

**Mr Marquard**—They were the ones actually conducting the discussions.

**Senator SANTORO**—The question which I would put to you and which I might put to Free TV Australia when they appear before us—and, if they are in the room, I put it on notice—is: why the change of heart in terms of their interest in the Ashes? Back in 2001 they basically said, ‘We’re not interested.’

**Mr Greiner**—A change of heart by whom?

**Senator SANTORO**—By free-to-air. That would be just from your perspective.

**Mr Malone**—That is probably a question best asked of them but, from our perspective, the coverage that the Seven Network provided for the last Ashes tour, their inability to telecast the first session of most days’ play and obviously the negative feedback that they received about that level of coverage, I guess, made them cautious about going down that track again.

**Senator SANTORO**—So why are we having this debate today? Why is it not just accepted that this is the way it is and is going to be?

**Mr Greiner**—I am not sure that we are good at speculating about that. I think the answer lies more on that side of the table than this side. That is the reality. We think the normal processes have happened. One suspects it has a little more to do with political perceptions.

**Ms Richards**—I think it is fair to say that any discussion about sport and in particular antisiphoning generates a lot more emotion than is probably warranted for this particular bill, which is simply changing a six to a 12. All of the stars are aligned on this issue. We have not made the debate or generated the emotive discussion about the Ashes 2005 and the so-called loopholes et cetera.

**Senator SANTORO**—I will certainly ask FTA the same question, but I just wanted your perspective. You think it is just that interested people, like the Prime Minister, Senator Conroy and others, express themselves about that great national iconic game called cricket—is that it? We are to blame for what is rapidly becoming a national debate?

**Mr Greiner**—I think that is probably right. It is not for us to comment on that, I don't think.

**Senator SANTORO**—Why is Fox Sports concerned about whole sporting events being included on the antisiphoning list? What is the rationale for not including them?

**Mr Malone**—I guess it goes to our ability to acquire rights and promote and broadcast them. Probably one of the best examples is the Wimbledon tournament. There are over 600 individual matches of tennis at that event. Every one of those matches is actually captured in the antisiphoning legislation. On average, the free-to-air broadcaster that covers that event covers about 40 matches each year. So a vast number of matches are happening at that event which are never going to be played by a free-to-air broadcaster. We think that the list should focus on the events that they are covering and have historically covered on a regular basis as opposed to having a catch-all approach, which was how the list was developed—that is, with a whole-of-event approach.

**Senator SANTORO**—So in the case of Wimbledon, with the qualification that you have put in terms of the free-to-air broadcasting of events that have traditionally been broadcast, what interest do you think there would have been had more of a free market situation applied in, for example, selling rights to Wimbledon? How many of the matches could have been available on pay TV? How many would have been offered and how many would have been accepted?

**Mr Malone**—Something like the Wimbledon tournament puts the sporting organisation in a better position to strike a position that would deliver better coverage—that is, by a free-to-air deal for marquee or main matches, and then more of a blanket coverage to a subscription operator such as Fox Sports. It gives the sports body power to broker a good arrangement and provide maximum coverage, which at the end of the day is what the sports organisations are trying to do. They want their sports covered in the best possible way; they want to grow their sports and increase awareness of and attendance at those sports.

**Mr Greiner**—You might describe what happened at the recent Australian Open.

**Senator SANTORO**—That is precisely what I am trying to get at. Using recent experience such as Wimbledon and the Australian Open, what proposals and approaches have come to the companies that you good people represent? What expressions of interest have there been—even if it is just discussion? We are trying to figure out what the potential is. I am also interested in what extra revenue would accrue to the umbrella sport organisations. I am very interested in the development of the sport.

**Mr Malone**—Last year we put together a deal with the Australian Open to provide subscription coverage for the first time this year and obviously in January 2005. That deal provided additional revenues to Tennis Australia to put back into grassroots tennis development and it was obviously a way for Tennis Australia to get greater coverage for that event. For a number of years the Seven Network covered a certain amount of the Australian Open. Again, like at Wimbledon, there are often matches happening simultaneously on a great number of courts. Fox Sports was able to structure a deal to provide coverage, particularly in the first week, of a great number of matches that were happening on the outside courts. That delivered better coverage for the Australian Open and greater revenues back into the Australian Open. More importantly, Australian viewers were able to view more of the Australian Open event on their television.

**Senator SANTORO**—What was the reaction? Was there any opposition? Were obstacles put up by Free TV to that deal being struck? What was the reaction during the negotiating process?

**Mr Malone**—You would probably have to ask that question of the Australian Open—it is difficult for me to answer that—but we obviously worked over a period of time to get that deal done. This was going to be the first year when there was going to be subscription coverage of that event. Seven had had it, if you like, exclusively for quite a few years, so I am sure there were some concerns about the level of coverage that Fox Sports was going to provide but I cannot give you specific examples of those issues.

**Senator SANTORO**—Would commercial-in-confidence provisions or conditions preclude you from telling us how much extra, say, Tennis Australia—

**Mr Malone**—Yes, they would.

**Senator SANTORO**—But it would have been substantial?

**Mr Malone**—It was a substantial investment, yes.

**Senator SANTORO**—If an event is removed from the antisiphoning list will it then only appear on subscription television?

**Mr Malone**—That is a very good question. We were talking about that matter with Senator Conroy earlier. No, that is not the case, and there are a number of examples where events that are not listed have been negotiated for free-to-air and subscription arrangements. We spoke about the Tour de France and Australian Swimming. In my opening statement I talked about the new Australian soccer arrangements whereby we have coverage of the A league and we have replays of the Socceroo matches. SBS has the Socceroo matches live. Again, in the absence of any regulation the sports bodies, in wanting to do the right thing by their sport, were keen to secure free-to-air television—

**Senator SANTORO**—Sensibly strike a deal.

**Senator CONROY**—The bill seeks to extend the automatic delisting period to 12 weeks from six weeks, but your submission indicates that you do not think this is enough. At what point do you think the automatic delisting should take place?

**Mr Malone**—It would be very helpful if we had at least six months prior to the event.

**Senator CONROY**—What is the average time that sports rights negotiations are done in advance? I know the World Cup 2010 is possibly being negotiated in the next few months, and it is only 2005. That would be a bit abnormal, but what would be the average negotiating period?

**Mr Malone**—We work as far in advance as possible, and that would be the case for major events for the free-to-air broadcasters as well. They are not deals that are done at the last moment.

**Senator CONROY**—There has been some suggestion you have been advertising the Ashes already. Have you had any ads on Fox yet?

**Mr Malone**—No, we have not.

**Senator CONROY**—Someone suggested it—I have not seen any myself and, as you know, I am an avid watcher of Fox Sports. What impact does the current six-week delisting period have on you and your viewers?

**Mr Malone**—It makes it very difficult for us to provide exact information to the distributors—Foxtel, Austar and Optus—about when those events are on and when they are going to be telecast. As you would probably know, being a subscriber, the distributors prepare magazines and information for their subscriber base. With the six-week auto delisting, it is too tight a deadline to have something delisted and then properly communicated and marketed to your subscribers.

**Senator CONROY**—Do you typically wait until the automatic delisting period before you bid for the rights to an event?

**Mr Malone**—No.

**Senator CONROY**—In your submission you argue that the notion of ‘use it or lose it’ should be more vigorously applied to the list—I have got a lot of sympathy for that proposal. How would you suggest that would work in practice? Can you give the committee an idea of what kinds of events the free-to-air have not been showing and which events will be delisted under the approach?

**Mr Malone**—The mechanism would work reasonably simply. It would require some regular reviewing of actual events as opposed to what we think is happening. Let us look on a regular basis at what events are getting free-to-air coverage then identify those events and, if they are not getting coverage, have them removed from the list.

**Senator CONROY**—What sorts of events do you think would come into play?

**Mr Marquard**—The French Open tennis is perhaps a good current example of that. The French Open tennis has been historically included on the list and is due to be included on the new revised list. Last year TWI offered those rights and applied for a delisting of those rights for both last year and this year based on the information provided to them by the free-to-air networks that they were not interested in acquiring those rights. My understanding is that, again, this year the free-to-air networks have been approached and there is still no interest in it from them. That is an example of one of the events that we say if it is not historically being covered by the free-to-air networks then there is no reason why it continues to receive regulatory protection.

**Senator CONROY**—So the French Open has not been shown at all, not even the final, the semis or anything.

**Mr Marquard**—It was not last year. It was actually delisted last year. In relation to this year, you will have to ask the free-to-air networks about their level of interest in it. Historically, it was covered by both the Nine and Seven networks and they moved away from it. Again, I think this is one of those issues for the free-to-air networks about ratings and audience numbers.

**Ms Richards**—Another example would be cricket in that in the revised antisiphoning list there is a recognition that the overseas cricket played by the Australian senior representative team was not being shown other than what was played in the United Kingdom.

**Mr Marquard**—That is a very good point. I think the revised list did pick up some of those things. Australia is playing New Zealand right now in a five one-day series and three test matches. That event has been removed from the antisiphoning list yet again because the free-to-air networks declined to acquire those rights, and here we are talking about iconic Australian trans-Tasman rivalry.

**Senator CONROY**—But isn't that the way it is meant to work? You say 'yet again'. Isn't this the way the system is designed to work so that if the free-to-air broadcasters do not want to show it then it is picked up by you?

**Mr Marquard**—I think this goes to the point about why we say that the mechanism at the moment is still too cumbersome and, to take David's point, that six months is a better time for us to market and promote. But it also goes to saying that there has been a review, and there was pretty much support for some of those events, like overseas cricket tours, being removed because they had not historically been shown. No overseas cricket tours have been shown since, I think, 1998, other than the Ashes tour in 2001.

**Mr Greiner**—If I might briefly reiterate the point about the necessity or desirability of independent monitoring, I think ACMA is the obvious one, but someone needs to do it because otherwise it will never get to square one.

**Ms Richards**—I think one of the practical things that would need to be done for any use it or lose it mechanism is an agreement and determination of criteria in terms of what is deemed to be coverage and what is not. Simple things like that could certainly be ironed out.

**Mr Malone**—I think use it or lose it also comes into its own when you start to look at whole events—if you start to look at some of the events that are on the list, such as Wimbledon, and at the traditional, historical coverage patterns and you ask: do all 635 matches at Wimbledon need to remain on the list? Over the last 10 years only 40 of those matches have been covered. We need to have a more realistic position for the list.

**Senator CONROY**—In terms of something being shown live—and you made the point strongly about something being shown live—it is technologically impossible at the moment under regulations that restrict, for instance, multichannelling for broadcasters to show more than one match live on free-to-air. Do you have a broader definition of 'shown live'—like two hours later? I am thinking of soccer, in particular, but it applies equally to tennis and some others where, as you say, two matches are happening at the same time, it is physically impossible for both of them to be shown at the same time and, as often happens with the

soccer, they show one match live. So one Champion Leagues match is live and the second match follows up immediately. Does that fall into—

**Mr Malone**—I think that is something that could be determined, but there tends to be a general acceptance that clearly we would love all of our sport live but in some circumstances there are slight delays when there are simultaneous matches.

**Senator CONROY**—Chelsea-Barcelona this week is a delayed match rather than a live match, which is probably good so that I do not have to get up at three o'clock in the morning.

**Mr Malone**—But that should be the exception. Trying to deliver live coverage should be imperative.

**Senator CONROY**—Live coverage is obviously the object.

**Ms Richards**—On subscription television, live is live.

**Senator CONROY**—I appreciate the point you make—live is often not quite live on some other platforms. I would like to ask you about the so-called loophole that has been raised by free-to-air broadcasters and others, particularly in the context of the debate about the Ashes. I think you have addressed that in some of your earlier comments on the Octagon letter. What is your response to the argument that the antisiphoning regime is flawed because it only stops licensees such as Foxtel from acquiring the rights to a listed event before free-to-air broadcasters have a reasonable opportunity and does not apply to a channel provider like Fox Sports?

**Mr Malone**—We have been operating under this arrangement for 10 years now. We have managed to work with the free-to-air broadcasters and have had a number of events delisted over that period of time. We do not believe that there is any loophole. As Nick said in his opening statement, we believe it is a furphy. Again, to refer to Nick's point, the minister has the final determination on this—the minister can make a decision about whether a particular event is delisted. If the minister feels that the free-to-air broadcasters have not been given an adequate opportunity to acquire those rights prior to a subscription broadcaster purchasing them, the minister does not have to delist, even within the automatic period. So we cannot see any loophole. The system is set up to give the minister total control.

