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

Monday, 28 February 2005

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

Substitute member: Senator Cherry for Senator Bartlett

Participating members: Senators Abetz, Allison, Bolkus, Boswell, Brown, George Campbell, Carr, Chapman, Colbeck, Coonan, Crossin, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Heffernan, Hogg, Humphries, Knowles, Lightfoot, Ludwig, Mason, McGauran, McLucas, Moore, Nettle, O'Brien, Robert Ray, Watson and Wong

Senators in attendance: Senators Conroy, Eggleston, Santoro and Tchen

Terms of reference for the inquiry:

Broadcasting Services Amendment (Anti-Siphoning) Bill 2004

WITNESSES

MALONE, Ms Andrea, Manager, Industry Review Section, Australian Broadcasting Authority 1
TANNER, Mr Giles, Acting Member, Australian Broadcasting Authority 1

Committee met at 11.22 a.m.**MALONE, Ms Andrea, Manager, Industry Review Section, Australian Broadcasting Authority****TANNER, Mr Giles, Acting Member, Australian Broadcasting Authority**

CHAIR—I declare open this public hearing of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee and welcome everybody here today. The committee is continuing its examination of 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 is to report to the Senate on 7 March 2005.

Today's hearing is being conducted by teleconference. In Canberra we have Senator Conroy, the witnesses and the secretariat. On the telephone we have Senator Tchen in Melbourne, Senator Santoro in Brisbane and myself in Perth. For the benefit of the 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 Mr Tanner from the Australian Broadcasting Authority. As you know from having appeared before Senate committees many times before, you are reminded that the evidence given to the committee is protected by parliamentary privilege and the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Would you like to make an opening statement or would you like us to proceed to questions?

Mr Tanner—We do not have an opening statement. I am here to see if we can assist.

CHAIR—Thank you. I think all of the senators have questions, but we will start with Senator Conroy's questions and then, if necessary, we can return to him if he has further questions.

Senator CONROY—The ABA stated at Senate estimates two weeks ago that you were doing some work on the operation of the antisiphoning list in relation to the Ashes cricket series. Can you give the committee an indication of the sorts of issues you have been looking at? Have you come to any conclusions?

Mr Tanner—There is not a great deal I can say about that. The ABA, pursuant to a standing direction from the minister, have a role in investigating issues around particular rights. The context here is whether or not another body apart from us—in this case, the minister—should exercise its power to remove an item from the list before the six-week period. The ABA have provided some advice to the minister since we spoke and we will almost certainly provide some further advice. But I would prefer that we kept the content of that advice to ourselves.

Senator CONROY—So you have now completed your investigation and passed that on to the minister, but there may be further information?

Mr Tanner—We have certainly not completed our investigation. We have sent in some information and foreshadowed that it may be appropriate to send some more information.

Senator CONROY—Is it possible that the ABA would recommend a delisting while the ECB and the ABC are still in negotiations?

Mr Tanner—It is a hypothetical question. It is certainly possible. The ABA is—

Senator CONROY—It is not hypothetical that they are in negotiations.

Mr Tanner—No, that is true. It is hypothetically possible that the ABA could recommend the delisting if it were satisfied that a real or reasonable opportunity had been given. That is hypothetically possible, whether or not they are in negotiations.

Senator CONROY—I am hoping that you have had it drawn to your attention that there has been a fair bit of discussion around this issue in this committee. Last week there was a lot of discussion about a letter from a company called Octagon CSI, which claimed to have offered the rights to the Ashes to free-to-air broadcasters in 2001 on behalf of the ECB. Are you aware of that testimony?

Mr Tanner—I am aware of that testimony and I am aware of the communication from Octagon.

Senator CONROY—Have you investigated this claim?

Mr Tanner—I do not have any more information about that Octagon letter than is available to you. That would be the short answer.

Senator CONROY—But are you investigating it? It would seem to be germane to—

Mr Tanner—It is germane. I would put the question somewhat differently—

Senator CONROY—Have you contacted Octagon?

Mr Tanner—We have not been in contact with Octagon. If the ABA became aware of circumstances that suggested that a reasonable offer had been given to all broadcasters then it would make that information available to the minister. From what I have seen of the Octagon material, it is certainly not clear from the testimony or the letter exactly what kind of offer was made. I understand that the FTVA has foreshadowed that it wishes to make further submissions on that issue, so we are watching them with great interest.

Senator CONROY—Do you intend to contact Octagon?

Mr Tanner—It depends on whether anything of interest to our role in this comes out of the material that has come before your committee.

