



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

STANDING COMMITTEE ON ENVIRONMENT,  
COMMUNICATIONS AND THE ARTS

**Reference: Reporting of sports news and the emergence of digital media**

WEDNESDAY, 29 APRIL 2009

MELBOURNE

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**SENATE STANDING COMMITTEE ON  
ENVIRONMENT, COMMUNICATIONS AND THE ARTS**

**Wednesday, 29 April 2009**

**Members:** Senator McEwen (*Chair*), Senator Birmingham (*Deputy Chair*), Senators Boswell, Ludlam, Lundy, Pratt, Troeth and Wortley

**Participating members:** Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Mark Bishop, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ian Macdonald, McGauran, McLucas, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood and Xenophon

**Senators in attendance:** Senators Birmingham, Lundy, McEwen, Troeth and Wortley

**Terms of reference for the inquiry:**

To inquire into and report on:

The reporting of sports news and the emergence of digital media, with particular reference to:

- a. the balance of commercial and public interests in the reporting and broadcasting of sports news;
- b. the nature of sports news reporting in the digital age, and the effect of new technologies (including video streaming on the Internet, archived photo galleries and mobile devices) on the nature of sports news reporting;
- c. whether and why sporting organisations want digital reporting of sports regulated, and what should be protected by such regulation;
- d. the appropriate balance between sporting and media organisations' respective commercial interests in the issue;
- e. the appropriate balance between regulation and commercial negotiation in ensuring that competing organisations get fair access to sporting events for reporting purposes;
- f. the appropriate balance between the public's right to access alternative sources of information using new types of digital media, and the rights of sporting organisations to control or limit access to ensure a fair commercial return or for other reasons;
- g. should sporting organisations be able to apply frequency limitations to news reports in the digital media;
- h. the current accreditation processes for journalists and media representatives at sporting events, and the use of accreditation for controlling reporting on events; and
- i. options other than regulation or commercial negotiation (such as industry guidelines for sports and news agencies in sports reporting, dispute resolution mechanisms and codes of practice) to manage sports news to balance commercial interests and public interests.

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**Committee met at 10.35 am**

**CHAIR (Senator McEwen)**—I declare open this public hearing of the Senate Standing Committee on Environment, Communications and the Arts in relation to its inquiry into the reporting of sports news and the emergence of digital media.

The committee's proceedings today will follow the program as circulated. These are public proceedings. The committee may also agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

A witness called to answer a question for the first time should state their full name and the capacity in which they appear and the witness should speak clearly and into the microphones to assist *Hansard* to record proceedings.

[10.36 am]

**GOSPER, Mr Richard Kevan, IOC Press Commission Chairman, International Olympic Committee**

**EDGAR, Mr Anthony, Head of Media Operations, International Olympic Committee**

**CHAIR**—Welcome. Our first witnesses for today are Mr Kevan Gosper and Mr Anthony Edgar of the International Olympic Committee. The committee has received your submission. Do you have any amendments or alterations to the submission?

**Mr Gosper**—No.

**CHAIR**—Would you like to make a brief opening statement before we go to questions?

**Mr Gosper**—Yes. The International Olympic Committee would like to thank you, Chair, and the members of the standing committee for the invitation and opportunity to participate in this inquiry. The International Olympic Committee believes this is a very important inquiry and welcomes the initiative of the Senate to explore the reporting of sports news and the emergence of digital media.

I appear before you as Chairman of the International Olympic Committee Press Commission, a position I have held since 1989. I am a former Vice President of the International Olympic Committee, the inaugural chair of the Australian Institute of Sport, a former president of the Australian Olympic Committee and a former Olympic athlete.

This has given me a unique perspective into the relationship between sport and the international press as well as the Australian news organisations. Mr Anthony Edgar, who is here today with me, worked with the Sydney Organising Committee for the Olympic games—of which I was also the vice president—, was previously press chief for an international sporting federation and has been head of the media operations for the International Olympic Committee for the past seven years. He flew in from the Lausanne yesterday to team with me in this appearance.

Before making our opening statement, we would like to make a point of clarification on previous comments. I will ask Mr Edgar to make a brief comment on this matter if you agree.

**CHAIR**—Yes, certainly.

**Mr Edgar**—I shall read from this because I have already passed over a copy to *Hansard*. In reading the submissions as well as the *Hansard* of Wednesday 15 April, we commend the high quality of the submissions but we would like to make the following specific observation: there seems to be some confusion as to the role fair dealings has in the reporting of sports news. Dave Tomlin, from The Associated Press expressed his similar concerns in his opening statement in this inquiry and we support his conclusions. This is one example: SBS stated in its submission to this inquiry, which we believe is a very strong and fair submission, that the reporting of sports

news in Australia is in essence self regulated by the broadcasting industry. The submission then states in the next paragraph that fair dealing is the overriding principle that governs the reporting of sports news in Australia. We are of the opinion that both statements are incorrect. We believe that for clarity and to avoid any confusion this should be clarified.

What makes these statements misleading is that they are offered from the perspective of a broadcaster, both a rights holder and a non-rights holder, and as such only relate to the reporting of sports news via the means of broadcasting. The reporting of sports news by the written and photographic press is not regulated by the broadcasting industry, and fair dealings plays no part in defining written and photographic reporting of sporting events. We believe that, to be accurate, these statements should read that broadcast reporting of sports news on television, radio or other media in Australia is in essence self regulated by the broadcasting industry and fair dealings is the overriding principle that governs the broadcast reporting of sports news on television, radio and other media.

The written and photographic press's reporting of sport is impacted by broadcast regulations such as fair dealings copyright only when the press start broadcasting and such broadcast includes Olympic footage or rights-holder footage such as short news excerpts of sports content as opposed to publishing or distributing written and photographic coverage of the sport. We feel this is an important differentiation which needs to be more widely understood not so much by the Senate—because I believe you do understand it—but certainly in some of the submissions there seems to be a misunderstanding and a misuse of the term 'fair dealings' as it relates to written and photographic coverage of sporting events. I will now pass over to Mr Gosper.

**Mr Gosper**—I will conclude our opening comments with an opening statement which goes on to say that the International Olympic Committee considers that the freedom and independence of the press is a fundamental principle in respect to the reporting of the Olympic Games and all of its related events. In line with its own charter, the IOC takes all necessary steps in order to ensure the fullest coverage by the different media and the widest possible audience in the world for an Olympic Games. The provision of press facilities and services at the Olympic Games is unconditional and the freedom of the accredited press is absolute. The IOC insists on an open and independent reporting environment of sport by the media. Any moves to exclude or limit the press from its traditional roles and responsibility of freely reporting sport is contrary to public interest and detrimental to sport itself.