**Ms Richards**—And you take a risk.

**Mr Greiner**—It is not for me to comment on this, but Debra is making the point that Premier Media Group is in fact at the moment at risk on the Ashes. It has made a commercial judgment which is at risk pending a ministerial decision.

**Senator CONROY**—Have you purchased the rights for any other events that were on the list previously or is it just because the Ashes are the Ashes? Is this the first time you have purchased rights ahead of a delisting from the antisiphoning list?

**Mr Marquard**—No, we have often purchased—

**Senator CONROY**—What other sports have you done that with?

**Mr Marquard**—The New Zealand cricket tour is a recent example. We purchased those rights. The rights, as you know, are often traded at another level—the sports body may license the event to an Octagon or a TWI or a third party, and then often they utilise those rights and

divide them up. For example, we bought the Australian broadcast rights for the cricket and offered it to the free-to-air networks. In that case we bought all broadcast rights. Also, on a number of other occasions we have actually only purchased the subscription rights at a time prior to the free-to-air rights being acquired or the event being delisted. An example of that is the National Basketball League rights. We acquired the rights to that on a multiyear basis and I understand that NBL has made a submission in relation to that. So there are a number of occasions where we have purchased those rights.

On David's point: we have been operating under the system for 10 years now. The idea of a loophole is a recent phenomenon. Certainly everybody knew the intention and what the system was. We have worked in conjunction with the free-to-air networks in relation to a number of events where they have not raised this as an issue. In our view, this is a bit of a smokescreen because of their own concerns—they do not want to actually bid for it, so they are using this as a smokescreen.

**Ms Richards**—Just further to those examples, the loophole did not seem to be a problem with the NBL negotiations on the finals and series in 2003, 2004 and 2005; the MotoGP; the 2005 French Open; and the 2004 ICC Cricket World Cup.

**Senator CONROY**—The rights have been available for 10 years for Fox Sports to do this. I am happy for you to take this on notice because you may not have the exact details. Can you give me the date for the first time you purchased an event that was on the antisiphoning list before it was delisted? You have quoted a whole string that were in 2003, 2004 and 2005, but were there any back beyond that? When was the first time? It may have been nine years ago and you have just forgotten.

**Mr Marquard**—I will take it on notice, but the answer is definitely that it happened in the nineties. We are in the 2000s now, so it was in the nineties.

**Senator CONROY**—You can take that on notice and give me a picture of what has actually happened.

**Mr Greiner**—Can I make the point that, if you assume that the committee or the government ultimately were to determine that there was in fact a loophole and we were wrong, and if they were in fact to adopt the proposed amendment that free-to-air has put up, it would create a playing field that resembles this angle as opposed to the angle that it is at now.

**Senator CONROY**—Unfortunately, *Hansard* cannot capture the angle you are describing.

**Mr Greiner**—No, but I am sure that, with the benefit of Sky News' excellent parliamentary channel, everyone can see it.

**CHAIR**—I have a question about the loophole issue. You have acquired the rights. Presumably you could not necessarily just on-sell those rights or provide the programs to pay TV; you could sell it to other operators? Is that a theoretical possibility?

**Mr Malone**—It is, but it is not how we have operated.

**Mr Marquard**—Do you mean free-to-air networks as well?

**CHAIR**—Yes, I do.

**Mr Malone**—There are some events where we do on-sell rights to free-to-air broadcasters.

**CHAIR**—Can you give examples of those?

**Mr Malone**—The MotoGP—world motorcycling.

**Senator TCHEN**—It seems to me that the principal element—in fact, the only important element—of this bill is to propose a change in the automatic delisting period from six weeks to 12 weeks. I know Senator Conroy asked you this question earlier, and I assumed that Senator Conroy was perhaps asking a rhetorical question because, at the risk of emulating Mr Greiner reminding Senator Conroy of what was said before by the Labor Party, I note that when the bill was introduced in the House in April 2004 Mr Lindsay Tanner, the then shadow minister for communications, said that Labor supports extending the automatically delisting period from six to 12 weeks to allow pay TV providers reasonable time to promote particular events. But, in case Senator Conroy was not being rhetorical, I was wondering if I could follow up on his question and ask whether you can give any specific examples of where the six-week delisting period gave you particular difficulties and where 12 weeks would give you a better chance.

**Mr Marquard**—A recent example was the Australian cricket tour of Sri Lanka last year, which was delisted under the six-week automatic delisting provisions. We were unable to market that effectively and to work with Foxtel, Optus and Austar in relation to promoting that event effectively because of the six-week window that the current automatic delisting provides. If there had been a longer period—12 weeks, or hopefully six months if Senator Conroy has taken that on board—we would have much more effectively been able to market and promote that event. That is a pretty good recent example in relation to that event.

**Senator TCHEN**—Can I come back to some of the evidence you gave earlier, Mr Marquard, about apparent collaboration between pay TV and free-to-air TV in broadcasting, for example, the AFL.

**Mr Marquard**—There were a number of events.

**Senator TCHEN**—That is by agreement and is permissible under the act. Is that sort of thing happening more often now?

**Mr Marquard**—It certainly happens on a regular basis. For example, even as recently as yesterday we broadcast the Jacobs Creek Open golf tournament in the morning and Channel 7 picked up the coverage half an hour after we went off air and concluded the coverage of that. That is an event again not on the antisiphoning scheme but where, while I would not call it collaboration in that sense, the broadcast arrangements are such that we have to come off air and they pick up the final holes. Golf is often an example where we show the first two days of a tournament and Channel 7 will show the final two days of a tournament in relation to the Australasian PGA. There are other events where we coexist in relation to that. Those occur on a number of occasions with a number of broadcasters. The situation is that we can coexist quite effectively with them. Another example occurred a couple of weeks ago with the Super Bowl, which again is not an event on the antisiphoning scheme. SBS has been showing that event live for a number of years, but so have Fox Sports and ESPN. There is a coexistence, if you like, there in relation to how that can work. It does vary on an event-by-event basis.

**Senator TCHEN**—So the option always exists for the event provider to package their broadcasting rights as a commercial package?

**Mr Marquard**—As David pointed out earlier, the sports bodies will do what they deem to be in their long-term best interest while obviously trying to get as much exposure as they can and will work—

**Senator CONROY**—And often think they will bite the hand that feeds them.

**Mr Marquard**—In relation to broadcast coverage? No. I think the demonstrated link between television coverage and broadening your game and your sport is pretty clear.

**Senator CONROY**—Sorry, Chair, for rudely interjecting.

**Senator TCHEN**—That is okay; I would do the same to you.

**Mr Marquard**—The sports bodies do, independently of the antisiphoning scheme, try to seek that coverage out.

**Senator TCHEN**—During the estimates last week, Mr Balding of ABC was asked a number of questions on the Ashes series. He said, from memory, that he was quite relaxed that Fox Sports had already secured the pay TV rights and he made quite a distinction between pay TV rights and free-to-air rights. He was not concerned about it. He was more concerned about the attitude of the British cricketing board. So basically free-to-air operators or channel providers can cut off other people; it is up to the sporting body to package their programs. Is that right?

**Mr Malone**—Going back to the earlier comment, the sports bodies are trying to generate exposure for their sports to build their particular code. So they are looking wherever they can to sell rights in separate packages—quite often subscription and terrestrial, or free-to-air—and construct arrangements which seize broadcast coverage and detailed subscription coverage. That is one of their key objectives. Again, we would suggest that this is a reason that the antisiphoning regime is not necessary. The sports bodies continue to strike very effective deals on events that are unlisted, as we have given you a number of examples of today.

**Ms Richards**—I think it is also clear that the sporting bodies themselves feel constrained somewhat by the antisiphoning regime. A few sporting bodies made submissions to this inquiry to support the provisions of the bill, which would make the whole process a lot easier and provide far more certainty for them, for the viewers and for us.

**Senator TCHEN**—That is the completely level playing field that you were talking about, Mr Greiner, where the sporting body has the rights about how to market their product.

**Mr Greiner**—To have a second bite at the question Senator Conroy asked me half an hour ago: if you take a clear public policy view, what the member for Wentworth said in the lower house on this bill is right—you ought to have dual rights, the market ought to be able to operate and you would in fact get a good outcome for the public. That is simply the reality of people watching, advertising rates and so on. That is what the ideal would be. In practice I think we concede that no government is going to run the risk of being accused of making people pay to watch some iconic events, such as Melbourne Cups, State of Origins and AFL grand finals. But clearly a more level playing field would reduce the size of the list and would have an active ‘use it or lose it’ component.

**Senator TCHEN**—I am not sure whether State of Origin is actually iconic. I am not sure which State of Origin you are talking about.

**Mr Greiner**—That is a very Melbourne comment.

**Senator TCHEN**—Speaking of a sporting body being able to control the market instead of being controlled by its legislation, can you give us some examples, Mr Greiner or Mr Malone, from the last 10 years where pay TV has acquired rights to listed events which at the time have not been acquired by free-to-air broadcasters—in other words, where they were able to cut the free-to-air out?

**Mr Malone**—There are a number of cricket tours. Basically every time the Australian team travel now those are currently listed events. As was recognised by the previous review of the list, most of those international tours have been taken off the list because they were list events which never received free-to-air coverage.

**Ms Richards**—But free-to-air broadcasters were not cut out of that process; they were given the opportunity, and that is how the delisting kicks in.

**Senator TCHEN**—But this is the sort of example being cited as the shortfall of the bill. In those instances that you referred to, was it raised as being a problem? Were there any objections or outcries?

**Mr Malone**—No, there were not.

**Senator TCHEN**—So these are fairly selective outcries?

**Mr Greiner**—I think that is a fair observation.

**Senator TCHEN**—I am looking at what is currently on this advisory list of sports events, which includes AFL and NRL. I am not familiar with all these events, but can you tell the committee whether, typically, these deals are done on a multiyear basis or a year-by-year basis?

**Mr Malone**—Major sports like that are on a multiyear basis. Most sports are multiyear, but particularly the bigger sports always work on a multiyear basis.

**Senator TCHEN**—Coming back again to the broadcasting rights, do you know whether any of the pay television bodies seek to acquire free-to-air rights at any time?

**Mr Malone**—Going back to those cricket examples, we have purchased free-to-air rights in acquiring cricket tours over the last 10 years.

**Senator TCHEN**—How do you use that right?

**Mr Malone**—We would offer them to the free-to-air broadcasters, and if no free-to-air broadcaster wishes to take up those rights then they are not used.

**Senator TCHEN**—So that is part of the packaging from the sports body?

**Mr Malone**—Correct.

**Senator TCHEN**—It was not your design; it was a take it or leave it sort of thing?

**Mr Malone**—Yes.

**Senator TCHEN**—Thank you. Chair, I am just looking at the time—

**CHAIR**—We are going to give Senator Conroy a bit more time because he started late and he has some other issues to raise to complete his line of inquiry.

**Senator CONROY**—We were talking about the loophole before. Are you able to approach sporting event broadcast right owners any time you want? If you know that the World Cup is on in 2010, can you approach them in the year 2000? What constraints do you have, or can you knock on their door any time you want?

**Mr Malone**—With major events like that, usually the dates are in place many years in advance. Generally, the sporting organisation will go to market at some stage and look for expressions of interest, which is generally how it operates.

**Senator CONROY**—So you respond to them rather than knocking on their door in most cases?

**Mr Malone**—In most cases.

**Senator CONROY**—When did Fox Sports in Australia come into existence as the entity that it is now?

**Mr Malone**—As the entity it is now, it would have been 1998.

**Senator CONROY**—Going back to the issue that I was asking you about before—that is, when was the first time you bid for them—was there another organisation that predated Fox Sports that bid for the rights?

**Mr Marquard**—I think David was trying to be very technically correct to make sure—

**Senator CONROY**—I probably framed that too technically.

**Mr Marquard**—We were originally a joint venture in relation to, you might recall, Australis and Galaxy. It morphed out of that, to use a non-technical term. So 1996 was the time that Fox Sports was first branded. Prior to that, we were called Premier Sports. We have been broadcasting since 1 January 1995 on one or more television platforms.

**Senator CONROY**—So when the legislation was drafted, an entity like yours was not in existence?

**Mr Marquard**—It was not broadcasting—that is correct. The legislation came into effect in 1994. We were only set up in 1995. We have always had to operate under the antisiphoning regime.

**Senator CONROY**—Does this highlight the problem of what could be described as laws and regulations—that is, the industry evolved in ways that was not perhaps foreseen by the drafters of the legislation? They would have assumed that the world would operate like the free-to-air world had always operated. We did not have other platforms or providers to the platform because they were one and the same entity, if you follow me.