Senator CONROY—We are in parallel to you, unfortunately, which is not an ideal set of circumstances.

Mr Tanner—We have somewhat different roles. It is important to understand that we are alert to what is going on and we are watching it with considerable interest. Where we see something of relevance to us, we will take that into account.

Senator CONROY—You have indicated you have seen the Octagon letter and your own words a moment ago were that it was ‘not clear’. Yet you have not sought to clarify with Octagon what the status of the content of that letter is. You described it yourself as unclear. We have actually written to them asking them to clarify because, like you, we are wondering what exactly it means.

Mr Tanner—It is probably fair to say that the body here which would presumably benefit from an early removal from the list is the ECB. The ABA has focused a lot of its inquiries on the ECB as the body which would stand to benefit. It would seem to us that they are the ones with the incentive to cooperate and they are the ones with the information. As far as I can tell from what has come before your committee, Octagon is an agent of the ECB.

Senator CONROY—So at this stage you have no intention of contacting Octagon.

Mr Tanner—No, but we are very alert to what is happening and that could change very quickly if became aware of something that we thought was important.

Senator CONROY—As you have indicated you are aware, there is a supplementary submission coming to the committee. We have to make a determination on whether all of that submission will be public. I am sure some of that will be of a great deal of interest to you. You have possibly pre-empted this question with your last answer: how relevant is the Octagon letter to your assessment of whether the free-to-air broadcasters have had a reasonable opportunity to acquire the rights and consequently whether there should be a delisting?

Mr Tanner—All I can say is that it is potentially relevant. There is an issue here. The person with the power to delist an event is the minister, not the ABA.

Senator CONROY—They rely on your recommendation, though.

Mr Tanner—That is right, because of a direction. Basically, that is likely to take the form of advice as to facts that we are aware of that might be relevant to the exercise of her discretion. If we think it is appropriate to gather facts and inform her further to that direction then we do that.

Senator CONROY—I think you indicated that the ABA has spoken to the ECB.

Mr Tanner—We have been in extensive contact with the ECB.

Senator CONROY—What sort of information have you been seeking?

Mr Tanner—I think I would like to leave it at what I have already implied, which is that our interest here is in advising the minister of any facts that are relevant to her discretion. The live discretion at the moment would seem to be whether or not to delist early. Potentially, at some future date we might be interested in whether there is information—

Senator CONROY—Whether to delist at all.

Mr Tanner—to not to delist and to go past the six weeks. That is a hypothetical observation.

Senator CONROY—I appreciate that. I am not trying to draw you out on those things. Do you know what sort of price the ECB are seeking in negotiations with the ABC?

Mr Tanner—I am not sure that I want to get drawn too much into—

Senator CONROY—I promise you I am not going to ask you what the price is. I am just seeking to know whether or not you have sought that information.

Mr Tanner—We have certainly sought it. We have sought a lot of information. We have asked what I would hope are the obvious questions to ask when trying to ascertain whether there are facts that would be relevant to the minister's discretion.

Senator CONROY—The department confirmed last week that the price being sought by the ECB is a relevant consideration in assessing whether FTA broadcasters have had a reasonable opportunity to acquire the rights. Would you agree with that?

Mr Tanner—That strikes me as an uncontroversial observation.

Senator CONROY—So, ultimately, the ABA has to make an assessment of whether the price being sought by the ECB is reasonable.

Mr Tanner—It is a relevant consideration, as is exclusivity and potentially a lot of other things. I should make it clear that this area is shrouded in confidentiality, so we can ask but we do not necessarily find out. For example, it may very well be—let me make it clear that I am thinking of past experience, rather than this—that we gain sufficient information about whether or not a reasonable opportunity has been given from some simple piece of material such as a chain of emails that shows that no-one is interested. If the drift of your questions is that deciding whether or not a reasonable or real—or whatever the actual test is—opportunity has been given would require a comprehensive understanding of a whole range of factors, including price as a very important one, then the answer is that we have always faced the problem that there is a strong preference to keep this information confidential. This is something that the ABA commented on in its 2001 report. I believe the Productivity Commission also commented on it.

Senator CONROY—As I said, I am not seeking in any way in this hearing to draw you into prices. The ABC have asked us not to press them. The committee could press the ABC for an answer to a question of what they are offering, but they have asked us not to do that given that it is commercially sensitive. So I have no intention of going down that path with you. I appreciate the points that you have made. I would like to talk more generally about the operation of the antisiphoning regime. One of the issues that we discussed last week was the role of channel providers in acquiring broadcast rights for pay TV licensees. Does the ABA have any information about how widespread this practice is and how long it has been going on?