When organisations attempt to influence or constrain media reporting by introducing restrictive statements or conditions such as not reporting anything that may bring the sport into disrepute, placing limits or restrictions on the use of still photography, or placing commercial interests ahead of the public's right to know the full story leading up to, during and beyond a sporting event, this we feel runs contrary to the public expectations in a democratic society. As we stated in our written submission, had the IOC accepted anything less than the position of a free and independent reporting environment at the 2008 Beijing Olympic Games, it would have been considered unconscionable to the international media, sporting organisations and the worldwide audience.

This move to greater openness, whereby China legislated less restrictive media rules, opening up news reporting activities in the country for the first international media in an unprecedented way, led to much positive worldwide reaction, notably—and we mentioned this in our report—

from Tom Curley, President and Chief Executive Officer of The Associated Press, who went so far as to say:

The Chinese movement on press freedom is a more significant event than the election of Obama. The long-lasting implications for a different world are extraordinary and may turn out to be the Olympic movement's greatest achievement.

As you would know, regarding these rules and the sunset clause whereby the rules would revert to the previous rules following the Olympic Games in October 2008, China made an unexpected but welcome announcement that they would continue with these more open Olympic media rules for the international press. It is very important for a sports-loving audience to be well informed of all matters relating to the sport they love, on and off the field of play. The public relies on free and independent reporting by the media to bring colour and objectivity to sport. Any lesser position for the reporting of sporting events in Australia should be considered unacceptable.

To take a quote from Agence France-Presse and their submission to this inquiry, which the IOC fully endorses:

Sports are much more than just a commercial venture for organisers. In most countries, they are fundamental cultural phenomena, transcending politics and the economy and clearly outranking individual commercial interests. Sports events are by their very nature public, especially in a country such as Australia where they are intrinsic to the very fabric of society and to national identity.

In short, our view is that the dynamic story of sporting events contributes to societal harmony. We are now ready to take any questions, Chair, from you or the members of your committee.

**CHAIR**—Thank you very much.

**Senator LUNDY**—Thank you for your submission. I note with interest your statement, Mr Edgar, about how we how we grapple with definitions and how various submitters have sought to interpret the fair dealing provisions for the purposes of news reporting. Can you tell me, from the IOC's perspective, where do you draw the line on what constitutes a news video grab as compared to what your broadcast rights holders think they are purchasing when they purchase the rights to the event?

**Mr Edgar**—It is clearly defined and it has been defined for 40-odd years. In fact, if we were to go back to the fact that this hearing is in Melbourne, I found that interesting because the line was drawn in 1956 for the Melbourne Olympic Games. Prior to that, all media covered sporting events equally, so broadcast and press covered them. There were no rights holders. The 1956 Olympic Games was the first major sporting event which separated broadcast from press coverage, and it was clearly defined that the broadcast or entertainment rights to sport could be sold off to the highest bidder, in a sense, but the press coverage of sporting events would always be maintained free. So for the 1956 games the press covered the events the same way they do today, and broadcast was covered only by those that paid for the events. Whether it was used in 1956 I do not know, but that certainly led to the practice of fair dealings for short video or audio highlights being used in news reporting practice—so the fair dealings provision as it works in Australia. I would like to state that that fair dealings provision is different in many countries, and part of what we do is to try and provide news access rules that work on an international level, but

understanding that the laws in each country are somewhat different. A large part of my job is doing just that.

**Senator LUNDY**—Going back to Sydney 2000, what was the interpretation by the Olympic movement of that fair dealing rule as it applied to video footage for the purposes of news reporting for the Olympic Games?

**Mr Edgar**—I do not believe it is defined by the IOC. It is defined by the laws of the country.

**Senator LUNDY**—What did you do?

**Mr Edgar**—I worked for the sport department of the Sydney 2000 Olympic Games, so I did not work in the media and I did not work for the media department of SOCOG. So I was not actually familiar with it. I joined the IOC following Sydney, and what was the practice in Sydney generally followed into Salt Lake City and then to Athens. So that same practice of the news access rules that we used in Sydney was then updated for both Salt Lake City and Athens. They were very similar—three by two by three—as to how it was broadcast. Again, there was no video reporting on the internet in Sydney. In fact, I do not think there was any in Salt Lake City. I think there was one case in Athens that I can remember. It really changed between Athens and Beijing—in fact, really for Beijing.

**Senator LUNDY**—In terms of the news access rules relating to video at the Sydney Olympics, it was three by two by three, as opposed to three by—

**Mr Edgar**—For terrestrial television?

**Senator LUNDY**—Yes.

**Mr Edgar**—There were no such rules for mobile, internet and so on. They did not exist. The rules did not exist and the practice did not exist.

**Senator LUNDY**—So, moving forward, and, obviously, there is the new media channel, I note in your submission that the IOC makes a very clear distinction between moving images in an online environment. It is probably my interpretation of what you said in your submission, given the transition to the internet environment, that a three by two by three or a three by three by three does not apply and that in fact you have different treatments for that internet environment for the purposes of broadcast images.

**Mr Edgar**—I would say it is more the Australian legal system that has a different environment. For example, it is how fair dealing works within Australia. I noticed, for example, that in the News Ltd and Fairfax submissions they said that they use the fair dealings provision. They believe they had a right, under the fair dealings provision within Australia, to be able to broadcast news excerpts on the internet. I would actually challenge that; I know that they believe that. Obviously the Premier Media Group, who follow us today, are the only ones to take a legal submission to the Australian courts, which I note did not go to a full hearing. We certainly use that as a basis for an understanding of what may happen were there to be a legal ruling on fair dealings. There is not one country in the world that I know of, and I still do not believe that there are cases in Australia as well, which specifically states that the fair dealings provision as it

relates to terrestrial television also relates to mobile and internet and any other online or mobile service. There is an interpretation of that at the moment. But just because News Ltd says they have a fair dealings right to do it does not mean they actually have a fair dealings right to do it, because it has never been tested. They may be right. But, as you know, we actually produced for Beijing, with Channel 7, news access rules for the internet for Australia. They were, I believe, the first such online new access rules ever created for any sporting event in the world. That was quickly followed by New Zealand, but it does not exist anywhere else and it was not because the law said it was so; it was because we thought it was fair to do so.

**Senator LUNDY**—So can you explain to the committee why it warranted such attention in Australia in the context of Beijing to codify, if you like, what the internet news access regime ought to look like for Olympic content?

**Mr Edgar**—The Australian media environment is different from any other in the world. It is more aggressive. I was brought up in the Australian media. My first position was in News Ltd. It is a very small media environment, it is an aggressive media environment, it is a very strong media environment and it pushes the boundaries. If you want to take the Olympic Games, generally we have more trouble with the Australian media than we do with all other media in the world put together.