**Ms Richards**—The drafters of the act famously said that they locked themselves in a room for a year to draft the legislation. Perhaps there are a number of entities within this current debate that feel that drafting was not exactly as wanted, or reflective of operations of their sector. But it is also fair to say that even subscription television was not around when the legislation was drafted.

**Senator CONROY**—That is one of the conundrums.

**Ms Richards**—We did not set up until January 1995.

**Mr Marquard**—But in relation to overseas models, Disney and Nickelodeon have been around for a long time.

**Senator CONROY**—Has ESPN been around for a while?

**Mr Marquard**—ESPN has been around since the seventies. I think if you looked at those you would have seen there is a difference between content providers and channel providers and operators.

**Senator CONROY**—I am not for a moment trying to criticise the previous drafters of the legislation. They just may not have been thinking in a context outside of the Australian box—no pun intended. I just want to go back to the case of the Ashes. When exactly did Fox Sports acquire the pay TV rights from the ECB?

**Mr Marquard**—In May 2002 we completed that deal.

**Senator CONROY**—When did negotiations commence?

**Mr Marquard**—I believe in late 2001.

**Senator CONROY**—So they were acquired in May 2002 and you began negotiating in 2001?

**Mr Marquard**—I think we had some discussions with them in late 2001.

**Senator CONROY**—Was this one of those instances where you approached them, or were there rights being touted around at that point?

**Mr Marquard**—I am not sure. I assume it was them approaching us, because—

**Senator CONROY**—You can take that on notice if you need to double-check.

**Mr Marquard**—Yes. I do not know off the top of my head.

**Senator CONROY**—And it is your understanding, as per the Octagon letter, that the free-to-air were notified that rights were available at the same time—so, late in 2001, possibly they approached you and they also approached everybody else?

**Mr Marquard**—As everyone knows, the Ashes are held every four years. Because of the way in which the deal was structured with us, it seemed to us pretty obvious that there was a reservation of those rights in relation to the free-to-air. As we previously indicated, we expected those free-to-air rights to be licensed, so we certainly anticipated and understood that they had in fact been offered, and Octagon has now confirmed that.

**Senator CONROY**—So this would be almost straight after the last series, which would have been in April, May or June four years before?

**Mr Marquard**—Yes, because they offer them on a four-year deal. In relation to the deal that we concluded, we were also offered rights to other teams touring England in the years 2002, 2003 and 2004.

**Senator CONROY**—Do you believe the intent of the legislation at the time was that free-to-air got the first crack at the rights? What is your opinion of the intent of the legislation?

**Mr Marquard**—Our view of the legislation is that they must have a reasonable opportunity to have acquired those rights. I think that is pretty clear from the face of—

**Senator CONROY**—No, I said ‘first crack’ not ‘reasonable opportunity’.

**Mr Marquard**—Do you mean the first crack before a pay TV licensee acquires it?

**Senator CONROY**—Yes.

**Mr Marquard**—Yes.

**Senator CONROY**—Do you believe the fact that channel providers can bid before the free-to-air undermines this principle?

**Mr Malone**—Not at all.

**Senator CONROY**—Going to the explanatory memorandum to the Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992, which introduced the antisiphoning regime, it describes the objective of the regime as follows: ‘This process should ensure, on equity grounds, that Australians will continue to have free access to important events. It will, however, allow subscription television broadcasters to negotiate subsequent rights to provide complementary or more detailed coverage of events.’ Do you think this reference to subscription TV broadcasters negotiating subsequent rights clearly indicates an intention that the free-to-air should get the first opportunity to bid for listed events? That is a direct quote out of the EM.

**Ms Richards**—Also in Mr Lee’s announcement at the time, he says that free-to-air broadcasters ‘must have the first opportunity to acquire the rights to broadcast’ but by the same token he also talked about it not being a list set in stone and that it would continue to be monitored in terms of if it was not shown—

**Senator CONROY**—This is not an argument about the list being set in stone. I do not think there is any argument, and I think that is compelling evidence.

**Ms Richards**—I think we always understood that the free-to-air broadcasters would have the privileged position around the negotiating table in that the sporting bodies would need to negotiate with them in the first instance.

**Senator CONROY**—My question goes to the heart of the privileged position that you have made the point about, Ms Richards. If Fox, ESPN or any other content provider has already purchased them, do you believe that privileged position has been maintained?

**Ms Richards**—Certainly, because the operator cannot actually broadcast the event until the free-to-air broadcasters have obtained those rights or decided they do not want them or do not want to show them and the event is delisted. So they still retain that.

**Senator CONROY**—You answered a slightly different point. I am asking you whether that privilege—which you just described as a privilege—has been maintained.

**Ms Richards**—Yes, we think it is maintained.

**Senator CONROY**—Even if they have not been able to get first bite of the cherry and the rights have already been sold to someone else? How can the privilege be maintained if they have been sold to somebody else?

**Ms Richards**—Because we cannot show something if they have not taken up the rights, unless it is proven that they have not taken the opportunity to take up the rights because they do not want them.

**Senator CONROY**—I appreciate that we are running a little over time, so I will quickly run through my last few questions. I appreciate the flexibility of the chair.

**CHAIR**—It is important for you to get your questions out.

**Senator CONROY**—You would be aware there has been a lot of discussion in the last week about the ABC's bid for free-to-air rights which was rejected by the ECB. You would have seen some of that commentary, and I am sure Mr Balding's testimony has passed across your desk if, in fact, you were not watching it live on digital TV. I hope you were not; otherwise, I would tell you to get a life! During his evidence last week, Mr Balding remarked:

... I think what really concerns me is that it appears that the ECB may be of the view that the rights are worth a lot more if they are kept exclusive to pay TV as opposed to being available at a reasonable rate to a free-to-air broadcaster.

You can expect some self-interest at this point. To me, this comment carries the suggestion that the ECB may be entitled to a higher payment from Fox Sports if the Ashes series is not picked up by a free-to-air broadcaster in Australia. I appreciate that these matters may be commercial-in-confidence, and we can go into a closed hearing if you would prefer to answer this question in a closed hearing, but can PMG comment on whether it has entered into this sort of contractual arrangement with the ECB? In other words, do you end up paying more if you get exclusive rights?

**Mr Malone**—I am happy to answer the question. As we said earlier, when we did the deal we fully expected free-to-air rights to be purchased. Our deal stands alone; it is not impacted upon, one way or the other, by the sale of free-to-air rights.

**Senator CONROY**—So you do not have to pay any more money to the ECB if you end up with exclusive rights?

**Mr Malone**—That is correct.

**Senator CONROY**—Are you aware of any sorts of arrangements like that?

**Mr Malone**—With the ECB?

**Senator CONROY**—With any other sporting events.

**Mr Malone**—There is a range of deals that can be put in place in different negotiations on different sports, so there are a lot of variants in the way these deals are structured. In relation to this particular one it is straight up and down.

**Mr Greiner**—I will make the point which I tried to make in my introductory remarks: Mr Baldwin's comments defy commercial logic and reality. I think they probably date to his time at the RTA in New South Wales.

**Senator CONROY**—Did you appoint him to that position, Mr Greiner?

**Mr Greiner**—The idea is that an owner of rights would consciously decide to discriminate against the clearly larger penetration. We have 23 per cent or 24 per cent. The notion that the ECB, unless it were totally irrational, would set out to do what has been suggested and what your question goes to does not make any commercial sense. As David suggested, you would think they would endeavour, as the Octagon letter suggests, to sell the rights to the people who have the larger penetration, for all the obvious reasons.

**Senator CONROY**—I am probably a bit of a cynic, Mr Greiner: I think they would sell the rights to the person who gave them the most money—they would not care how many people got to see it. I am a bit of a cynic on that front.

**Mr Greiner**—We could take that argument offline, because if you were the ECB there would be more to it in a commercial sense than simply the most money for the rights. There is the question of all of the people who have bought advertising around the grounds and that of the overall ECB relationship with its commercial stakeholders. I would have thought that the commercial stakeholders would not look kindly on the sort of deal you are suggesting.

**Senator CONROY**—I only know of one organisation that owns sporting rights around the world that has been prepared to resist the law of the dollar ultimately, and that is the Augusta board of control—or dictatorship—that runs the US Masters. It is the only sporting organisation I have known to resist ultimately the law of the dollar.

**Mr Greiner**—Just for the record, the IOC did as well. The subscription television industry outbid them for European rights for the Sydney Games, I happen to know. They had a view, which I think they still have, that the Olympics and Commonwealth Games ought to be—

**Ms Richards**—It is in their charter.

**Senator CONROY**—Two pure organisations in the world! Excellent.

**Mr Greiner**—I am sure the IOC would welcome your attestation to their purity!

**Senator CONROY**—I definitely do not want that on the public record. Did Fox Sports ask the ECB to seek from the minister the delisting of the Ashes?

**Mr Marquard**—We had discussions with them because we wanted to have certainty about them. We certainly had discussions about them, whether it was actual—

**Senator CONROY**—Why didn't you do it yourself?

**Mr Marquard**—We do not own the rights. We are obviously not in a position to know the status of the free-to-air rights. That rests with the ECB.

**Senator CONROY**—Has Fox Sports had any discussions with the ECB since the ABC's announcement that it is seeking them?

**Mr Marquard**—In the last week? We have had discussions with them about the ongoing status of the delisting.

**Senator CONROY**—Obviously you would not have said, 'By the way, we've noticed the ABC are bidding. How's that going'—

**Mr Marquard**—No.

**Senator CONROY**—'because we cannot show it unless'—

**Mr Marquard**—They are fully aware—

**Senator CONROY**—I trust you have pointed that out to them. Do you get a refund?

**Mr Marquard**—They are fully aware of the regulations.

**Senator CONROY**—Do you get your money back if you do not get the show because it does not get delisted?

**Mr Malone**—As I stated earlier, commercial arrangements are not impacted upon whether free-to-air rights—

**Senator CONROY**—No, but if it does not get delisted and you do not get to show it, do you get your money back?

**Mr Marquard**—We do not get our money back. We are now entering into the realm of commercial-in-confidence. I am getting very nervous about talking about this.

**Senator CONROY**—I am happy to finish up there.

**Mr Marquard**—Our competitors are sitting behind us here!

**Senator CONROY**—I am happy to finish. Thank you very much,

**Senator SANTORO**—I just have one further, brief question. I am told that laughter and smiling greatly reduce stress in people. Just looking at Mr Greiner today, if that is the case he will walk out of here stress free.

**Senator CONROY**—Is that advice you are planning to take, Senator?

**Senator SANTORO**—I am always smiling. I am told that it is one of my better attributes! In its submission, Free TV Australia has raised concerns that rights holders will drag out negotiations with the deliberate intention that automatic delisting will come into play. Do you consider that Free TV has any real concerns in that area?

**Mr Greiner**—My colleagues, who are obviously involved—I am not—would have a better view, but I would have thought at face value that would make no sense from the point of view of these sporting bodies. Again, it is attributing totally irrational behaviour to the rights holders.

**Senator SANTORO**—It is a pretty strong point that they make in their submission, though. I just thought I would test it.

**Mr Malone**—Could you repeat the question, please.

**Senator SANTORO**—I will give it to you precisely. It is about the concerns that have been raised by Free TV Australia that rights holders will drag out negotiations with the deliberate intention that automatic delisting will come into play. Do they have reasons to be concerned, as they have expressed in their submission, from your point of view?

**Mr Malone**—Not at all. The sports bodies are always very keen to get these deals done as early as possible. Generally the closer a deal gets to the event happening the lower will be the revenues received for the sale of those rights. So they are very keen to get their major events tied up as early as possible and plan, with the broadcaster, the best possible coverage that can be put together.

**Senator SANTORO**—Are you aware of any situations or instances where the accusation has been made that the negotiations have been deliberately drawn out?

**Mr Malone**—No.

**Senator SANTORO**—I intend to put that question also to Free TV Australia, so they are benefiting from a question on notice advantage. I thought that given they expressed that very serious concern I would ask you the question.

**CHAIR**—I thank ASTRA and Premier Media Group for appearing.

[10.36 a.m.]

**FLYNN, Ms Julie Patricia, Chief Executive Officer, Free TV Australia**

**LONGSTAFF, Ms Pam, Director, Legal and Broadcasting Policy, Free TV Australia**

**CHAIR**—Welcome. Thank you for giving us your time today; it is appreciated. The committee has received your submission as submission No.1. Would you like to make an opening statement, Ms Flynn?