Mr Tanner—There is some information about this in our 2001 report. Obviously, we are also aware of the role of Premier Media Group in the present event, and that is an issue on which we are informing ourselves.

Senator CONROY—Mr Tanner, I have seen you coming to the Senate estimates table for a long time—and I hope I am not doing you a disservice when I say that. In the ABA's view, when the antisiphoning regime was first established was it thought that licensees rather than channel providers would acquire products such as sports rights?

Mr Tanner—My knowledge of the debate back in 1992 is limited to what I can read from the explanatory memorandum of that time—notwithstanding my longevity!

Senator CONROY—I think DCITA said there was certainly an expectation that licensees would have to acquire those events if they wanted to broadcast them. They were not trying to be particularly helpful to the committee at the time, but I hoped you might have had a recollection from the time. Like you, I also have read the EM; as you would have seen last week; I put into *Hansard*.

Mr Tanner—You are raising a point about the construction of the provision. A moot question here is what it means to obtain rights. Certainly there is a reading that if you are able to screen it then you have obtained rights. I read some of the transcript of the Monday hearing with great interest for that reason. That is an issue of interest to the ABA, but I would not want to say anything else on that. I say it is of interest because another key role we have, apart, obviously, from assisting the minister as we have been directed, is to ensure that there is compliance with the Broadcasting Services Act, and there is that condition on subscription licensees. So we read that debate with a lot of interest.

Senator CONROY—We have taken legal advice on some of the issues that have come up—and I think we may have some of that as well.

Mr Tanner—That is of interest to us because it is relevant to our role. I would not want to say anything else than that, but we are certainly alert to and taking an interest in those issues. We are in contact with people as we think appropriate, and we will continue to monitor that situation.

Senator CONROY—Does the ABA agree that the objective of the antisiphoning scheme was to ensure the free-to-air got the first opportunity to acquire listed events without having to compete with pay TV licensees or channel providers?

Mr Tanner—Once again, I have the relevant late 1992 explanatory memorandum, and that is the only articulation I am aware of of parliament's state of mind in doing that.

Senator CONROY—I can save you time; I have the relevant passage. It says:

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.

The key phrase is 'negotiate subsequent rights'.

Mr Tanner—Yes. And certainly the effect of the provision is that the subscription licensee is not able to negotiate rights according to the condition until the event has been delisted or the rights have been obtained by free-to-air broadcasters.

Senator CONROY—So if no information is provided by the ECB can we decline to delist?

Mr Tanner—The minister has very broad discretion.

Senator CONROY—I was not in the parliament in 1992, and I am pursuing all sorts of inquiries to try and understand the intent of the legislation as well as its wording. I am sure that you too are grappling with many of those issues.

Mr Tanner—Yes, we are. It is probably worth mentioning that, as you would be aware, the ABA did at least comment on this in passing in its 2001 report. So the debate about the substantive effect, if any, and the policy importance of what is described as the 'loophole'—that is, that another entity can acquire rights before free-to-air broadcasters have acquired them—were considered by the ABA, at least in passing, in 2001. So we are well aware of the issue.

Senator CONROY—There did not seem to be many examples back in 2001, whereas there seems to have been—

Mr Tanner—Yes. I think the ABA made two points. I should make the general point that the ABA was not directed to look into those policy issues but that those policy issues flew up at it out of the submissions process, and it did comment, at least on a number of them. The main point the ABA made, from memory, was that it was not aware of the loophole, if that is how you describe it, having had any deleterious effect in terms of depriving viewers. The ABA also made the point, though, that circumstances might change in the future. The ABA made a larger, overarching recommendation, you will probably recall, that it would be worth looking at the antisiphoning regime in the context of the digital reviews. The ABA made the comment, I think, here that it may be appropriate to look again at the question of the functioning of that condition in that context. So the ABA was merely making the point that, whether or not this is a loophole, it was not aware of information that it was contributing to the loss of events to free-to-air television at that time.

Senator CONROY—Do you think a third party intervening between a subscription broadcaster and a rights holder and then offering them to a subscription holder prior to offering them to a free-to-air is consistent with the act?

Mr Tanner—The act is silent on whether they offer, but the subscription broadcaster is not entitled to acquire rights until after those scenarios—either delisting or acquisition by free-to-air.

Senator CONROY—So at a minimum you would anticipate that, if a third party purchased the rights from the rights owner, the third party would be required to offer them to free-to-air before a subscription TV station could purchase them? You would anticipate that that would be the sequence of events to be consistent with the law?

Mr Tanner—I believe that is the sequence in the law, yes.