**Mr Gosper**—I think we would say we have more involvement with the Australian media than any other media in the world, which often—

**Senator LUNDY**—Duly noted!

**Mr Edgar**—In saying that, that does not mean that it is a problem for us; it is that they push the boundaries. So when it came to digital media News Ltd and Fairfax, and, I believe, Premier Media Group—as happened with the rugby league—pushed those boundaries. With Channel 7 as a rights holder, we were dealing with them for some time about what we do with the internet. Channel 7's legal counsel firmly believed that they had the right prior to Beijing to prohibit the broadcast of any news excerpts on the internet or a mobile.

**Senator LUNDY**—Any news excerpts, including still photography?

**Mr Edgar**—No. I do not consider that a news excerpt.

**Senator LUNDY**—So we are just talking about video.

**Mr Edgar**—Just the broadcasts of Olympic content. They did not believe that the fair dealings provision as it was currently stated clearly or implicitly implied that it works on both broadcasts and internet. But, in dealing with them, we decided that we felt it was best and fair to produce something which would give guidelines not just to non-rights-holding broadcasters but to all bona fide media in Australia.

We did not discuss those guidelines with anyone. It was very quietly negotiated between Channel 7 and us, and also their partners in Telstra and Yahoo!. We distributed those guidelines to all Australian media. They were taken very well by the Australian media and they were not abused. We had fewer problems with the Beijing games than we have ever had. In other words,

we came a certain way and the media seemed to respect that. They have come to us without a fight, and we will respect those guidelines because they are based on fairness—or what we considered fair—more than anything else.

**Senator LUNDY**—For the sake of clarity: the arrangement we are talking about is that bona fide news organisations were able to broadcast on the internet portions of press conferences that took place at the main press centre at the Olympic Games without any territorial restrictions?

**Mr Edgar**—No. Those guidelines were actually introduced internationally in 2003. What I am talking about is the supplementary news access rules for the broadcast of Olympics material on the internet within the Australian territory, which is one of the annexes I submitted with the original submission.

**Senator LUNDY**—Can you describe the provisions of that for the completeness of this exchange.

**CHAIR**—Including the use of still photographs—because in your submission to the committee you say that still photographic pictures can be published for editorial purposes on the internet with no restrictions.

**Mr Edgar**—That is correct. They can be published anywhere for editorial purposes with no restrictions.

**CHAIR**—Is that clause 11?

**Mr Edgar**—I think you are referring to the internet guidelines, which are different from the guidelines I just mentioned. We have many guidelines. We have internet guidelines for written and photographic press, for rights-holding broadcasters, for international federations and for national Olympics committees. We have blogging guidelines for athletes and news access rules. But I am specifically talking about the online news access rules we have created, of which still photography plays no part. Still photography has always been able to be published on the internet freely.

**CHAIR**—So what were the limited permitted broadcasts in the Australian territory at the Beijing Olympics on the internet?

**Mr Edgar**—I will not try and read out the whole thing because you have got that submission. But I will just say that the bona fide news organisations may use a total of 180 seconds of Olympics material per day on the internet, subject to the following provisions: they may only appear in video highlight packages that are designed as a news update bulletin and in no more than three such portions per day. They were really based on the terrestrial television rules, but there were differences. There are differences because, in terrestrial television, a news highlight goes out with the six o'clock news and it is gone. With the internet, as soon as you put it on the internet, it is video on demand. So you may watch it at six o'clock, seven o'clock, eight o'clock, nine o'clock—and you can keep watching it. So there is definitely a difference. We, the IOC, Channel 7 and Yahoo! did feel that there were reasons to put in differences. We used the Federal Court interlocutory hearing, and the recommendations from that hearing, as a basis to work on.

**Senator LUNDY**—Thank you for that. I think it is important to understand the specifics of what that special arrangement was. With respect to that exception, the special arrangements for the Australian territory, you mentioned that that had been picked up by New Zealand as well. Has that been reflected in other jurisdictions since the Beijing Olympics? I am trying to get a bit of an idea.

**Mr Edgar**—From the Olympics point of view, we have not got another event till next February. So it has not been picked up.

**Mr Gosper**—We have the Winter Olympic Games in Vancouver.

**Mr Edgar**—We are in the process of looking at Vancouver now, and it is not yet been decided whether that same ruling will apply. We have changed rights holders. It was Channel 7 for the Beijing games. It is now Channel 9 for the Vancouver games. In New Zealand it was TV New Zealand and it is now Sky. We have had different rights holder changes in both countries, so we are speaking with them. But we have very strong relationships with them as non-rights holders as well, so there is an established relationship there. But I cannot actually tell you what the rules are for the Vancouver games as yet.

**Senator LUNDY**—You mentioned the Federal Court. Given so many news organisations now, by definition, have an online presence that is part of their news service, and the ABC in Australia is a very good example of a completely integrated news service that has journalists who collect for TV, radio and online print—they basically do it all, particularly in regional areas—how does your policy fit with that kind of methodology of news collection given the internet is becoming almost the core of their news service and the more traditional media flow of that? Where does that leave you?

**Mr Edgar**—Those rights were the first time they had ever had the rights to broadcast, legally, news excerpts of sport on abc.net. I spoke with them regularly about it and they were very thankful for that right. In other words, it supported their position of what they wanted to do; it certainly did not hinder it.

**Senator LUNDY**—It goes to the heart of the contention here—that is, by definition news is reported in that digital environment and, putting aside the use of video images, what you are asserting is that for news organisations to choose to place their news items on the internet, that does not come with a commensurate right to cover events and place that coverage on the internet. That is the heart of your contention, is it not?

**Mr Edgar**—I am not asserting that. I would say that the Australian law is asserting that. If the Australian law were to say something else, we would agree with the Australian law. We work within your legal system, within those rules. In other words, the fair dealings provision that works within the Australian territory is a fair dealings provision that we work with. We do not work with the US fair use provision here. I would not say it is an IOC provision at all; I would say it is Australian law.

**Senator LUNDY**—I understand that, but now I want to take you to those precise provisions of the law that you are drawing upon to reach that position as an organisation.

**Mr Gosper**—The answer to the question, I think, is that we had our first experience with the Australian media on this, and Mr Edgar is taking you to that. By sitting down and consulting with Channel 7 in particular, who had the broadcasting rights within an Australian legal entity, we came to a certain agreement which they were comfortable with. So we moved with the changing media scene. If that occurs in other jurisdictions, we will do the same thing. We have moved absolutely from a classic written press-television rights geo-exclusive to a much more global environment. I would say that the steps we took in Beijing are the start of moving in the wider direction that you described. But we cannot lay out a panacea rule because of the different legislation in each country. So we are aware of what you are saying and we believe we are moving appropriately, and the test of that is that, at the end of the day, Channel 7 did not feel by the arrangements which were agreed in any way caused a problem for their rights and the return on their rights commercially.