**Ms Flynn**—Thank you for giving us this opportunity to appear before the committee and to make a few brief introductory remarks. The antisiphoning rules reflect an important public policy, namely, that Australians should not be forced to pay to see television coverage of major sporting events which they have traditionally seen for free. I would like to draw the attention of the committee to the explanatory memorandum, some of which has already been quoted on the record by Senator Conroy. I would like to add an extra paragraph that says:

This process should ensure on equity grounds that Australians will continue to have free access to important events. It will, however, also allow subscription television broadcasters to negotiate subsequent rights to provide complementary or more detailed coverage of the events.

My honourable colleague the former Premier of New South Wales quoted a press release from Michael Lee. The quote left out a couple of paragraphs that followed, which said:

The list honours a promise made by the government that the introduction of pay TV would not force viewers to pay to watch events which were currently broadcast free.

... ..

It means that free-to-air broadcasters must have the first opportunity to acquire the rights to broadcast. I expect that pay TV will complement and expand the coverage of sport provided by free-to-air television.

By and large over the last decade the rules have operated as intended with the vast majority of listed sports shown on free-to-air television and a complementary coverage on pay TV.

We have two major concerns today. First, we do not support the extension of the automatic delisting period from six to 12 weeks. The parliament changed the delisting process only three years ago to advantage the pay TV operators. Second, there is no evidence that the current system is not working. The pay TV operators can apply for delisting of an event at any time and recent history demonstrates that all applications for delisting have been successful. Many of these have been made in advance of the 12-week period currently being considered. The pay TV operators say they need the 12-week delisting period in order to publicise an event, yet Fox Sports is already advertising that it will be broadcasting the Ashes series this year, some months in advance of the commencement of the event. I think we have a copy of the latest Fox Sports listings in the Foxtel magazine. There may have been some promotions on air as well but I am not sure about that.

Our concern, as you have noticed, Senator, is that if automatic delisting is extended to three months there will be greater opportunities for pay TV and rights holders to circumvent the antisiphoning rules by stringing out negotiations for rights until the automatic deadline approaches. We think this is most likely to impact on smaller and less powerful sports. Secondly, however, we are concerned that the integrity and effectiveness of the antisiphoning

lists will be further undermined unless parliament addresses the existing loophole in the legislation that allows pay TV channels to acquire rights to listed events before they are offered to free TV broadcasters.

Free TV first raised concerns about the loophole in the legislation over a decade ago. In fact we appeared before this very same committee almost 10 years to the day—it was on 23 February. I am happy to make our submission to that hearing available. Here is the transcript of the Senate hearing from our copious files and this is a copy of our submission, which is dated 17 February 1995, and which contains a number of issues. It states:

The siphoning scheme prevents a pay television licensee from acquiring television rights in advance of any acquisition of rights by a free-to-air broadcaster but it lacks any prohibition on a controller, associate or related body corporate of a licence from acquiring those rights. This is a glaring loophole which is bound to be exploited eventually, given the influential position of rights intermediaries in pay sports services.

I am happy to table that.

**CHAIR**—You also had a previous document relating to an advertisement. Do want to table that as well?

**Ms Flynn**—Yes, we will table that as well. We have repeatedly drawn attention to the problem, including in our submission to the Australian Broadcasting Authority in 2001 and in a number of appearances before this very committee. The controversy surrounding the sale of the 2005 Ashes series pay TV rights before, as I understand it, any serious discussions were held with the free-to-air broadcasters—and we can come to that later—demonstrates how the loophole is being exploited to undermine the intent and the spirit of the list. If the loophole is not closed, the precedents set here will mean that more events will be siphoned to pay TV and the three out of four Australians who do not subscribe to pay TV will be deprived of free coverage of an increasing number of major sporting events.

**Senator SANTORO**—Welcome. I think you probably got a bit of a drift of the sort of questions that I want to ask you. They are basically questions that seek to clarify your position and some of your reasoning. In relation to the letter from Octagon that was dated 18 February and which has been given to the committee today, do you accept the course of events and the description of the interest expressed by Free TV?

**Ms Flynn**—I will have to take the discussion of the earlier events, the letter, on notice. My information is that there were lengthy and extensive discussions in June and July of 2003, that there is a paper trail to that effect, and that the offer on the table at that time was for non-exclusive free-to-air rights

**Senator SANTORO**—To refer in a little more detail, this letter refers to negotiations that began in mid-2001.

**Ms Flynn**—As I said, I will have to take those on notice because I do not have any information to hand on the earlier rights negotiations. What I can say is that it is more than typical that negotiations extend over some period of time and that there are negotiating positions at the beginning of a deal. These things are always about the price and the other circumstances. What I do know is that when this matter was raised in 2003 and when the discussions were on—and there are lengthy trails of emails and what have you—we wrote to

the government at that time to raise our concerns that we thought the loophole was being exploited to allow someone who was not a pay TV licensee to bid for the rights. But I will need to come back to you on the nature and status of any earlier discussions.

**Senator SANTORO**—Putting aside issues of timing—whether it was 2001 or 2003—would you agree with the claim in the letter that, with regard to ABC and Channel 10, ‘both broadcasters indicated that they had no interest in pursuing an opportunity to acquire the series’?

**Ms Flynn**—I have no knowledge of the ABC. Obviously they are not members of Free TV Australia, so I cannot comment on them, and I would have to check with Channel 10. What I think I can say is that Channel 10 has not traditionally shown the rights, as I understand it.

**Senator SANTORO**—SBS advised also that it was not interested in the Ashes series as it was not in accordance with the charter. So we can dismiss that one because it is not, as you say, a member of your association.

**Ms Flynn**—They were associate members but not day-to-day members.

**Senator SANTORO**—The Seven Network rejected the rights, including the Ashes series, out of hand.

**Ms Flynn**—Channel 7 has of course changed management since 2001. They were the incumbent broadcaster. I am simply not in a position to comment. All I can tell you is that the offers—and I have checked with all three of the networks—that were made to them in 2003 were made on the basis of being non-exclusive free-to-air broadcast rights.

**Senator SANTORO**—Would I be able to ask you, Ms Flynn, if you could take those questions on notice?

**Ms Flynn**—Yes, we will certainly take them on notice.

**Senator SANTORO**—And would you provide the answers to us as quickly as you can? You can gather from my previous line of questioning that they will be pretty influential, at least in my consideration of the issues that we are debating. It would seem to me—and I will put this to you as a proposition that you may wish to comment on—if serious negotiations started in mid-2001 and those attitudes as outlined in this letter were clearly the attitudes expressed by Channels 7, 9 and 10, you could almost forgive the negotiators on behalf of the sporting body if they just went ahead full belt with the people who were actually interested in doing the deal as opposed to hanging around.

**Ms Flynn**—I am not in a position to comment, because I do not know about the earlier discussions. I do know that it would seem very peculiar to me, if you thought that they were not interested, that you would come back to them 18 months to two years later to offer them non-exclusive rights.

**Senator SANTORO**—I can see the point that you are making, but I am particularly interested in ascertaining the veracity of the contents of that letter. I would be grateful if you were able to assist the committee.

**CHAIR**—Can we have that information by the end of the week?

**Ms Flynn**—Yes, certainly.

**CHAIR**—We have an early deadline for the report. So that has to be in by Friday at the latest.

**Senator SANTORO**—I asked the ASTRA representatives before they left about your concerns about the possibility of negotiations being dragged out with the deliberate intention that automatic delisting would then come into play. On what do you base those concerns as expressed in your submission?

**Ms Flynn**—Our concern is based on two things. In our submission I think we point out that it is the culmination of the existing loophole and now extending out to 12 weeks. Putting aside what happened in 2001, you could arguably say that the 2005 rights are an example where the loophole has allowed someone to negotiate for rights. Foxtel for instance, under the legislation could not have done that deal in either 2001 or 2003 as the licensee—neither could Austar or Optus. However, because there is that loophole, the channel provider was able to. There was an incident in 2001 with the preliminary games involving the Australian soccer team where the rights holder sought to hold out the negotiations and the matter was acted upon by the then minister to ensure that there was free-to-air coverage.

**Senator SANTORO**—So you are basing your concern as expressed in your submission on the 2005 experience with Foxtel.

**Ms Flynn**—No. As I said to you, we have raised this issue repeatedly over the years: at this Senate committee, it was the last section of our submission to the ABA review in 2001 and we raised it again in the course of what I think was commonly known as BLAB 2, when we appeared before this committee on Broadcasting Legislation Amendment Bill (No. 2) 2002. We think that the six-week period has been working. We have been concerned—there is a stack of files that high in our organisation with letters from David Leckie, Tony Branigan and from whoever happened to be the chair of the organisation at the time, to governments of every colour and stripe talking about this issue of the loophole—that if you have the three-month period, you are not going to be captured. I should also make the point that the legislation refers to the acquisition of rights; it does not refer to the broadcasting of rights. We understand that it is open to question as to whether or not the minister could stop the delisting because Foxtel has not acquired the rights.

**Senator SANTORO**—Getting back to an example that was quoted by the ASTRA representative in terms of Wimbledon, do you support their—

**Ms Flynn**—I am very glad you asked me that question, whether it is Wimbledon, the Australian Open or any other tennis event—

**Senator SANTORO**—I thought you would be interested in having your say in relation to Wimbledon and the Australian Open. What justification is there for all 635 Wimbledon matches each year to be—

**Ms Flynn**—Which game would you like to watch on free-to-air? The one on the Outer Mongolia court between two people ranked 450 and 455 or the one between two people who may be Australian? And you are not going to know that in advance. You never know in advance what are going to be the key games. The Australian Open has recently demonstrated that. You can make a pretty fair guess, but people may perform differently. Let us not forget that at the end of the day it is not about us and it is not about them; it is about what you, the

parliament, decided that this list was for. It has been repeatedly stated over the last decade that that is the case. If you were to take those events off and you were to argue the toss then you might find that on free-to-air you are watching the game on the Outer Mongolia courts.

I might just take the opportunity, while we are talking about sports rights holders, to note that it is most interesting that the English cricket board made a submission following seeing our submission and the attachment that we had of the article from Greg Dyke. But I can show you a ton of articles that appeared as recently as last December, when the rights holder, the English cricket board, decided to sell its rights to BskyB, the pay operator, and not do a deal with the free-to-air operator. I will quote from one article from the *Guardian* on 16 December from David Hopps. The article says:

For all the propaganda from David Morgan, the England and Wales Cricket Board chairman, about Sky's "continually expanding subscriber base", the viewing figures tell a different story. Channel 4 pulled in 4 million viewers for its coverage of the first Test between England and New Zealand last summer. The second Test, shown live by Sky, attracted a total audience of 900,000—20% of the Channel 4 audience.

If it is really about the audience you would have thought that the deal would look a little bit different, but some of the other stories tell the story, which is that it was about a £15 million difference in price. Quite clearly, the English cricket board are not the people that we are concerned with here today. They are a rights holder and they are not covered by the legislation.

**Senator SANTORO**—Just getting back to your example of the Outer Mongolian outer court, I do not think that the ASTRA representatives were suggesting that that is all free-to-air broadcast, were they?

**Ms Flynn**—I am sure they were not.

**Senator SANTORO**—What do you see is intrinsically wrong with an arrangement where—

**Ms Flynn**—We have always been opposed to a system of dual rights—that is, simultaneous rights as opposed to complementary rights. The current situation allows the free-to-air broadcaster to ensure that Australian viewers get to see the best games, whether or not it is the Australian Open. To take their point on the French Open and the lack of interest, that is correct, and that is why the recent changes to the antisiphoning list have limited the games to the quarter-finals, semifinals and finals and not to the early rounds.

We have no issues with that. We think that is how the system has been working and a lot of what you heard earlier today demonstrated that the system works. Our concern is purely and simply that there is a loophole, which means that the channel provider is not covered. Deb Richards, who was directly involved, makes the point that in the early days, before anyone knew how this business was going to evolve, it was assumed—and I have talked to a lot of people who were there at the time—that everyone would be a licensee à la the existing free-to-air broadcasters, but in fact that is not the case.

**CHAIR**—I will ask a couple of questions and then we will hand over to Senator Conroy for the rest of the session, unless there are some major issues that we want to pick up on. One of the issues that you mentioned is the loophole, and you may have heard that I asked Premier

TV whether or not they had the theoretical capacity to sell to free-to-air. They have acquired the rights—as you quite rightly pointed out they are not a broadcaster—and they gave some examples of having done that.