Senator CONROY—As you mentioned, you conducted a public review of the antisiphoning list in 2001. At that time the ABA considered a case put by the commercial television sector that there was a loophole in the antisiphoning regime because it did not apply to channel providers. You recommended against any changes to the so-called loophole. Are you actively reviewing that at the moment? I appreciate that you are about to be merged into another entity and there are probably a couple of other issues on your mind at the moment.

Mr Tanner—I mentioned that we have an interest in the current English test situation, and in particular in the PMG acquisition of the rights. I have said that we are interested in that primarily because of our function of ensuring that the condition on subscription television broadcasters is complied with. But the effect of the 1996 direction from the minister is that, if the ABA becomes aware of information of relevance to that direction, the ABA will make the minister aware. So I think it is fair to say that the ABA is taking an active interest in that question. If we become aware of information we think we should share with the minister, we will do that.

Senator CONROY—I think free-to-air channels as well as Premier Media Group have agreed to provide a list to us of other circumstances where this has arisen—perhaps less controversial circumstances.

Mr Tanner—Yes.

Senator CONROY—So, again, that may be information of use to you.

Mr Tanner—Yes. Certainly an initial question for me is whether or not this is a new scenario. It seems that, at least at face value, it might be somewhat different from the ones the ABA looked at in 2001. It is another reason to take an interest in the details.

Senator CONROY—You did say that you would review the issue if it became problematic.

Mr Tanner—Yes.

Senator CONROY—It is certainly looking problematic at the moment from the haggling backwards and forwards and the ‘he said, she said’.

Mr Tanner—I cannot speak for my board, but we are keeping a very close eye on what is coming out in this process. As I say, we are in contact and will be informing ourselves further.

Senator CONROY—I would like to explore some of the reasoning the ABA put forward in 2001 in reaching the conclusion that it did.

Mr Tanner—I shall do the best I can.

Senator CONROY—In 2001 the ABA stated that the effect of the changes proposed by free-to-air broadcasters would be:

... 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.

Does the ABA stand by that view?

Mr Tanner—I certainly was not a member of the board at that time and, as you could tell two weeks ago, my recollection—and Ms Maddock’s—of the contents of the report was a little vague. The board seemed to be making some assumptions about how the law would be changed and then commenting on the potential deleterious effects of those changes. To some extent, the board’s comments invited discussion about exactly how you are proposing to change the law. I think the ABA was identifying that, in certain circumstances and ways, you may very well be simply strengthening a perhaps undesirable gatekeeper role. However, I did read some of those remarks to be referring to the potential deleterious effects of amendments that take a particular form. It is a little hard for me because I am not aware of exactly what proposal in detail the ABA thought it was commenting on.

Senator CONROY—Didn’t the parliament intend to put free-to-air broadcasters in a privileged position?

Mr Tanner—There is no doubt about that. I think the issue for the ABA was that, depending on how you fix the perceived loophole, you might inadvertently increase the privileged position. Without necessarily advantaging viewers, you may simply disadvantage pay television. I think the board was quite concerned in the report to address the public interest concern in maximising free-to-air coverage but to do so in a way that minimises the impact on pay television—for example, by depriving pay television of the opportunity to adequately promote events that it obtains the rights to and those sorts of things. From my reading, that is the context of the ABA’s remarks.

Senator CONROY—So from your reading would you say that the comments were confined to the specifically worded amendment that was being proposed at the time rather than the principle?

Mr Tanner—I am not sure, but that was my feeling. I read the remarks and they seemed quite specific. It seemed to me that the ABA was concerned about particular ways you might do this. I am a lawyer by training—

Senator CONROY—I promise I will not hold that against you.

Mr Tanner—Many do—and before I finally comment on something, I tend to want to know precisely what it is that I am commenting on. It seems to me that the ABA is making some assumptions. I have not gone back and looked at the submissions it looked at in 2001.

Senator CONROY—I might tax your memory and interpretation again then. In that report, the ABA also suggested that amendments along the lines suggested by the free TV sector would be difficult to implement, and it stated:

From a practical viewpoint the application of tracing provisions would require 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.

Does the ABA stand by that argument?

Mr Tanner—I think the assumption there is that the form of any amendment would restrict the rights of associated entities or entities with some sort of traced connection to a free-to-air body. That is how I read that: they were assuming that that is the way it will be addressed. I think the ABA is proceeding from a position that it has typically done its job under the direction by getting enough information from the person seeking the benefit—such as a person seeking to have an event deleted early—to be able to satisfy itself and advise the minister that there has been a reasonable opportunity. The ABA tends not to use its compulsory powers to acquire information. The problem that we have is that all players in rights negotiations are extremely reticent about telling us things, and to date the ABA has not used its compulsory powers to obtain information and analyse that. That would be an extremely labour intensive and time-consuming route for the ABA.