**Mr Edgar**—I would add to that that in the discussions I had with News and Fairfax, as well as many other press organisations all around the world—AP, Reuters and so on—we have always had a straight line. Press and photographic coverage is on one side, broadcast coverage on the other side. That broadcast coverage works under the fair dealings provision. In other words, the right to be able to broadcast short news excerpts on terrestrial television has been clear for a long, long time. I think many of the submissions have made it clear that it works; it has worked for a long time and it does not need changing. When the internet became broadband and fast enough to start running video, press organisations started to think they were broadcast organisations, but they wanted to work to press rules. That does not work. If you are becoming a broadcaster, you need to work under broadcast provisions. I do not believe it is a grey area; it is a fairly clear area and it works under the provision of the fair dealings here. As I said, I do not believe that fair dealings has been implicit within Australia that says you can or cannot, it does or does not work on these extra platforms. And that is where, maybe, you could assist.

**Senator LUNDY**—Certainly the arrangement you described for the Australian territory at the Beijing Olympics is the best example we have seen of an agreement having been struck for the internet environment where there is the existence of internet rights associated with broadcast rights. That is certainly the case. I would like to draw you out a little more on the geoblocking feature of that particular arrangement. Can you outline to the committee why geoblocking was necessary as part of that arrangement in the context of other international rights holders, particularly internet rights holders, for the Olympic event in Beijing?

**Mr Edgar**—It is absolutely clear to us, and I think it is to any rights-holding broadcaster, that geoblocking is a fundamental foundation of which any digital rights is developed. We sell rights by territory. NBC may own the rights to the USA, but it is a non-rights holder in every other territory of the world. The BBC owns the rights in the UK; it does not own the rights in France. Channel 9 owns the rights in Australia; it does not own the rights in New Zealand or Singapore or anywhere else in the world. A media organisation—in other words, News Limited or Fairfax—under a fair dealings provision or by these news access rules was allowed to broadcast in Australia, but in broadcasting on the internet, the difference between terrestrial television and the internet is obviously that there are no boundaries on the internet. Terrestrial television is contained within Australia, so it is easy to control that. France Television is contained within France, but if it leaks into Germany and Switzerland and so on, they are all under the same EU territory.

With the internet, the great challenge is that there are no boundaries. We were concerned, and this is what I also spoke with Channel 7 about, that were a fair dealings provision to say, 'Within Australian territories, you media organisations have a right to broadcast on the internet,' that is fine, and we will work with that—we went ahead of that and did it anyway—but that does not mean that News Ltd has the right to broadcast those news excerpts in New Zealand or the USA or any other territory. It would be in breach of the legal rights in those territories because it does not own any rights. Those fair dealings provisions, as they relate to Australia, do not relate to the USA and they would be in breach of the NBC's rights in the USA, for example, or EBU's rights in Europe.

**Mr Gosper**—The whole basis of exclusive rights with broadcasters is—

**Senator LUNDY**—You just said news broadcasts though, and I want to clarify that. So you are saying that internet-based news organisations, if they are not rights holders, do not have the right to provide news to those jurisdictions?

**Mr Edgar**—They have the right to provide news, but they do not have the right to provide Olympic content specifically: the audio and video content of the sporting events.

**Senator LUNDY**—I wanted to clarify that. Sorry, Mr Gosper.

**Mr Gosper**—No, I was just going right back to a fundamental point. The whole basis of exclusivity in entering into specific rights holder agreements between nations or regions is a geographic principle. While we could do that with standard free-to-air television broadcasting, and even to a degree with cable, it was not the case with the internet. And this whole process that Anthony has outlined in respect of Channel 7 was done with Channel 7, but absolutely within the terms of geographic exclusivity, otherwise the whole process of rights holder contracting unzips.

**Senator LUNDY**—With respect to internet based news reporting in other jurisdictions during the Beijing Olympics, was that contained as part of internet rights that were sold and, therefore, were internet-based news stories prevented in other jurisdictions?

**Mr Edgar**—No other territory in the world permitted the use of short excerpts of content within their territory. It is not an IOC rule—

**Senator LUNDY**—On the internet?

**Mr Edgar**—On the internet, yes, because those fair dealings provisions were not in practice. This was the first country to actually do that.

**Senator LUNDY**—When your submission talks about some of the traffic flows online, you are dealing with stills?

**Mr Edgar**—Yes.

**Senator LUNDY**—The SI site and other sites.

**Mr Edgar**—Not necessarily. If you were to take the US territory, NBC Olympics had its text and photographic coverage, but it also had its video coverage. The Associated Press did a—

**Senator LUNDY**—As the rights holder for broadcast?

**Mr Edgar**—As the rights holder for internet rights and mobile rights in that territory.

**Senator LUNDY**—They were allowed to use cross-platform because they were also the broadcast rights holder and that gave them that entitlement?

**Mr Edgar**—Yes. There was also a deal between the Associated Press and NBC in the USA where the Associated Press had the right to distribute video links to its clients—newspapers such as the tribune group, the *New York Times* and so on—so that you could potentially be reading a *New York Times* article on Phelps winning his fifth gold medal on the internet and it would say, ‘If you want to see this race, click here,’ and if you did a video screen came up and showed the race. That was an NBC video clip, but it was a seamless link. That was the only country to do such a thing. But it was not the *New York Times* running video; it was a deal that was struck between the Associated Press and NBC. NBC did a very good job of making video available on the internet for the games both through themselves and through partners.

**Senator LUNDY**—So with the advent of digital television, which effectively allows television to be run across the internet, as a hypothetical, what happens when everything is available on the internet? Will that fundamentally undermine the regime that you have put in place.

**Mr Edgar**—I would say it will not be. It will not be at all.

**Mr Gosper**—Because we have got the facility to go to the internet in that geographic area with the agreement of the group that has the rights holding. So you can replicate what we did in Australia in any other geographic region. You can maintain with the digital side the same regime you had with the initial free-to-air broadcaster.

**Senator LUNDY**—I have one final question about news. Is the IOC contemplating accepting that internet based news services incorporating video excerpts as provided is in fact part of the normal environment of the future and is probably the reality of the environment that you are going to be facing from here on in?