**Ms Flynn**—Yes, they have and they do.

**CHAIR**—Have any members of your organisation purchased programs from Premier?

**Ms Flynn**—I am not sure what the arrangements have been, but I certainly know that in our submission to you we have given you an example of when they have offered us the free-to-air rights. I think it is true to say that in the past that has happened to events that there has not been a lot of interest in. Those events are no longer on the list; they have been deleted from the list.

**CHAIR**—So they have offered you events which were on the list and are now deleted?

**Ms Flynn**—Because they then become the rights holder, that is right.

**CHAIR**—And you had not sought to bid for them yourself?

**Ms Flynn**—I do not know the individual details.

**CHAIR**—It would be interesting if you could get us some information about that in some way, but never mind at this point. The other thing is that you mentioned the English cricket board and the fact that the viewing audience through BSkyB was limited. But if you go to the conclusion of their letter they say:

ECB is excited by the fact that Sky will be broadcasting Test Matches and One Day Internationals (ODI's) from 2006 to 2009. Highlights will be broadcast on Channel 5 in peak time between 19.15 and 20.00 hours each evening. The research shows 21 million people watch television at that time including the majority of boys and girls.

But towards the bottom they say:

British Sky Broadcasting Limited (Sky) has been essential to rights holders in the UK ... Sky is the only broadcaster prepared to cover overseas England cricket tours. People's viewing habits are changing and cricket will be spread across a number of viewing platforms. Sky has already reached 26% of market share with Sky Sports accessible to 11 million homes (including through cable operators) and Freeview now reaching 5 million homes.

The important point that I want to pick up there is that people's viewing habits are changing and that cricket will be spread across a number of media platforms. Surely that evolution is also occurring in Australia and if the subscription program provider has acquired these rights and is going to broadcast them through pay, isn't that a reflection of changing circumstances in the media? It is not anything fixed. The percentage of pay TV is increasing and highlights are available.

**Ms Longstaff**—It is still a fact that three out of four households in Australia either cannot afford to or choose not to subscribe to pay TV. But the answer to your question goes back to the spirit and the intention of the antisiphoning list. The intention was that free-to-air broadcasters should get, as Senator Conroy has pointed out, first bite of the cherry in negotiating rights to listed events. The intention behind that is that by giving free-to-air broadcasters first bite of the cherry, you can ensure that you get the widest possible coverage to Australians for free and enable complementary coverage where that deal can be done.

**Ms Flynn**—There is not a suggestion that there would not be a deal. I should also correct something that was said in the previous session: it is not true that the Australian Open pay rights were available for the first time for the last open. It is the first time Fox Sports had them, but when Channel Seven still had an operating pay TV channel, C7, they also showed the Australian Open on that pay TV channel.

**Ms Longstaff**—Colleagues at ASTRA this morning have provided numerous examples of where there has been successful complementary coverage and that only ensures that there is the widest possible coverage of the event to the Australian audience—free-to-air of the major parts of event, and complementary coverage on pay TV.

**CHAIR**—I think we would have to agree that the world is changing and the world of television is evolving and that when the original antisiphoning provisions were put in place through law it was a different world to the world of today. There are many platforms upon which television can be observed these days, but that is an observation. The other specific point in relation to this legislation is that it extends the period from six to 12 weeks. How far ahead would you consider to be reasonable to enable programming to be put in place to accommodate a major sporting event? It seems to me quite a valid comment that six weeks is perhaps a bit short and 12 weeks is okay but not necessarily totally satisfactory.

**Ms Longstaff**—I think it is important to make a point about automatic delisting, which is what we are discussing here. The current period is six weeks and the bill proposes an extension of that automatic delisting to 12 weeks. We are concerned about extension of that because, upon automatic delisting, the incentive for a rights holder to negotiate with free-to-air television broadcasters is diminished: at the point of delisting, pay TV can purchase the event. The further out from the event this occurs, the higher the likelihood that an event will appear exclusively on pay TV. However, there are numerous instances—and Premier Media points them out in their submission—where they have made applications for delisting and all of those applications have been granted, and they have allowed pay TV to advertise and promote an event long before the 12-week period that we are now discussing. You have in front of you the excerpt from the Foxtel magazine at the moment. Certainly, the six-week period or a 12-week period has not stopped promotion of the Ashes tour.

**CHAIR**—In the past but not at the moment I have been a Foxtel subscriber, so I declare an interest. I used to receive my booklet about six weeks before the month in which the programs were to be broadcast, so quite obviously programming decisions were made within that period of time ahead. I find it difficult to accept the concept that six weeks is an adequate time to rearrange a program when it is published. It seems to me that it is not unreasonable that that period should be extended simply in terms of the mechanics of programming.

**Ms Flynn**—I think we would say that it has not caused major difficulties to date. People are still promoting things, and Pam's point about the automatic delisting is the point to note here.

**CHAIR**—It is but it means it provides an opportunity for the pay TV people to bid but nevertheless that then implies changes to programming. I suppose the point of the government's legislation is to enable bids to occur if they going to occur with an adequate period provided for rescheduling of programs. That is not an unreasonable proposition that the government should provide for that.

**Ms Longstaff**—As you state, many sports are negotiated long in advance. When that occurs and there is no free-to-air interest in broadcasting the event, pay TV has been able to apply for delisting so that the event can be scheduled and promoted long in advance of any 12-week period that we are now discussing. We are concerned that an automatic delisting 12 weeks prior to an event will impact on smaller and less powerful sports. Overseas rugby tests are a good example of where the rights are negotiated much closer to the deadline.

**Ms Flynn**—I would like to add something here. I think we would have a degree more comfort if we did not have the problem with the loophole. They do not need the opportunity, because they have got the loophole. That is why we must fix the loophole before making any changes. That is the key part of our argument and our submission to you. It is the combination of the two.

**CHAIR**—So you are arguing that the combination of the loophole with the extension of time disadvantages you substantially?

**Ms Flynn**—That is right. It provides an opportunity for the rights holder to string out the negotiation or to do a deal with someone who is not captured by the—

**CHAIR**—And any problem with scheduling is not so great that it cannot be overcome?

**Ms Flynn**—What we are saying is that we would have a degree more comfort around the 12-week period if the loophole were closed.

**Senator CONROY**—Six to 12 weeks is academic. From your perspective, it is the loophole that is the problem.

**Ms Flynn**—That is the key. It is the combination of the two.

**Ms Longstaff**—The loophole allows a person other than the pay TV licensee to acquire the event before there has been negotiation with the free-to-air broadcaster.

**Senator CONROY**—I want to raise a couple of points you made in your opening testimony and subsequently in answer to questions. You said that it was May 2003, I think—

**Ms Flynn**—June 2003. I think May was a date someone else used. It was not us.

**Senator CONROY**—You said that it was in 2003 and that they did not offer you exclusive rights.

**Ms Flynn**—No.

**Senator CONROY**—Do you believe the legislation, or even the intent of the legislation, was to offer you exclusive rights?

**Ms Flynn**—I think the intent of the legislation was to give us first dibs, to give free TV broadcasters the first opportunity to acquire.

**Senator CONROY**—Do you mean first dibs for exclusive rights?

**Ms Flynn**—That is part of the negotiating process, so the opportunity is there for you to acquire both the free and the pay rights.

**Ms Longstaff**—However, it entirely depends on the wishes of the rights holder. More often than not, the rights holder wishes complementary coverage on pay TV. As we have said, there

are numerous examples of exclusive coverage of main games on free TV and complementary coverage on pay TV for those who can afford it.

**Ms Flynn**—While the legislation does not stipulate what kinds of rights would be offered or acquired by the parties, it is designed to provide free-to-air with the opportunity to negotiate before any other party, giving them, as we said, the first bite of the cherry before pay operators are able to purchase any rights at all. It was considered that this was the best way to ensure that events stayed on free TV. Giving free broadcasters the right of the first negotiation is the most likely to result in a deal that will see the event delivered to the majority of Australians.

**Senator CONROY**—You also made a point during your opening presentation that you are concerned about the precedent of the Ashes. From earlier testimony, it would seem that this is not a precedent at all. This has happened before with other events.

**Ms Flynn**—Our concern is that there have been a couple of things around the edges that the free-to-air broadcasters have not been keen to acquire. We are not walking away from that. Those events are now delisted, but this is an event—

**Senator CONROY**—The question I asked specifically previously was: can you give us examples—and they gave us a number and in fact did go away and get us some more—of rights that you had purchased prior to the delisting?

**Ms Flynn**—The only ones that I am aware of are the ones that we have cited in our submission. I am not the person who would be involved in those discussions.

**Senator CONROY**—It would seem that the concept of the Ashes precedent is not necessarily a precedent of purchase of rights that are still on the list—not ones that have already been delisted, which they would send out to every single person who possibly might purchase them, whether they are free-to-air or pay TV. Of course they would send you a letter saying, ‘Are you interested in the rights to this?’

**Ms Flynn**—It is the case, though, that this is an issue of concern for the free-to-air broadcasters. In our view we have not been given an adequate opportunity to purchase an event that we might otherwise have purchased. It is true that we have been concerned about this for a long time and I suppose that is because my predecessors were aware of some of these.

**Senator CONROY**—I want to go back to the timeline. As you know, there is an application to delist the Ashes before the minister at the moment. In terms of the minister making the judgment under the legislation, it is important that a reasonable attempt has been made to negotiate, so I want to go back to the time line. Octagon say they started in mid 2001, which would have been just after the completion of the last Ashes tour. They commenced the Australian market sales process for the 2005 Ashes series in mid 2001. Fox have indicated that in about mid 2002 they purchased the rights. On the evidence that you are aware of at this stage there was then communication in 2003 where they offered only nonexclusive rights. At that time you then wrote to the minister saying, ‘Just a minute; we think something has happened here.’

I was going to suggest that perhaps the committee itself might want to contact Octagon and seek some clarification of this. You may be able to go back through all of your records and

find nothing, but Octagon may have an obscure email or even letters that you do not have access to at this moment or are unaware of. So I suggest that the committee might want to approach Octagon. If I were the minister I would certainly want to clarify this matter, because it goes to the heart of whether a fair and reasonable negotiation is being undertaken by the ECB and Octagon. Can you take that on notice and come back to us with what information you have?

**Ms Flynn**—As I said earlier to Senator Santoro, these things can often be quite extensive in terms of the time of the negotiation, and the first offer is not always the last. There is a lot of manoeuvring in the process.

**Senator CONROY**—Is it ever the last?

**Ms Flynn**—I would not have thought so, no.

**Ms Longstaff**—Senator Conroy, you talked to the examples that ASTRA and Premier Media Group gave this morning about having previously acquired rights to events on the list and having offered them to free-to-air broadcasters. Again, that is an example of exploitation of the loophole because that puts free-to-air broadcasters in a position where you are negotiating with a party that has as one of its primary aims the exclusive coverage of that sport on pay television.

**Senator CONROY**—Sure. I was only raising it on the basis that Ms Flynn described the ashes as a precedent. I was suggesting that given the earlier evidence perhaps it was not a precedent. It might be a nice high profile. You use the word precedent but factually it probably is not a precedent.

**Ms Longstaff**—It has been acquired as a result of the loophole.

**Senator CONROY**—Sure. I was not suggesting that that was not the case. Under the Broadcasting Services Act the minister has the ability to override the automatic deadline if free-to-air networks have not been given a reasonable opportunity to acquire the rights. Why is this mechanism not a safeguard against the sort of conduct you are worried about?

**Ms Flynn**—We are not sure that in actual fact the minister could do anything because we do not think that the channel provider is captured—only the broadcaster. And the broadcaster is actually the licensee. The act talks about acquiring rights not about broadcasting.

**Ms Longstaff**—That is, it is not at all clear that Foxtel ever acquires the rights in the 2005 Ashes series. Foxtel obviously has—

**Senator CONROY**—But they must purchase something from Fox Sports. What is it they have purchased if it is not the right to broadcast?

**Ms Flynn**—You would have to ask them.

**Senator CONROY**—I am not a lawyer, thankfully.

**Ms Longstaff**—They would have the right to communicate the channel to the public, but that is—

**Senator CONROY**—But they purchase the right to transmit.

**Ms Flynn**—Obviously, we cannot speak to the commercial arrangements between Foxtel and Fox Sports channel; all we can say is that it is not clear that Foxtel ever acquired the rights in the 2005 Ashes coverage.

**Ms Longstaff**—For instance, TXA is the organisation that transmits a number of free-to-air broadcasters' signals around Australia. They would never acquire the rights to the content contained on those broadcasters.

**Senator CONROY**—Is it possible to get some legal advice on that issue either from you or from somewhere else, Senator Eggleston?

**CHAIR**—I am sure we can do that.

**Senator CONROY**—I am not sure what avenues we have to get legal advice. It would be of interest as to what the situation would be.