There is a general issue that there is a paucity of data available to any part of government about what factors really determine when you show or do not show an event, and it is shrouded in confidentiality. I think the ABA's point here is that generally we have been able to do our role under the direction without recourse to our substantive powers. If we used our substantive powers, we would probably get a ton of documents and we would have to then analyse and make sense of those documents against a backdrop of considerable disquiet and concern from industry that we have highly confidential information. I think the board was reluctant to take on such a large additional job without querying the necessity for it. As I say, though, it was not central to what the ABA was asked to report on, and the ABA says that it is simply not aware at this stage of evidence that what is described as the loophole is causing problems, but if that changes it would be appropriate to look at it.

Senator CONROY—Sure. Last week, there was much discussion about the need for monitoring of the operation of the antisiphoning list. Free TV told us that the broadcasters report to you every six months.

Mr Tanner—Yes.

Senator CONROY—What do you do with that information? Is it published anywhere?

Mr Tanner—No.

Senator CONROY—Why not?

Mr Tanner—We are basically doing it in order to, if we need to, advise the minister. That is the context. We provide advice to the minister in confidence, because she is the one with the relevant powers.

Senator CONROY—This is just a report on what is actually happening. As you know, there is a lot of claim and counterclaim by all the parties involved. You are the independent umpire, if you like. If you said this is what is happening, it would end the debate between—

Mr Tanner—Let us be quite clear. The ABA's returns, which are obtained in confidence for that purpose that I have described, only go to some issues. In fact, broadly what we ask about is what rights are held, the nature of those rights in broad terms and whether events have been offered. I would like to make a general comment. That is only a part of the picture.

Senator CONROY—Those are all commercially known. The losing bidders will tell you who won, even if the winning bidder says, 'I can't tell you I've won.'

Mr Tanner—That may very well be the case. I suppose the larger point I am raising is that when people say there should be monitoring, you have to ask what kind of monitoring they think would be actually desirable. For example, I am aware that when it began its own monitoring—and ASTRA does monitor and report in very bare terms on percentages—ASTRA said at the time it announced it, 'We think this would be a great job for the government to be doing. Maybe the ABA could do it.' I have to tell you that the ABA does not collect such detailed information as it collected in the 2001 review on a month-by-month ongoing basis. It has taken the approach to date—and this may change in future—that looking for trends here is something which one can do perfectly adequately by taking a periodic sample or waiting for someone else, someone well funded and able to advocate, to come along and say, 'We think there is a trend. You'd better look into it.' In terms of its monitoring, the ABA is limited really to what rights are held and what rights have been offered.

Senator CONROY—What do you mean when you say, 'It is limited to'? That is a self-imposed limitation.

Mr Tanner—Yes.

Senator CONROY—Some would argue that by monitoring trends you are actually able to proactively anticipate and be better informed about what is happening, rather than coming to it cold at the last minute and saying, 'Tell us all about it.'

Mr Tanner—I am sure some would argue that and I am sure there are some in this debate who would prefer that the ABA or ACMA in future does do that monitoring, but the ABA has not done that monitoring in the period since the 2001 review. We know how we would do it; we have the means to do it if it is required. It is an issue which we have an open mind on. I make the larger point that the ABA is an exceptions based regulator. It only really has recourse to ongoing monitoring of a particular compliance when there is some particular reason why it believes that is essential. I suppose the question I would ask in the present case

is whether there are others quite capable of blowing the whistle once a trend begins to emerge. It seems to be an issue which receives a great deal of attention and publicity and an issue in which there are some quite well-funded and capable protagonists.

Senator CONROY—Are they independent?

Mr Tanner—What the ABA can bring to this is a dispassionate view of the trends. That is what we certainly would bring to it, if there were reason. I have to be frank with you: we have not monitored, other than those returns, since 2001. It may be time to do it again. It is a question for the ABA going forward, or for ACMA, whether it should take another look at the pattern or trends, maybe across both platforms. At present, the ABA is not doing that.

Senator CONROY—Finally, I want to move on to the soccer World Cup. Does the ABA think that the World Cup is of national importance and cultural significance to Australians?

Mr Tanner—I do not really want to go past what we said in our report. We were asked to report on what we recommended should be in or should be out. We were actually advised as to what the policy was for inclusion, which basically had to do with whether the event was regularly shown on television. The ABA did that and it made certain recommendations.