**Mr Gosper**—Yes. In 1999 we had an international meeting in place in Lausanne with representatives of all elements of the media to discuss the implication of the growth of the internet, not just for sport but news in general across the world. We put in place a special standing committee—an ad hoc committee, actually—that continues to monitor what is happening with the internet and its effect on our arrangements in ensuring the freedom of photographs, written commentary and moving pictures across the world, because that is how we function at an Olympic Games to ensure, firstly, that the world sees it and, secondly, the source of income. So we have tried to be in front of the changes that have been occurring dramatically since, we would say, 1999. Our first experience of initiating an arrangement with a rights holder broadcaster is the one that Anthony has outlined. I suspect we would proceed along that line until we found it was not serving the public in the first instance, which in terms of the internet is

rapidly growing, the broadcasters on whom we rely as revenue providers and the committee itself.

**Mr Edgar**—I can say as well to answer that that the basic principles of Olympic Games broadcast rights based on territorial distribution and exclusivity shall remain intact for future rights negotiation. Just because it is on the internet does not mean you lose the territorial rights aspect of it. No-one would own the international rights to sport unless they were to buy them, and no-one has done that.

**Senator BIRMINGHAM**—Gentlemen, thank you very much for your time and very thoughtful evidence this morning. Senator Lundy has covered a lot of the ground that I would have liked to, so I will try to be as quick as possible. Just so I am clear, in the discussion about NBC and their arrangements in the US, did they have the right to broadcast footage on the internet as a result of being the broadcaster or did they negotiate and purchase those internet rights separately?

**Mr Edgar**—When they purchased the rights they purchased all rights for the US territory. That included all platforms.

**Senator BIRMINGHAM**—They negotiated a package to include all platforms?

**Mr Edgar**—Yes.

**Mr Gosper**—That is only a recent development. If you go back to the negotiations which took place for the summer and winter Olympic Games up to and including 2002, I seem to recollect, it would have been just straight broadcasting rights. But, as the digital world, the Internet world, has evolved, they pick up all rights, including radio—in some cases we used to separate radio from broadcasting.

**Senator BIRMINGHAM**—Does the exclusive arrangement that the broadcast rights holder has in other jurisdictions outside of Australia to broadcast on the Internet and across platforms impact on the value of the rights that the IOC is issuing compared with in Australia where there appears to be a more liberal basis to that use of footage?

**Mr Edgar**—We are not those responsible for broadcast rights at the IOC. We work at the IOC; we are not disconnected, but we are not the people to ask about how we are going to deal with digital rights into the future. If you could permit me that. We are here to talk about how we deal with the written and photographic press.

I can say that the rights for the broadcasting of the Olympic Games are sold by territory. In some territories the rights holder buys all the rights and in some territories the rights are split up, so there are mobile rights, Internet rights and terrestrial rights. There is a big difference between the Olympic Games broadcasts for the Sydney 2000 Olympic Games and for the Vancouver Olympic Games. In Sydney you had Channel 7, which had one terrestrial television station. It ran that station 18 hours a day, running 28 Olympic sports as much as it could. In Vancouver you will be able to see every single sport live and in London you will be able to see every single sport live. There will be 3,000 to 4,000 hours of coverage, whereas in the past it was limited by

one station. You have the terrestrial rights, the cable rights and the Internet rights—and all of these rights.

The NBC streamed 70 per cent of its Olympic content live on the Internet, but it still had only the one terrestrial television station that was running those main things. It is just a different world that we are moving in. How those rights are still sold is different per territory. It is certainly done on a territorial basis.

**Mr Gosper**—We believe that what flows through the broadcast rights holder arrangements is a very fair and reasonable distribution of information, news and sporting images. Where we do have a concern on the written press and agency side is the potential for limitations of those groups not to be able to function as they have in the past because certain organisations are inclined to believe that they can increase their ownership from the events in a sporting arena to matters which become news and information and by doing that impede the free flow of information and entitlements that the audience has to a sporting event. That has been done, as I said in my opening comments, in terms of commercial opportunity and to head off the potential for commentary that might be negative in respect of the sport or bring it into disrepute.

Stepping back from that: within the International Olympic Committee ever since 1956 we have been careful to separate the broadcasting issues from written press. We have set up two advisory commissions that have been in place since the late 1970s in respect of those two groups. Indeed, we have a third one which actually deals exclusively with the contracting arrangements with the broadcasters. We have done that because, whilst there is overlap, there are very special issues relating to each form of media. As Anthony says, our focus—and this is why we have come to this commission—is to ensure that the written press and the photographic press, which we see as a news element of the written press, are not interfered with, as they have not been in the past, because we see some trends in some parts of the world where that is changing and we think that is very bad.

**Senator BIRMINGHAM**—Mr Gosper, I want to come back to the photographic issues shortly, but just sticking with digital coverage for a moment I wanted to approach the question I asked before from a slightly different perspective. If NBC is empowered to claim total ownership of the broadcast rights across multiple platforms, including the internet, and the *New York Times* can only broadcast a 30-second or 60-second clip, or whatever has been agreed, of Olympic coverage through contract negotiations—

**Mr Edgar**—No US organisations are allowed to broadcast any audio or video on the internet. That is under US law.

**Senator BIRMINGHAM**—None?

**Mr Edgar**—None.

**Senator BIRMINGHAM**—Without purchasing it off the broadcaster?

**Mr Edgar**—No. They have no rights to do it at all.

**Mr Gosper**—Are you asking this hypothetically or as it is now?

**Senator BIRMINGHAM**—When you put the proposition of the link in the pop-up box with NBC coverage—

**Mr Edgar**—That was a link which opened up an NBC video window. Now, the reader of the *New York Times* did not actually know it was an NBC link; they just saw it as a video—but it was a clear link. It was not a link to NBC.com and then you had a look for the video you wanted to watch. It is just the way the internet works. You are able to create these sorts of environments where it is still NBC—so it is still NBC advertising, NBC video. It is an NBC video; it is not a video which is being run on the *New York Times* website.

**Senator BIRMINGHAM**—Having clarified that—which is helpful—to come back to my question, surely that means that NBC's rights to broadcast on the internet were worth more, ignoring population differences and so on, than the rights that Yahoo!7 purchased, given that of course you could get your clips of video footage across almost any internet news site in Australia.

**Mr Edgar**—At the moment we broadcast, what is it, 500 hours a day of coverage. Under the fair dealing provisions you are allowed to broadcast three by two minutes—that is, six minutes of coverage. Is six minutes of coverage going to jeopardise those thousands of hours of television footage? That is what we get down to when you are talking about what is fair. Is six minutes too much or too little? Is 180 seconds too much or too little? That is really what you are getting down to: what is fair in a news environment for the broadcast of news excerpts? There is no clear definition, but I think that is starting to happen, and what we produced, following the Premier Media Group's case and so on, was a start. I am not saying that we were right, but everyone seemed to accept it and they abided by it. And, if they did not agree with it, they would not have abided by it.