**Ms Flynn**—I think we might be able to assist on that process.

**CHAIR**—We can certainly ask to see to it at the end of the morning.

**Senator CONROY**—When the revised antisiphoning list was released last year a number of events were dropped from the list, and the explanatory note that accompanied the list stated:

While the commercial broadcasters have generally objected to the removal of any events, they have either shown little or no interest in acquiring the rights to many of the events to be removed from the current list, or despite having acquired live rights, have not consistently broadcast those sports live.

What is your response to those comments?

**Ms Longstaff**—It is always open to the minister to remove sports from the list, and he took the chance to do that when he revised the list. It shows that the list is a live and operating rule.

**Senator CONROY**—Does the soccer World Cup fall into the category of broad commercial broadcasters who have either shown little or no interest in acquiring the rights or not broadcast them live?

**Ms Flynn**—I think Channel 9 acquired rights last time and then SBS.

**Senator CONROY**—With SBS.

**Ms Longstaff**—So we have had extensive coverage. It rated over three million viewers, I am advised.

**Senator CONROY**—I think SBS appeared before Senate estimates and suggested that 14.5 million Australians had actually viewed it—certainly, I was one of them. Do you accept that the failure of free-to-air broadcasters to consistently broadcast events has undermined public confidence in the antisiphoning regime?

**Ms Flynn**—That is not the experience we have with the research that we have done on Australians' attitudes to the list. We believe that most programming is shown live and in full. Most rights that are required are shown live and in full and, in fact, there is now more sport on free-to-air television than there was in 1994 when the list first commenced. No, we do not accept that at all.

**Senator CONROY**—You would have heard the comments earlier by ASTRA and PMG about the need for the application of the ‘use it or lose it’ principles to the antisiphoning list. Do you accept that if the free-to-air all pass on an event it should be removed from the antisiphoning list for as long as the list is in force?

**Ms Flynn**—For the reason that we just said, we do not believe a provision like that is necessary. We do not hoard rights to events, and the main broadcasters show all the sports they acquire live and in full. There are a few examples where broadcasters do not exercise rights that have been granted and in many cases where this does occur the rights are usually offered to either the ABC, SBS, community television or pay TV.

**Senator CONROY**—Are you aware of any instances where this has not been the case? The most famous one I can think of—though I think ultimately public pressure forced a change in the position—is, of course, the infamous clash between Wimbledon and the Ashes where Channel 9 had both and, ultimately, did not show either.

**Ms Flynn**—I think it made arrangements for it to go elsewhere.

**Senator CONROY**—As I said, I think public pressure ultimately forced a change in practice by Channel 9 at that time, but are you aware of any other instances where sports have been—

**Ms Flynn**—Not off the top of my head.

**Senator CONROY**—This is an ongoing debate about whether or not things are being shown, shown live or packaged up and shown late at night. Would you welcome formal monitoring by the new ACMA when it comes into force so that we could actually try and—

**Ms Flynn**—I understood that the ABA already does. We have to report to the ABA, don’t we, every six months?

**Ms Longstaff**—Not Free TV but the broadcasters report to the ABA every six months.

**Senator CONROY**—But certainly they do not seem to publish much about it. You may be reporting to them but they do not seem to be saying a great deal. Given ABA became part of—

**Ms Flynn**—There may not be a great deal to be said.

**Senator CONROY**—That is also possibly true. Certainly, if ACMA beefed up this section of their activities so that we could have an independent body making a regular statement—

**Ms Flynn**—As I said, we are already reporting every six months. That is a matter for the new ACMA board to decide.

**Ms Longstaff**—We would not have any argument with that approach.

**Senator CONROY**—Doesn’t the ‘use it or lose it’ proposal maximise the incentive for the free-to-air networks to show the event?

**Ms Flynn**—As I said to you, we do. There has never been an argument about the number of hours broadcast between us and pay TV operators. The only argument has been about what percentage that represents of the total.

**Senator CONROY**—You would be aware that there is regularly criticism of the free-to-air operators for portraying an event as being shown live when in fact it is not. I have experienced that personally. If you follow sports—possibly not as avidly as me—

**Ms Flynn**—Most games that are not broadcast live are on delay because of commercial arrangements with the rights holder. They may be delayed against the gate. You might find that an AFL game, for instance, that is delayed in Adelaide is being shown live into Melbourne and Perth—certainly, into Melbourne, perhaps not into Perth because of the time delay. There are time shift delays as well in some markets.

**Senator CONROY**—Going back to the Ashes for a couple of minutes, would you agree that the objective of the England and Wales Cricket Board is not to maximise the viewing audience in Australia but to promote the sport within the UK, build its own infrastructure, support its academy and raise as much revenue as it can?

**Ms Flynn**—I am not free to comment on the motives of the English cricket board. All I can say and demonstrate is that in their own market they have been attacked for doing a deal exclusively with the pay TV operators, which is not unusual in the UK market. It is different there. After all, our laws were introduced in the first place to ensure that what happened there could not happen here. I really do not feel that I am qualified to comment on their motivation.

**Senator CONROY**—I am sure that its charter does not include maximising the viewing audience in Australia. That is probably a true statement.

**Ms Flynn**—Yes. It probably does not.

**Senator CONROY**—As you note in your submission, you have been raising the issue of the loophole for a number of years. In 2001 the ABA considered the case put by your predecessor FACTS in rejecting the argument to apply the antisiphoning provisions to channel providers and other third parties. The ABA stated:

The practical effect of extending the legislation as proposed by FACTS is that all rights holders would have to first deal with the free-to-air broadcaster and so further strengthen its position as gatekeeper in negotiations for rights to listed events.

From a practical viewpoint, the application of tracing provisions would require a greater intervention by the ABA, including involvement in sensitive commercial negotiations that is not necessary under the existing provisions, which could be complex and time consuming.

What is Free TV's response to these propositions put by the ABA?

**Ms Flynn**—I think it goes on to say—I do not have it immediately to hand—that they would, however, keep an eye on the situation to see if there was any evolving use of the loophole. I am not aware of what has happened since then. As I said, we have been making these concerns known for about a decade and we will continue to do so because at the end of the day if you start seeing more events being purchased in this way and only the nonexclusive rights being made available—and I make the point that the government, when it made its announcement last year in the regulatory impact statement, rejected the notion of dual rights—you will see more Australians having to pay to watch sport that they had previously seen for free.

**Senator CONROY**—Many people, including the minister, have suggested that the argument about the loophole is just an excuse and that in reality no commercial free-to-air broadcaster wants to show the Ashes because it will interfere with their established programs. I am sure you have heard that argument. Would you like to respond?

**Ms Flynn**—I would simply like to say that, as far as my members are concerned—and it is my advice—they were never offered rights in a way that would make it economically viable for them. It is a rather hypothetical question for us at this point.

**Senator CONROY**—If exclusive rights were to become available, would you be able to get your members to send us a letter saying that if they were able to obtain the exclusive rights they would show them?

**Ms Flynn**—I am not—

**Senator CONROY**—I am inviting you to go back to your members and ask them to give a guarantee to this committee.

**Ms Flynn**—The circumstance is that the pay TV rights have been sold. We really are in the land of the hypothetical at this point.

**Senator CONROY**—You can understand that there is a degree of cynicism with a response like that.

**Ms Flynn**—There may be a degree of cynicism but the fact of the matter remains that the rights have been sold. As I said earlier, our advice is that they are not captured by the antisiphoning provisions. I am just reminded that I should also point out that the negotiations in 2003, which were quite lengthy, revealed that there was a degree of interest then. It is not the case that there was no interest.

**Senator CONROY**—We understand that the ABA has written to all free-to-air broadcasters asking whether they have had a reasonable opportunity to acquire the rights to the Ashes. Are you able to inform the committee what the response from your members has been?

**Ms Flynn**—As I understand it, the members have written back saying that they were only offered non-exclusive rights. They did not believe they had been given a reasonable opportunity to apply.

**Senator CONROY**—They believe they had or they had not?

**Ms Flynn**—They had not.

**Senator TCHEN**—I want to follow up on some of the points that Senator Conroy has raised. You said in your submission that you represent all 48 commercial licensees in Australia.

**Ms Flynn**—That is correct.

**Senator TCHEN**—Some of the licensees will be quite large and some quite small.

**Ms Flynn**—There are 48 separate licences—channels 7, 9 and 10. Channel 7, for instance, has a range of regional licences in Queensland. Channel 9, by comparison, has Sydney, Melbourne and Brisbane and, I think, an interest in Darwin. The Ten Network is a national

network. We also represent Southern Cross—SCB—WIN and Prime. We have a number of independent members—NBN, Imparja and Swan in Western Australia.

**Senator TCHEN**—Do they all share the same interest in terms of sport broadcasting?

**Ms Flynn**—Yes. If I speak, you hear from everybody. If there are differences of view, you will not be hearing from me.

**Senator TCHEN**—So this is a comprehensive, representative view of the free TV sector. You expressed a view to Senator Conroy that if there is no exclusive right to a sporting event there is no commercial value.

**Senator CONROY**—Reduced.

**Senator TCHEN**—Insufficient commercial value.

**Ms Flynn**—What we are saying is that for free-to-air broadcasters, who rely solely on advertising and not on subscription and pay per view, there are a range of economic models. There is a totally different model for a free-to-air broadcaster, both here and overseas, than there is for a pay TV operator. That was our argument against dual rights. In other systems overseas where they have a system of dual rights sport eventually migrates to pay because of the dynamics and the finances—that is, how you fund the event.

In an earlier life in the years leading up to the Sydney Olympics I was fortunate enough to be the Olympics operations manager for the commercial radio networks that owned the rights to Sydney 2000. I saw very much up close the kind of money that was spent to protect the rights holders, the sponsors, the broadcasters and the advertisers. There is no doubt that advertisers demand exclusivity in the amount they are prepared to pay and their capacity to capture the audience.

**Senator TCHEN**—Have you ever managed to make a quantitative case for how the free-to-air commercial interests have to be protected or cannot be sustained if there is no exclusive right? You have said there is—

**Ms Flynn**—You have the opportunity to bid for exclusivity—that is the deal. Then you may not take up exclusivity but you may end up with complementary rights as opposed to simultaneous rights to an event. So while we recognise that the act itself does not talk about exclusivity, it does envisage the opportunity for the free-to-air broadcasters to have first go and, therefore, to acquire exclusivity.

**Senator TCHEN**—My problem is that the pay TV sector comes to me and says, ‘We are happy. We have exclusive rights for pay broadcast and we do not care about free-to-air,’ and then you come along on behalf of the free-to-air sector and say that if subscriber television gets exclusivity for their pay TV right then it damages the commercial viability of free-to-air. However, there are many instances where they can coexist. So the difficulty for me is whether we take your word for it and basically put the pay TV sector at the mercy of the free-to-air TV sector or whether we say, ‘Let’s see how it works out.’

**Ms Longstaff**—I think that we have to go back to the intention of the list. The issue of whether rights are exclusive or acquired in some other way is really a bit of a red herring. The intention of the legislation was that important sporting events should not be siphoned to pay TV, requiring the viewers to pay to see any event which they have traditionally seen for free.

The legislation does not stipulate what kinds of rights would be offered or acquired by the parties. Parliament decided at that time that giving free broadcasters right of first negotiation was most likely to result in a deal which would see the event delivered to the majority of Australians. In other words, free TV broadcasters were given first bite of the cherry before pay operators were able to purchase any rights at all. It was considered that that was the best way to maximise coverage.

The outcome of the negotiations between the free broadcaster and the sports right holder would be one of a number of options. In some cases, free-to-air broadcasters do acquire exclusive rights. In other cases they enter into a deal where they provide some coverage on free TV and complementary coverage on pay TV. Going back to the explanatory memorandum, we noted earlier that one of the aims of the act was to ensure complementary coverage on pay TV. Alternatively, there may not be a deal entered into between free TV broadcasters and the sports rights bodies, in which case the event can be delisted, and that has happened.

Finally, if the act was intended only to prevent pay exclusivity, it would have provided that pay operators cannot purchase the free-to-air rights. This would have enabled pay to purchase the pay rights at any time regardless of free-to-air. But it does not. The act specifically says that pay TV may not purchase the pay rights, enabling free-to-air to negotiate before pay is involved in the negotiation and purchase the exclusive rights if they and the rights holder choose.

**Senator TCHEN**—Yet this act has been operating for 10 years and, as Ms Flynn said, there is more sport broadcast free-to-air than before. Mind you, I am one of those people who does not believe that wall-to-wall sport broadcasting is necessarily good for this nation, either culturally or economically, but that is a different argument.