Senator CONROY—One of the criteria is national importance and cultural significance—is that correct?

Mr Tanner—That is correct.

Senator CONROY—If you recommended that the World Cup stay on the list, would it pass that test of national importance and cultural significance to Australians?

Mr Tanner—I would not like to go past what we said in 2001.

Senator CONROY—In 2001 you stated:

Soccer is a sport with a growing following among Australian audiences generally. It matches Rugby Union in level of interest in television viewing.

Mr Tanner—We stand by whatever we said in that report. I am aware of what we said, but I do not have any new view. The ABA has not met and considered the siphoning position to be taken since and formed views on those discussions or provided advice on that question.

Senator CONROY—The point that I am asking about is that one of the criteria you have agreed for listing on the antisiphoning list is ‘national importance and cultural significance’. Therefore can I assume that the ABA believes, given that you recommended that it be retained on the list, that the soccer World Cup is of national importance and cultural significance?

Mr Tanner—My reading is that the ABA was not actually asked for that in 2001. The decision to put it on the siphoning list is not the ABA’s; it is the minister’s.

Senator CONROY—You make a recommendation.

Mr Tanner—Yes, but we were also asked to make recommendations based on certain things. Those things were set out in the direction to the ABA from the previous minister to conduct the inquiry. The principal fact which the ABA was asked to take into account was the policy that the event should be included in the notice if the event had been consistently broadcast by free-to-air television broadcasters in the last five years.

Senator CONROY—Has the World Cup been consistently broadcast in the last 20 years?

Mr Tanner—The ABA's report speaks for itself. We actually—

Senator CONROY—And the answer to that question actually is, Mr Tanner?

Mr Tanner—By that criterion alone, the ABA advised that it should remain on the list.

Senator CONROY—Thank you. Did you even consider removing the World Cup from the list in your last review?

Mr Tanner—The report speaks for itself. There is really nothing I can add to gloss it. I think you know completely what is in the report. The ABA was asked to advise. It was advised of the policy it was to have regard to. It did do that and it gave its advice about which events should be removed and which should be put on. The fact is that the decision maker is not the ABA.

Senator CONROY—I am not for a moment being critical of the ABA for its removal. I am seeking to understand the basis on which you made the recommendation that soccer be retained.

Mr Tanner—Basically, the ABA had a look at this concept of 'consistently broadcast'. It did some work to refine what it believed 'consistently broadcast' meant, which turns out to be a highly moot point, as you can understand once you think about the range of choices, including real-time highlights and all that lies in between. The ABA concluded, having regard to the criteria it developed, that some events should be retained on the list, some should be removed and a couple should be added. I think that speaks for itself.

Senator CONROY—In fact, didn't you consider recommending that the Euro Championships, the UEFA Cup final and the UEFA Champions League also be added?

Mr Tanner—The SBS made a submission inviting us to consider that. The ABA decided that not all those events raised by SBS should appropriately be covered, having regard to the criteria it established to implement the policy it was told by the government to implement.

Senator CONROY—Were there any other criteria? You are saying that was your primary criterion. Were there any other criteria?

Mr Tanner—That is the major one we look at in the inquiry, because that is what we were directed to do. If you like, the minister, who has quite a wide discretion here, asked some very specific questions and asked them in a way which basically told the ABA what criteria to have regard to. So the ABA did not run around inventing other criteria for itself; it basically took itself as being directed to have regard to this question of 'consistently broadcast'. That is the criterion we used.

Senator CONROY—So it was irrelevant to you whether the event was of national importance and cultural significance?

Mr Tanner—It was not the question we were asked to advise on.

Senator CONROY—Are the criteria determined by parliament or purely by the government of the day?

Mr Tanner—The criteria that govern the legislation for the minister's exercise of her discretion are determined by the parliament. The criteria that the ABA investigates when it is

asked to inform are subject to the minister's power, including to direct us to general policies. If you look at the direction which is dated 22 December—

Senator CONROY—I have it in my hand right now.

Mr Tanner—you will see that the ABA was basically told what criterion it should apply. That really is the key to understanding the ABA's report.

Senator CONROY—Let's go through it. It says:

I, RICHARD KENNETH ROBERT ALSTON ... direct the Australian Broadcasting Authority under the subsection 171(1) of the *Broadcasting Services Act 1992* (the Act):

- (a) to conduct an investigation into:
 - (i) which events should be removed from the Broadcasting Services (Events) Notice No. 1 of 1994 (the Notice), under section 115(2) of the Act;
 - (ii) which events should be added to the Notice ...
 - (iii) the date or dates on which protection should expire for events that the ABA considers should be retained in or added to the Notice; and
- (b) in conducting the investigation, to have regard to the policy that an event should only be included in the Notice if the event has been consistently broadcast by free-to-air television broadcasters in the past five years ...