**Senator BIRMINGHAM**—So, notwithstanding your very clear statement at the beginning that you separate the fair dealing principles that are recognised in the traditional, printed environment from those in the broadcast environment, you are 'happy' to see those principles broadly applied to the digital platform, as you developed in Australia, notwithstanding the fact that there are far tighter rules in other jurisdictions where you sell rights?

**Mr Edgar**—I would again go back to the fact that we will work within the laws of the country. If all of a sudden a provision within the US or within the EU changed—for example, the EU this year comes out with its Television without Frontiers Directive guidelines. Again, it talks about online and mobile but it does not implicitly say that fair use or fair dealing applies to those platforms. So the EU at the moment does not believe that, legally, there is any right whatsoever to include video footage within its TV broadcasts. So we do not know until it is actually tested legally. That is where the difference between press and broadcast coverage is, because this right of fair dealings is tested on a legal platform. It is not the IOC or sporting organisations that define it; it is the law of the country that defines it.

**Senator BIRMINGHAM**—One quick question on geoblocking: has it proven to be effective for the IOC?

**Mr Edgar**—Yes, absolutely. It worked very, very well.

**Senator BIRMINGHAM**—It worked very, very well, and you have not had problems of rogue countries, in a sense, basically undermining the entire system?

**Mr Edgar**—It worked very, very well. I will not go into it in detail, but the IOC has implemented all sorts of things in relation to protecting the internet rights. Firstly, we fingerprinted all of the television footage for the first time in Beijing so that if someone were to put up television footage on the internet we can take it off immediately. We work with the social network platforms where that can happen.

If I could just read out one thing. We at the moment have our report coming out fairly soon, and we have a congress coming out in October where we are talking about just this. There is one statement from this which is just a draft. If you do not mind, I will not give the whole paper. It says, ‘Finally, Beijing has brought an end to the myth whereby digital media has been considered to have a cannibalising effect on TV broadcasts of the Olympic Games.’ That is a very strong statement. Everyone was scared that the use of the internet would cannibalise TV ratings. In Beijing almost everyone broke their records. They broke their records as far as TV rights and they also broke their records as far as internet rating. NBC, for example, found out that viewers watching the Beijing Olympics on both internet and TV consumed twice as much content as those who just consumed TV. But that is under a protected environment. If you were to allow everyone to broadcast as they wanted, that would be a different thing altogether. It is working under an environment where there are rules in place as to who can and cannot broadcast.

**Mr Gosper**—I think the answer to your question is that there is still keen competition between the broadcasting groups all around the world to get rights to an Olympic Games, and if it were the case it was a not secure arrangement we would lose that competitive big environment.

**Senator LUNDY**—I just want to follow that up. In essence, that statement says that the Olympic movement can demonstrate that the broadcasting rights have held their value in the context of the internet proliferation.

**Mr Gosper**—Yes.

**Mr Edgar**—We will have to see what happens next time the rights come up in the USA to justify that, but it certainly looks that way.

**Senator LUNDY**—It needs to be tested in the market.

**Mr Gosper**—The answer is yes because we are continuing to negotiate these rights across the world, and there has been no faltering in terms of the direct amount of people’s confidence in the exclusivity capacity of geoconstrained areas.

**Senator LUNDY**—And that view is what underpins, essentially, your disagreement with the activities of associations like Cricket Australia and the AFL in their pursuit of an expansion of the definition of fair dealings to news coverage.

**Mr Edgar**—I do not believe that their definition is correct in the first place. That is what I have a challenge with.

**Senator LUNDY**—Yes, but I just want to get on the record that you disagree with their efforts to try and restrict.

**Mr Edgar**—Fair dealings has nothing to do with still photography of sporting events.

**Mr Gosper**—We disagree where it interferes with the written press and photographic.

**Senator LUNDY**—Just one point of clarification that I think relates to Senator Birmingham's. Does the Olympic movement try to, or do you, derive revenue from the sale of video footage separately to that held by your broadcast rights holders directly?

**Mr Gosper**—No.

**Senator BIRMINGHAM**—In relation to photographic pictures, your internet guidelines for the written press, the non rights holders, state:

... photographic pictures can be published for editorial purposes, provided such pictures are not reproduced in a sequential manner, so as to simulate, in any way, moving images.

Have you had any breaches of that?

**Mr Edgar**—We have very few breaches of our photographic guidelines. I generally have photographers coming up to me on a daily basis thanking us for our position on still photography and treating still photographers as news providers instead of criminals.

**Mr Gosper**—The answer is no because each of the groups watch the others and each other very closely, and if there is a sense of an abuse of the moving image principle that finds its way back to our broadcasting organisation, and they will take the matter up with the particular media organisation. So we have never been faced with a serious breach of that.

**Mr Edgar**—I can also say that in my time at the IOC I have not had one rights-holding broadcaster ever complain to me or the IOC that somehow still photographs used on any platform hurt their broadcast rights—not one.

**Senator BIRMINGHAM**—That is a very useful statement. It is useful to clarify the issue around here and the way that you have worded this in terms of simulation of, potentially, the effectiveness of such conditions that can be imposed elsewhere.

Just to wrap this up, we have had positions put from two sides of the ledger in this inquiry for some form of increased legislation or regulation, one coming from AAP, asking for a legislated right to access in some scope or form, and the other coming from sporting bodies like the AFL, asking us to define under regulation or guidelines or rules in some way what news content is in an online environment. That could well reflect the types of guidelines that you have drawn up. Do you think there is a role for the Australian parliament in either of those propositions or are you content with the current regulatory arrangements in Australia?

**Mr Gosper**—I do not think we would seek to have the Australian government regulate in respect of press freedom and press independence, but I would think that, if there is any disputation, if there were a body or an ombudsman arrangement to which the parties could resort, that might be a reasonable thing. That is my first point. Behind that is that the way we have moved forward is to include in the commissions I mentioned to you earlier representatives of the media and the press. On the television commissions we have representatives of national broadcasting groups. Inside the press commission we have representatives of AAP, Reuters, EFE and so on. That is to ensure that as we are moving forward they are comfortable with the way we are. So we think our model is fine. If we think our model is fine and if it is respected then we do not see a case for seeking a legislative process to keep something in good order which we think is in good order. So we are here to say: we think our model is okay, we think it works and the press seem comfortable with it. We are concerned if their rights as they apply to us are intruded upon by other organisations. We think they are danger signals that any governmental authority should keep under notice. But I would not go so far as to say that we would argue a case that you should legislate on the matter.