**Ms Flynn**—Senator, our research suggests that about 50 per cent of the Australian population thinks there is enough sport on air and are happy with the amount on air; the other 50 per cent are evenly divided between those who think there is not enough and those who think there is too much. You are not an isolated case.

**Senator CONROY**—You are in the 25 per cent, Senator Tchen.

**Senator TCHEN**—My point is that, obviously, during the life of this act up to now, the free-to-air sector actually has had no complaint about how it has been operating, yet we are looking at an adjustment of the system which may have far less impact than when the act first came in. But your submission says there is a loophole now.

**Ms Flynn**—With respect, we have been talking about the loophole since 1994.

**Senator TCHEN**—The most famous instance of siphoning behaviour was the one Senator Conroy raised about one of the commercial channels refusing to broadcast a definitely iconic event. As you say, subsequently it offered the program to other free-to-air, but I would suggest that it would have been on very short notice—

**Ms Flynn**—We do have antihoarding rules as well.

**Senator TCHEN**—I am just wondering whether you have any actual examples of this siphoning behaviour by the pay sector.

**Ms Flynn**—Any examples of them doing what exactly?

**Senator TCHEN**—Of excluding the free-to-air television or—how should I say it?—pre-empting free television from negotiation.

**Ms Flynn**—I think in their evidence they have talked about events.

**Senator TCHEN**—I need two things to satisfy myself: firstly, pay television rights will definitely damage the commercial viability of commercial stations.

**Ms Flynn**—No, it damages the commercial viability of broadcasting of that particular event. I think the 2005 Ashes series and the fact that we were offered non-exclusive free-to-air rights is an example, and that is why we are here today.

**Ms Longstaff**—Senator Tchen, I think one of the problems with the loophole is where an associate or a channel provider of a pay TV licensee is the rights holder. Premier Media Group gave some examples of where that has been the case. The free-to-air networks are then negotiating with a party which has as one of its primary aims the exclusive coverage of the sport on pay TV, and it may be the case that, in those circumstances, they price the free-to-air out of the market to guarantee rejection of the event.

**Ms Flynn**—In fact, I think if you have a look at the regulatory impact statement that the government put out last year in relation to this, it makes a number of comments that I am happy to provide you with later. I can highlight the ones that I think are relevant. They look at a number of options which go to the issues that you are talking about, but they say:

Migration of events to pay television would represent a high cost to the 77% of Australian households that do not have access to these services. This is inconsistent with the primary aim of the anti-siphoning scheme, which is to ensure continuing free-to-air coverage of events of significant interest to maximise their availability to ... viewers.

The government did consider the issue of the dual rights regime, and they basically rejected that as well.

**Senator TCHEN**—What are you quoting from?

**Ms Flynn**—The regulatory impact statement that the government put out last year when it revised the antisiphoning listed sports.

**CHAIR**—Thank you very much, Ms Flynn and Ms Longstaff, for your appearance this morning.

[11.40 a.m.]

**SUTTON, Dr David John, Industry Analyst, Corporate Planning and Governance, Australian Broadcasting Corporation**

**WARD, Mr Michael, Head of Policy and Administration, ABC Television, Australian Broadcasting Corporation**

**CHAIR**—Welcome. I know you are experienced witnesses before Senate committees. The committee has received your submission as submission No. 8. Do you wish to make any amendments or alterations to your submission?

**Mr Ward**—No, we do not.

**CHAIR**—Would you like to make an opening statement, bearing in mind that evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate?

**Mr Ward**—Yes, I will make a very brief introductory statement. I will speak briefly from some notes I have prepared, and I will try not to repeat some of the things that have already been said. We welcome the opportunity to appear before the committee and add some comments to our submission. As you know, we have made a very brief submission on two matters of importance—the delisting extension, as discussed, from six to 12 weeks; and also the loophole, as we perceive it. In summary, we would like to note that the ABC believes that the antisiphoning legislation was put in place to provide a maximum public benefit from broadcasting listed events in terms of audience and that this was determined to be best achieved when free-to-air broadcasters provide that coverage.

It is our view that in the current legislative circumstances the extension of the delisting time frame is not in the best interests of the community. I have referred to the current circumstances. In doing so, I just want to comment on what the ABC believes is a major issue here and one that has been discussed this morning—that is, the issue of the loophole, as we perceive it. As we have noted and as has been noted here, pay television licensees have, as a condition of their licence, a requirement in relation to events on the antisiphoning list. However, these provisions in no way limit the ability of other parties, such as channel providers, to acquire the subscription television rights before they have been acquired by free-to-air broadcasters. It is our belief that this is what has happened in the case of the 2005 Ashes cricket series.

This would seem to fly in the face of the spirit and the intention of the legislation. It is our understanding that antisiphoning provisions are intended to protect the availability of free-to-air broadcasting of events of national importance and cultural significance, and that this is given effect by enabling free-to-air broadcasters to have preferential access to the broadcast rights to those listed events. However, the ABC believes that the current incident demonstrates that the problems created by this loophole go deeper. While the rights seller in relation to the 2005 Ashes cricket series, the England and Wales Cricket Board, has sold the pay television rights before the free-to-air rights, there is currently an offer on the table from a free-to-air broadcaster—the ABC. If the rights seller were to accept that offer, the event would be available to free-to-air audiences. However, at this stage our offer has been declined. We are hopeful that a sale can be agreed.

Nonetheless, the current situation exemplifies the problem with the current system, as it is entirely possible the ECB will not sell the rights—indeed, they have indicated that they believe the rights are worth a lot more money. If that happens, then six weeks from the beginning of the first match the event will become automatically delisted and the Ashes will only be available to pay television subscribers. We believe that will be in spite of a reasonable offer from a free-to-air broadcaster being on the table.

This is precisely the calculus that the antisiphoning rules anticipated and are designed to prohibit. If, for whatever reason, the ECB decide that they will not sell the free-to-air rights to the Ashes to the ABC then, as I said, they will not be shown on free-to-air. This is possible because the loophole in the antisiphoning rules allows subscription channel providers and other third parties to acquire rights to events on the antisiphoning list before free-to-air broadcasters even if subscription television broadcaster licensees are prohibited from doing so. The ABC believes it is critical, especially if the parliament is to consider extending the automatic delisting period to 12 weeks, that this apparent loophole be removed.

**Senator CONROY**—So no success yet—

**Mr Ward**—Not yet.

**Senator CONROY**—in our quest to get the Ashes broadcast on free-to-air.

**Mr Ward**—Not as we speak.

**Senator CONROY**—Last week, Mr Balding told us about the ABC's bid to televise the Ashes this year. Can you comment on the evidence from Octagon that you rejected the rights back in 2001. It said:

With regard to ABC ... both broadcasters indicated that they had no interest in pursuing the opportunity to acquire the series.

**Mr Ward**—The comments that I am able to make at this stage are twofold. One is that the checks that we have been able to make this morning since being provided with a copy of this correspondence have not revealed anything in our files regarding any communication in 2001. I am not saying that it has not been made, but at this stage our checking has not revealed that. Perhaps someone spoke to our then head of sport; we have a new head of sport since then. Perhaps the offer was to the then managing director; we have a different managing director now. In my role I have been involved in discussions and briefings with our sports department since late 2004. At all times in those discussions people have spoken about two offers, two sets of discussions and negotiations prior to the current ones: one in mid-2003, similar to the evidence provided by Ms Flynn and another in 2004.

**Senator CONROY**—You are familiar with the 2003 negotiations?

**Mr Ward**—Yes

**Senator CONROY**—And did you decline them then?

**Mr Ward**—We did, yes.

**Senator CONROY**—That should not be seen as meaning that you were ruled out. At that stage you may have felt that the other free-to-air would outbid you, but once they dropped out you were free to re-enter the market at any stage.

**Mr Ward**—That is right. We would see rights negotiations and discussions as an ongoing issue, and obviously the rights holders would want to bring those to a conclusion at some stage. The managing director gave evidence last week that it has been a number of years since the ABC was in the major sports rights business. But we assess every offer that comes our way. We analyse it in terms of what the rights cost might be and what the broadcast costs might be. At that time there were a number of issues that we considered, one of which may have been that another free-to-air broadcaster would take up the rights. The context of the 2003 offer, which was that the pay TV rights had already been sold, was a significant factor in our consideration of the offer.

**Senator CONROY**—Octagon says:

An agreement was finally concluded with Foxsports in May 2002 for a package of ECB cricket that included the non-exclusive right to the Ashes series, with the ECB retaining the FTA rights. The agreement was concluded only after all FTA broadcasters were given a full and final opportunity to make an offer or at least to express some interest in the rights to the Ashes series. However, from May 2002 until January 2005, Octagon did not receive any interest in (or offers for) the Ashes series from any of the FTA broadcasters in Australia. In fact, ECB approached all FTA broadcasters in 2004 to confirm such non-interest which was confirmed in writing.

That would seem to miss the 2003 negotiations that even you are aware of.

**Mr Ward**—I suppose it depends on how you read those sentences.

**Senator CONROY**—I am just trying to work out whether they are splitting hairs about the exclusive versus the non-exclusive et cetera. But from your own records and Ms Flynn's testimony there were certainly discussions in 2003, as opposed to what they believe seems to be just 2004.

**Mr Ward**—I should point out that, in terms of 2003, my understanding of 2004 and absolutely the current discussions, we have always dealt with the ECB.

**Senator CONROY**—Who are Octagon? Are they the owner of the rights?

**Mr Ward**—I am not sure.

**Senator CONROY**—You are not dealing with Octagon currently in your negotiations?

**Mr Ward**—No. The communication that I am aware of—I am not aware of all of the detail of 2004, but certainly in terms of mid-2003—was apparently always with the ECB.

**Senator CONROY**—So it is possible that all of these statements are true, given that the ECB seem to be conducting negotiations with you currently, not through Octagon, and that Octagon have been in discussions with clearly some media organisations. It seems a strange way to do business, having both the ECB and Octagon separately negotiating. You do not necessarily have to pass comment on that unless you want to.

**Mr Ward**—I do not think I could comment on that.

**Senator CONROY**—Some of this again may be commercial-in-confidence, and we can go into in-camera hearings, but has the ABC put in a higher bid, or are you trying to persuade the ECB that the bid was reasonable considering that they are offering non-exclusive rights and that two-thirds of the event takes place after 10 p.m.

**Mr Ward**—I have to say, in all honesty, that I am not aware of all of the detail of the most recent communications and whether we have gone up. I can say that we are continuing to communicate with them as recently as over the weekend. But now, in all honesty, I cannot provide you with any detail.

**Senator CONROY**—Just out of interest—and if anyone else who is still in the room is aware of this they might want to pass a note up to the committee—who actually owns the free-to-air rights? Is it Octagon or is it the ECB?

**Mr Ward**—We are negotiating with them on the basis that they own the rights and they can sell it to—

**Senator CONROY**—The ECB own the rights?

**Mr Ward**—The England and Wales Cricket Board.

**Senator CONROY**—And they have not suggested that you go and talk to Octagon at any stage?

**Mr Ward**—Not at all.

**Senator CONROY**—If anyone else in the room has any updated information they could pass up a note. That would be helpful to the committee. Has the ECB told you what they want?

**Mr Ward**—Could I take some advice before I answer that?

**Senator CONROY**—As I said, if this goes into commercial-in-confidence, we understand.

**Mr Ward**—I have a twofold difficulty. One is that I am not handling it myself and I am only peripherally aware of some of the things that are being discussed and I would not want to mislead you in any way. The other is that these things are fairly sensitive at this time. If there is another way of providing you with some information about it we would be happy to try and do that.

**Senator CONROY**—I know that Mr Balding did give a bit of a response. There continues to be some speculation in the media that the ABC has only put in a token bid.

**Mr Ward**—I could say that it is certainly not a token as far as we are concerned. It is an analysed and assessed bid on our part. As you know, Mr Balding gave some detail—

**Senator CONROY**—So I could not outbid you with a bid of 150 bucks or anything like that?

**Mr Ward**—No, you would probably need a bit more than that.

**Senator CONROY**—I could not secure the rights?

**Mr Ward**—I do not think so.

**Senator CONROY**—The bill would effectively bring forward the automatic delisting of the Ashes from June to the end of April. How long does the ABC expect these negotiations to go on?

**Mr Ward**—I do not honestly know the answer to that question. We presume that, if we could negotiate something, we would be able to do it relatively quickly because, if we were to

be able to complete the negotiation successfully, there are broadcast and related technical issues that we would have to have addressed fairly quickly subsequent to that.