So that is the direction.

Mr Tanner—Paragraph (b) is the key one there. We were 'to have regard to the policy that an event should only be included in the notice if the event has been consistently broadcast'. The ABA is properly subject to directions from the minister in a situation like this.

Senator CONROY—So the government said—

Mr Tanner—Basically, the government said, 'Look into it,' but it also said, 'And here is your criterion.' The ABA basically takes submissions on that criterion and comes up with a much more elaborate test of what it means to consistently broadcast, which, for example, excludes mere highlights packages but does not require necessarily—

Senator CONROY—In the last five years has the World Cup been subject to 'mere highlights packages'?

Mr Tanner—Not that I am aware of.

Senator CONROY—No. I have watched almost every match live—

Mr Tanner—I have watched it myself.

Senator CONROY—and the ones that are shown straight afterwards. Even when it has not been in our time zone I have still watched them live, hence my bleary eyes. You had no choice, on the government's own direction and criteria, but to recommend that the soccer World Cup be listed; is that correct?

Mr Tanner—We found that, on the facts, it met those criteria, and we advised accordingly. We recommended neither its inclusion nor its removal. The issue was simply—

Senator CONROY—You recommended it be retained, though?

Mr Tanner—Yes, that is right. That is what I was trying to say.

Senator TCHEN—Thanks to Senator Conroy for his questioning. I think he has certainly illuminated the issues very adequately. Mr Tanner, can you actually say for the record whether you are satisfied that the ABA has fulfilled its statutory role? That is the feeling I get from you, but I want to make sure that that is properly recorded.

Mr Tanner—I believe the ABA is actively fulfilling its statutory role. I would not like to imply that we have finished here, because we have not.

Senator TCHEN—Yes, I understand that. Can you also confirm that you are satisfied that the antisiphoning legislation has operated properly according to its purpose?

Mr Tanner—What purpose is that?

Senator TCHEN—The statutory purpose of this antisiphoning legislation: protecting the right of the viewing public of Australia and preventing siphoning behaviour by pay television.

Mr Tanner—The ABA is not until now aware of a major trend of events away, but this is an issue. This is at the very centre of what our role is under the direction; it is actually to form views on this and to advise the minister.

Senator TCHEN—Yes, of course; I understand that. That is in context with your answer to the first question: it is a continuing watch. But with regard to the way in which the legislation has operated so far, are you satisfied that in fact the legislation has been permitted to operate properly?

Mr Tanner—Yes. I would take care here—I am very keen to leave policy questions about whether or not the antisiphoning regime is good policy or is working optimally to parliament and to your committee. That really is an assessment for you to make properly rather than us.

Senator TCHEN—Of course; that is understood.

Mr Tanner—We are endeavouring to discharge our functions under this scheme. Those functions, thanks to the minister's direction, include advising the minister of whether over a time there has been a sustained reduction in the extent to which a particular event or events of a kind specified have been televised. So we do have a general interest in trends. The ABA is watching the current developments with the English test series with great interest and is discharging its functions as appropriate.

Senator TCHEN—Thank you. Finally, going back to your original submission, is it fair to say that the ABA—perhaps I should not say it is satisfied but it has no great concern about the proposed amendments and believes that the act will continue to operate properly according to the intention of the parliament?

Mr Tanner—The ABA does not have a view on the current amendment. It certainly would have made a submission had it a view that was strongly pro or anti. I think it has treated this as a policy issue for the parliament.

Senator TCHEN—But you have no concern about future trends, anything that we need to watch out for?

Mr Tanner—I think that is probably fair.

Senator TCHEN—Thank you, Mr Tanner. That is all I have to ask.

Senator CONROY—There is some new evidence that has been submitted to the committee, I understand. I have not seen it myself and I do not think any of the other senators have seen it yet.

CHAIR—That is true; they have not.

Senator CONROY—No, and I have not received a copy of it yet either, because we have not made a decision. I am aware of what is in this evidence, roughly, but as I stated clearly I have not seen it. It does go to a number of key issues and, because we are not going to consider publishing it till after Mr Tanner has finished his evidence, I would like to ask him a question based on my private knowledge of what is in that.

CHAIR—You will have to be careful, because it is being provided on a commercial-in-confidence basis.

Senator CONROY—I assure you I will not be going to any of the commercial issues, Chair.