**Mr Edgar**—I would answer the question with a question. If, in the Beijing Olympic Games, the Chinese government told the world, ‘We will not accredit any photographers; we will supply all the photographers and we will supply you photographs which you are free to use,’ would that have been acceptable?

**Senator BIRMINGHAM**—I am sure there would have been an outrage.

**Mr Edgar**—Why should it be any other position for sporting organisations?

**Senator BIRMINGHAM**—There is a difference between outrage and government intervention.

**Mr Edgar**—Governmental organisation of the sport.

**Mr Gosper**—I do not think I can elaborate on the answer.

**Senator BIRMINGHAM**—There was a second part: the AFL and others argue similarly for legislation in trying to define appropriate content that can be aired now. The US has its blanket ban in terms of online coverage, but Australia has a different set of rules, which obviously you have found to be able to accommodate.

**Mr Edgar**—Australia does not have a different set of rules; we establish rules for the games. Again, I would go back to the fact that I do not believe those rules are firm here and I do not believe there is anything that says that fair dealings relate to those other platforms. Even though other people may argue otherwise, until it is actually tested I do not think it is factual to say that.

**Mr Gosper**—Madam Chair, not to repeat a point, but why we are here—and we asked to be invited and you gave us that privilege—is to say that we regularly, at the highest end of competition sport, have an event which involves 26 international sports which are reported on more widely than any other sporting event in the world. The way in which we work with the press seems to work easily and we work in conjunction with them. Where we see an intrusion on those values by other sporting bodies it gives us concern because we think it is detrimental to the

freedom of the press, it is detrimental to the sport and it is certainly detrimental to the public's right in a democratic society to get the full picture. As media changes—and this is what Senator Lundy was focusing on all the way through—it is our role to keep abreast of those changes to ensure those principles are kept in place. So we are not here to seek or promote any legislative changes; we just wanted to have a voice in respect of your inquiry.

**Senator WORTLEY**—Thank you, Mr Gosper and Mr Edgar, for your very interesting submission. I have a couple of questions. In your submission, you say that the IOC does not require the media to sign accreditation contracts. Then you go on to say that the IOC requires non-rights holding broadcast organisations to sign an undertaking that they will abide by and respect the IOC news access rules. Have a look at the news access rules. For example, point 7 says, 'Non-rights holding broadcast organisations, provided they are holders of ENR accreditation, will have access without equipment to all Olympic venues.' Then it goes on to say, 'Holders of ENR accreditation shall not have access to Olympic events listed as ticketed high-demand sessions.' Then it goes on to say that there are a number of conditions under which accredited organisations—the non-rights holders—will have access. What are the news access rules, if not accreditation? Basically, my understanding of this would be that, for the non-rights holders to have access as outlined, they would need to abide by those rules. You then go on to say, 'The accreditation of any organisations or persons accredited at the Olympic Games may be withdrawn without notice at the discretion of the IOC for the purposes of ensuring compliance with these news access rules.' If that is not a form of accreditation, what is it?

**Mr Edgar**—We do not have an accreditation contract. In other words, we do not have a contract that says, 'These are the terms and conditions under which you receive accreditation.' We most definitely have guidelines in place. For example, still photographers have guidelines; we have news access rules—there are a number of different things. So, yes, there are terms and conditions that basically need to be abided by. The only one from a media point of view whereby there is something conditional on accreditation—in other words, if you do not sign this, we will not accredit you—is non-rights holding broadcasters, of which there are accredited around 200 for a winter games and 400 for a summer games; very limited numbers. So, yes, there is—

**Senator WORTLEY**—So to gain access—

**Mr Edgar**—They need to agree to the rules.

**Senator WORTLEY**—To receive accreditation to gain access, these media organisations have to agree to all the conditions that you have outlined here under the news access rules.

**Mr Edgar**—That is correct.

**Mr Gosper**—That is essentially to protect the rights of people who are paying money for the entertainment element of the competition in the venues. At the same time, it enables news about the event to be transmitted by everybody.

**Senator WORTLEY**—Can you repeat the beginning of that? I missed it.

**Mr Gosper**—You have a need to have agreement with the non-rights holders about what they can and cannot do to protect, essentially, the rights of the broadcasters who have paid for

exclusive transmission of the event and event related matters at the Olympic Games. Otherwise, the whole system of revenue generation would fall away. On the other hand, by doing this you enable non-rights holders to gain access for the public at large to the news element. You have to put a framework around that. Again, we have had not complaints for the ENR people about those arrangements. Indeed, most Olympic organisations now provide extra facilities for ENRs. They were not provided some 10 years ago. It seems to suit both parties. The other alternative would be to exclude all broadcasters who had not negotiated an exclusive right. We think that that would put a limitation on the freedom of the press.

**Senator WORTLEY**—Within your contracts or agreements, is there anything regarding not bringing the Olympics into disrepute or—

**Mr Edgar**—No.

**Mr Gosper**—No.

**Senator WORTLEY**—Specifically in relation to the non-rights holders and the issue of accreditation—we have already touched on photographs—but what about moving pictures and a number of other areas that I have outlined here? If any of those rules are broken, accreditation is removed and that media organisation is not allowed to enter the venue. Is that correct?

**Mr Gosper**—It is not an automatic process. If it is considered that a non-rights holder is in breach of the understanding that they have—in other words, they take their equipment into a competition venue and start filming—that matter is brought before a small group within the Olympic broadcasting group. They listen to both sides of the story. They have a range of disciplinary actions that they can take. They might suspend that non-rights holder's access to venue competitions for three or six days. In fact, that happened to Channel 9 in Beijing. They were suspended for one week.

**Mr Edgar**—That was from one area.

**Mr Gosper**—If it got to be a more serious issue than that, the matter would be taken to the executive board of the IOC, who would make a judgment about it. But until now there has not been a dispute which has reached the serious stage where you have taken accreditation away completely and you have asked that nonbroadcaster to leave the city or to leave the premises of the Olympic movement. It seems to work.

**Mr Edgar**—I do agree with your implication that there is an accreditation term for non-rights holders. In other words, it is an agreement. But I can say that the IOC have been at the forefront of news access rules for a long, long time. We seem to have the support of non-rights holders. We work with them. But, as has been mentioned in so many of the submissions, they understand that they are there to work within the guidelines that are established, not just for the Olympic Games but for all sporting events, because one week they are a rights holder and the next week they are a non-rights holder. They need to work within those guidelines. That is why we generally do not have problems. There were a number of accreditations within the non-rights holder group that we took away in Beijing. One which I will highlight is that someone got into the Olympic village with a hidden camera, did an interview with an athlete without telling them and then broadcast it on television. So their accreditation was taken not so much because of the

breach of the news access but because of the breach of the guidelines under which you should operate as a member of the media.