**Senator CONROY**—Mr Balding said the ABA had written to you asking whether the ABC had been given a reasonable opportunity to acquire the rights. Are you able to tell the committee what the ABC's response was?

**Mr Sutton**—As I recall at the time, we wrote back to the ABA and said that we were still considering the matter.

**Senator CONROY**—Okay, you are batting on despite the light fading?

**Mr Sutton**—Absolutely.

**Senator CONROY**—I am going to blame my staff for that one. Thanks very much.

**Senator TCHEN**—The ABC's basic position is that it believes that the extension of the automatic delisting period from six weeks to 12 weeks is a matter of concern—which actually is the only thing that the bill proposed apart from detailing the listing. On that, no-one has actually persuaded me that the extension of the negotiation period is actually bad for negotiation. By the way, I congratulate the ABC on its submission, which is one page in length. It is very clear. Instead of the message being hidden within 20 pages, it is very clear. Reading through it, it is fairly clear that the real concern is, since the legislation was brought in, about the entry of what we might call third party players within the pay TV sector. The pay TV sector is not simply a couple of licensees and that is it; there are other players as well now. That is the real loophole in the situation, isn't it?

**Mr Ward**—That is right.

**Senator TCHEN**—It is not so much the period of negotiation. If the length of the negotiation is longer when there are more players, you actually need a longer period of negotiation to get there. Your real concern is that the entry of this type of new player can actually facilitate siphoning behaviour. If that does happen, when a player within the pay TV sector actually demonstrates behaviour in a siphoning manner, the government can act very quickly to amend the act to include this player in the prohibited behaviour list. At the moment, there is nothing to say this third party player would not play fairly and also deal with the free TV sector. Why pre-empt them?

**Mr Ward**—Our view is that you are right in that the extension of the delisting from six to 12 weeks would not be a significant matter if this apparent loophole could be removed. I do not believe the government can act at the moment because the problem is that the loophole exists in the legislation. It is our view that the spirit and intention of the legislation is that free-to-air television should be given unencumbered access in the first instance to events on the antisiphoning list and that cannot be achieved if it is the case that that access is mediated through a third party—for example, a pay television channel provider. It is our view, further, that that was not the intention of the legislation. The reason is that free-to-air television at this point, at the time the legislation enacted and for the foreseeable future is still the broadcasting service that has the ability to provide these events to the overwhelming proportion of the Australian people. It is in that public interest that we speak.

**Senator TCHEN**—But that public interest will only be damaged or negated if these third parties actually behave in what I can only describe as a siphoning manner. If they behave in accordance with the spirit of the legislation then there is no problem—in other words, if they continue to negotiate as though they were the sporting body.

**Mr Ward**—The difficulty for us is that it is a different case, as we note in our submission, for the ABC, as a national broadcaster, compared to a commercial broadcaster. Nonetheless, the issue for us is about balancing the range of interests that Mr Balding spoke about last week, which include the interests of the audience that watch our regularly scheduled program and the interests of the audiences that potentially come to the ABC for something like a sporting event. We have to take into account what the relative size of that audience is going to be and if it is already being diminished by virtue of audiences going somewhere else to view this event—that is, the fragmentation of that audience has happened before it is even offered to us—that reduces the appeal of that event to us and our consideration of it. Therefore, we are not able to go forward and take up the event.

**Senator TCHEN**—Yes, I appreciate that, Mr Ward. I thank you for your comments on the real crux of the matter, which is the entry of the third party. Although, on this point about the ABC's audience—this is just by way of an aside now and perhaps not so much to do with the last issue—I am a little bit curious about your comment that the ABC looks at the size of the audience before deciding on scheduling, because in my experience I have found the most interesting programs on ABC television are the ones whose audience I expect you could count on a couple of hands.

**Mr Ward**—That does happen.

**CHAIR**—We thank the ABC for appearing.

[12.02 p.m.]

**CAMERON, Mr James David Alan, Chief General Manager, Broadcasting Division, Department of Communications, Information Technology and the Arts**

**NEIL, Mr Gordon James, General Manager, Licensed Broadcasting, Department of Communications, Information Technology and the Arts**

**CHAIR**—I welcome the representatives of the Department of Communications, Information Technology and the Arts. You are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Do you wish to make an opening statement or do you just want to take questions?

**Mr Cameron**—Senator, we have no opening statement.

**Senator CONROY**—Before I commence asking questions, I have received some extra information that, as you heard me earlier, I was soliciting about the role of Octagon. I am advised that Octagon was acting as the ECB's agent. My understanding is that Octagon previously conducted all the negotiations with the broadcasters and the ECB brought the negotiations in-house at some point in the past two years. I just wanted to provide that update on the role of Octagon in that process.

**CHAIR**—We thank you for that information, Senator.

**Senator CONROY**—The minister has had an application from the ECB to delist the Ashes series. Has a decision been made on this application yet?

**Mr Cameron**—No.

**Senator CONROY**—Has there been any communication with the ECB on the issue?

**Mr Cameron**—As is normal practice, the request for delisting has been referred to the Australian Broadcasting Authority for advice. I understand the ABA has contacted a number of parties to seek their views on the delisting. I am not sure whether they have specifically spoken to the ECB to date.

**Senator CONROY**—The government has not said to the ECB: 'We're not going to delist until you start negotiating in good faith with the ABC'?

**Mr Cameron**—No.

**Senator CONROY**—There has been no attempt to encourage them to negotiate in good faith?

**Mr Cameron**—What is before the government is a request for delisting, and the government is undertaking its normal inquiries on that matter.

**Senator CONROY**—While this bill brings forward the automatic delisting period, the minister will still be able to make a declaration to prevent an event from being removed from the list. Has this ever occurred?

**Mr Cameron**—I would have to take that on notice, but I am not aware that it has occurred.

**Mr Neil**—We have listed events on request, but I do not recall us ever holding one on the list. But we will have to take it on notice.

**Senator CONROY**—If it is different, please come back to us. I am not aware of any, and I do not follow the matter as closely as some. I am not aware of that happening. The minister can issue a declaration if she is satisfied that at least one free-to-air broadcaster has not had a reasonable opportunity to acquire telecast rights. What factors are relevant in this assessment of whether the free-to-air have had a reasonable opportunity?

**Mr Cameron**—Again, with such a request the matter would be referred to the ABA for investigation. It is fair to say that the ABA would take into account a range of considerations, including the time frame and the process by which the rights holder sought to enter into negotiations, if that is what they did, and other relevant factors which might be raised in consultations with both the rights holders and the broadcasters.

**Senator CONROY**—Could an unreasonably high price being demanded by the owners of the TV rights be a factor?

**Mr Cameron**—In theory, I think that could be the case. However, clearly it would depend on the circumstances.

**Senator CONROY**—In practice in this case?

**Mr Cameron**—Your suggestion is—

**Senator CONROY**—I am asking what factors could influence a decision under the legislation; you are the department.

**Mr Cameron**—If a price was in fact unreasonable and in addition the rights holder was not prepared to enter into any negotiations then that may well be evidence that could be brought to bear.

**Senator CONROY**—On the face of it, only one bidder tends to make it a buyer's market, I have always found in my dealings in any sort of financial transaction. A single bidder for any piece of property usually means that it is a buyer's market. Is that a fair call, Mr Cameron?

**Mr Cameron**—There would be a range of considerations that a rights holder might have, including the fact that if the rights to a similar event would be available in the future they might have regard to the circumstances in front of them now, keeping an eye on possible future sales as well. There are a range of factors that might influence their conduct.

**Senator CONROY**—You have been here most of the time, Mr Cameron.

**Mr Cameron**—I have.

**Senator CONROY**—You don't have to look so pained! We have talked a bit today about the so-called loophole in the antisiphoning regime. Has the department done any work, or is it aware of any work done by the ABA, on how common it is for channel providers to acquire the rights to listed events before the free-to-air networks?

**Mr Cameron**—The department is aware of the examples that I think the Free TV submission has given and also some of the examples provided by the ASTRA and Premier Media Group witnesses today.

**Senator CONROY**—Is it a common practice?

**Mr Cameron**—It is not an unheard of practice; it is a practice which occurs, whether you would necessarily call it common—

**Senator CONROY**—From the evidence given to us by ASTRA it sounds like it is an increasing practice. There was a little bit early on, but in the last couple of years I thought they indicated there were four or five items, so it is certainly on the increase rather than on the decrease.

**Mr Cameron**—It is fair to say that the practice is more common in relation to certain types of events.

**Senator CONROY**—What types of events?

**Mr Cameron**—It is probably a practice which has occurred more regularly in relation to cricket events which are played overseas—one-day internationals and tests involving Australia.

**Senator CONROY**—Is it still the government's view that the antisiphoning regime is working as intended?

**Mr Cameron**—Yes, I think that is fair to say.

**Senator CONROY**—When the antisiphoning regime was first established, was it thought licensees would acquire the products such as sports rights rather than channel providers?

**Mr Cameron**—I cannot comment on the mindset of the people who were there at the time, but I think there certainly was an expectation that licensees would have to acquire those events if they wanted to broadcast them.

**Senator CONROY**—Earlier today I read from the explanatory memorandum for the Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992, which established the antisiphoning regime, and I think you indicated that you heard that discussion with ASTRA and PMG. To recap, the EM states, 'This process'—that is, the antisiphoning regime set up under section 115 of the Broadcasting Services Act—'should ensure, on equity grounds, that Australians will continue to have free access to important events. It will, however, also allow subscription television broadcasters to negotiate subsequent rights to provide complementary, or more detailed, coverage of events.' Doesn't the reference to subscription TV being able to negotiate subsequent rights indicate the intention that the free-to-air should get the first opportunity to bid for listed events?

**Mr Cameron**—Certainly the explanatory memorandum identifies the intention that a subscription television broadcasting licensee should not be able to acquire the rights to an event prior to a national broadcaster acquiring the rights or a commercial broadcaster with coverage of more than 50 per cent of the population acquiring the rights.

**Senator CONROY**—Putting aside the argument about whether or not Foxtel ever actually owned the rights, which you would have heard discussions of, briefly, in your view were the free-to-air channels able to negotiate prior to someone else purchasing the rights—for the Ashes, as an example?

**Mr Cameron**—Because the case of the Ashes is currently a matter before the minister and being considered by the ABA, I do not have enough information before me to comment at this point.

**Senator CONROY**—Didn't the purchase of rights to listed events by channel providers of licensees before free-to-air networks have the opportunity to undercut the scheme?

**Mr Cameron**—The intention of the scheme is that free-to-air broadcasters should have a real opportunity—

**Senator CONROY**—First—

**Mr Cameron**—to acquire the free-to-air broadcast rights for an event. The way in which that is achieved is to prevent a pay TV licensee from acquiring the pay rights until those free-to-air broadcast rights have been either acquired or delisted.

**Senator CONROY**—The word ‘subsequent’ in the EM would imply the first rights opportunity—not free and fair but the first rights opportunity.

**Mr Cameron**—The EM identifies that the rights should be available to free-to-air before a pay TV licensee—that is correct.

**CHAIR**—That concludes the hearings. The secretariat reminds me that any questions or matters on notice should be in to the committee by Friday of this week. We have a reporting date that requires the information to be in by the end of this week so that we can prepare a report, so I ask you all to comply with that request. I thank everybody for appearing this morning and close this public inquiry meeting.

**Senator CONROY**—We talked about getting some legal advice before, possibly from either free-to-air TV or—

**CHAIR**—We are going to have a private meeting about that now, which is for the information of the committee members.

**CHAIR**—The adjournment is rescinded so that Senator Conroy can ask DCITA a question regarding legal advice.

**Senator CONROY**—Do you have any advice on the issue that Free TV flagged—that is, whether or not the government could stop Foxtel showing a program without having the rights? Are you able to provide us with any information about that?

**Mr Cameron**—As I understand it, the suggestion is that it may well be the case ... the proposition is that Foxtel may not formally acquire the rights at the time that they broadcast the event or immediately prior to broadcasting the event. The department does not have any formal legal advice on that question, although in discussions with our legal area on occasions on this matter it has been indicated that the broadcast of an event would necessarily involve the acquisition of the right to broadcast; otherwise, the broadcast itself would be in breach of those rights arrangements.

**Senator CONROY**—Is it possible to get us anything in writing along those lines?

**Mr Cameron**—I can take that on notice, if you want.

**CHAIR**—We would appreciate that. We would like it by Friday so that the committee can draw up its report.

**Committee adjourned at 12.17 p.m.**