CHAIR—I accept that.

Senator CONROY—No, it is certainly not going to any of the commercial issues and, as I said, I actually have not seen it so I could not comment on any of those commercial issues anyway. Mr Tanner, the tenor of the information that I have been given separate from the committee's new evidence is that the ABC, Channel 9 and Channel 10 have no record whatsoever of any negotiations with Octagon. Channel 7, I believe, had what they believe to be a preliminary discussion with Octagon. As I said, some of that information we understand is commercial-in-confidence and cannot be published—or I suspect will not be published—but I am sure you would be able to get this information yourselves. You will not be able to get it from us, but I am sure the TV stations will be willing to provide it to you.

CHAIR—I must say, given that none of us have seen the material, it is somewhat speculative. I would have thought that it placed Mr Tanner in a difficult position in terms of responding to what is essentially speculation.

Senator CONROY—The difficulty, Chair, is that we have not considered the new information yet, which is very germane to both our considerations and, ironically, Mr Tanner's.

CHAIR—I know, but you are speculating as to the content.

Senator CONROY—No, I—

CHAIR—Admittedly, you claim it is informed speculation—

Senator CONROY—I would say that it is informed speculation, but I am sure that once the evidence is available, both the public and private parts, that would be an important part of our committee's deliberations, I hope, as well as Mr Tanner's and the ABA's.

CHAIR—Are you making this as a comment?

Senator CONROY—I accept your point, Chair, that it is hard for Mr Tanner to respond to what may or may not be informed speculation on my part, but I did want to put it on the public record while he was here to see if he wanted to respond or if he was in a position to make any sort of comment. It would seem from the records that the free-to-air stations largely

rebut the evidence supplied to the committee last week by Octagon, and it does seem to be descending into a fairly murky affair which may require you to fire up your investigative abilities and actually demand some evidence from Octagon. We have written to Octagon seeking clarification.

CHAIR—I do not think it is fair to ask Mr Tanner to comment on speculation, because that is all it is.

Senator CONROY—I want to save having Mr Tanner asked back again when I know the government are very keen to debate this next week, Senator Eggleston. No, hopefully commonsense will prevail and we can actually get to the bottom of this because I think it is really important for us to understand the issue and to establish the facts.

CHAIR—We take that point, but nevertheless we do, as you know, have material supplied on a commercial-in-confidence basis. Depending on what we do with that, the ABA and other bodies may be asked to comment. But, until the decision is made about how we will handle that material, and given that none of us actually know the specific contents, I really do not think we can proceed down this pathway at this point.

Senator CONROY—I should say Mr Tanner is a veteran at appearing before these committees and dealing with sensitive information. He may or may not want to make a comment about informed or uninformed speculation. I would have thought we should just provide him with the opportunity and, if he chooses to say, ‘I’d prefer to just see the actual evidence rather than Senator Conroy’s potentially informed speculation’—

Mr Tanner—I think that is right. We are watching what is coming out with interest, but remember that the question which is probably of main interest to us is whether there is anything germane to the minister’s powers that we can advise her of. In the present case, where we have had on the table the question of whether or not there should be delisting earlier than six weeks, I guess we are interested to know the nature of any opportunity to obtain rights and whether it was real or reasonable. I go back to a point I made earlier: I have seen what has come out of Octagon and it clearly has some purposeful point in the wider debate about this perceived loophole that has been a big issue with this committee, but the question we are interested in is whether there is a real or reasonable opportunity. I did not read that correspondence to necessarily imply that there had been but merely that there had been some contact. We will watch with interest what comes out, but we are looking forward at the minister’s powers rather than necessarily at the same questions that you are looking at, which have more of a policy nature.

Senator CONROY—Chair, the committee are advised that Senator Santoro has no questions.

CHAIR—If that is the case and you have no further questions, we will conclude this hearing. Before we go I have to advise members of the committee that the commercial-in-confidence material which we sought is now available and will be distributed today. Senator Conroy will receive it, I believe—

Senator CONROY—I have not received anything whatsoever at this point.

CHAIR—You will, following this meeting. Other members of the committee will have it posted to them overnight. I remind everybody that the reporting date for this inquiry is 7

March and hopefully we will have a chair's draft of the committee's report out to you within a short period so that you can comment on it.

Senator CONROY—Do we need to hold another meeting to decide whether to publish or what portion of the evidence we can publish?

CHAIR—I will close this hearing and we will discuss that in an impromptu private meeting. We do not necessarily have to record that in *Hansard*. I thank everybody involved and declare this hearing closed.

Committee adjourned at 12.14 p.m.