**Senator WORTLEY**—So you would say that the Australian media is happy with the current situation regarding access to the Olympic Games and the accreditation processes required by the IOC for non-rights holders.

**Mr Edgar**—Yes. I deal with all of them on a regular basis and I would say yes. The ABC would like a bit more, but so would all of them. SBS was a rights holder in Beijing on certain events. But right through I would say that they are all fairly happy with the news access rules as they relate to Australia, which are slightly different from the IOC's news access rules.

**Senator WORTLEY**—So they are satisfied with the news access rules. They would like more—

**Mr Edgar**—They always want more.

**Mr Gosper**—The accreditation process works through the national entity as well. There is a very close liaison between the national Olympic committee of the country and the IOC in granting accreditation, certainly with respect to the written press and the photographic press. The negotiations for television rights are done with the understanding and knowledge of, and not necessarily the participation of, the national Olympic committee in that area. We are not perfect.

**CHAIR**—Thank you very much, Mr Gosper and Mr Edgar. Thank you in particular for travelling from Lausanne to join us here today. We appreciate your submission and your attendance at the hearing. Thank you very much for your input.

**Mr Gosper**—Thank you for the opportunity.

[11.44 am]

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

**ALLEN, Ms Christina, Manager, Legal and Business Affairs, Premier Media Group**

**CHAIR**—Welcome. Thank you very much for coming along to talk to the committee today. The committee has received your submission as submission No. 28. Do you have any amendments or alterations to that submission?

**Mr Marquard**—No.

**CHAIR**—Would somebody like to make a brief opening statement before we go to questions?

**Mr Marquard**—I would; thank you. Premier Media Group welcome the opportunity to present our views to the committee today. We have a vital interest in the ongoing development and growth of sport in Australia. We contribute to the financial wellbeing of sports organisations through our financial investment, production support and news-gathering and publishing activities.

The terms of reference for this inquiry cover a wide range of issues, which we attempted to deal with and respond to in our written submission. As an overview, our view is that sporting bodies should be freely able to exploit, or license the right to exploit, visual, audio and audiovisual coverage of the events that they conduct and produce. However, because sport occupies a vital and integral part of Australian society, that exploitation should continue to be subject to the ability of others to report and transmit sports news in any medium utilising the existing news-reporting regime recognised under copyright law.

Premier Media Group purchase from sporting bodies a range of exclusive and non-exclusive television, online and mobile rights. When we purchase exclusive rights for a sporting event in a particular format, we are very well aware that others will utilise the news-reporting regime to report on that event. As we are also a news publisher and news broadcaster, we on occasion use that news-reporting regime when we do not hold relevant underlying rights ourselves.

Whilst in theory the regime may erode an exclusive or non-exclusive right that has been sold or purchased, it has been our experience as a rights holder that this does not generally happen. That is because the news reporting regime only operates in a very limited way. It does not provide the ability for those utilising it to create an association with the relevant code or event. If the regime is misused then remedies are available to the sporting bodies which conduct the event or a media organisation that holds the relevant rights to quickly remedy that situation. This ability for a sports body or rights holder to link to the event and create that association clearly acts to differentiate in the public's mind those that have an official association with an event. They can clearly market and promote that event as such, and all rights holders do exactly that. Similarly, sports bodies who have their own websites talk up their own websites as the official websites and utilise that association. The public policy underpinning the news-reporting regime

still ensures that other non rights holders can report on the relevant event in that limited way that I explained.

We believe that the current news-reporting regime generally operates effectively and efficiently. It continues to be applied across all media formats. We are very strongly of the opinion that the same general principles and regime that have applied should apply going forward. In our view, what has changed in the last 10 years or so is simply that there are now a multitude of so-called new media opportunities to be considered along with the traditional media formats. The club has changed. This has resulted in three interesting developments. Firstly, digital media formats mean that the public can access news in a variety of different ways, compared to the ways that were historically available to them. Secondly, the digital media has enabled sporting bodies to open up new revenue streams, and they have done so with alacrity in relation to those new media outlets. Thirdly, sports media bodies have for the first time established their own websites, which has enabled them to interact with the public in a way that they historically have not been able to do. This has meant that sometimes they have found themselves in a different space and theoretically in competition with media bodies and news outlets as they have never been before. That is where some of this debate has stemmed from.

While some sporting bodies are still coming to terms with how to deal with these new media opportunities and how news is provided across different media formats, in particular on the internet and through mobile phones, for the most part our experience has been that sports bodies and media organisations have quickly adjusted to deal with these aspects and have built these new forms of media transmission into their thinking when selling and purchasing rights. It is in fact no different to the transitions that occurred, as we well know, when subscription television was introduced about 15 years ago. Certainly the debate that was had at that time around subscription television as against terrestrial television was akin to the current debate.

In sum, we believe the current system operates relatively efficiently and that no further regulation is called for in the digital media space. General principles should continue to be applied across a technology neutral basis with all media formats. We are happy to take any questions from members of the committee.

**CHAIR**—Thank you very much, Mr Marquard.

**Senator LUNDY**—There is a comment in your submission that says that the market will evolve to deliver the right balance of sports news reporting in new media. Given your statement in your presentation today, are you able to define where that line currently is with respect to the use of video images in an online environment?

**Mr Marquard**—Senator Lundy, are you talking about moving images or still images?

**Senator LUNDY**—Yes, moving images, video images.

**Mr Marquard**—The short answer to that is that different sports organisations have different approaches to it, both domestically and internationally. We sit in an unusual position in that we are, as I have said, the acquirer of a range of rights ourselves and utilise the regime as a news publisher and news broadcaster. The line is no different to any other line in that it has to be

looked at on a case-by-case basis, and that is an editorial decision made by a journalist on a day-to-day basis.

**Senator LUNDY**—With respect to Premier Media Group as an owner of broadcast rights, what is the position taken by your organisation in seeking to protect those rights in online video content? What do you ask for when negotiating with a sports organisation for those rights?

**Mr Marquard**—I think we are no different to any other commercial organisation seeking to acquire rights. There is a value proposition to be analysed and you try to acquire a range of things that fit into your business model and then seek to understand how those rights would otherwise be exploited either by the sports bodies themselves—and often rights are reserved by the sports body—or they will explain that the rights will be used by others utilising different formats. How we deal with rights in relation to the Premier League maybe very different to how we deal with rights when acquiring domestic football rights.

**Senator LUNDY**—Would it be helpful for Premier Media Group to have, hypothetically, a clearer guide on where that line ought to be rather than the situation where it really depends on a negotiated environment?

**Mr Marquard**—We believe the existing regime that has operated in Australia operates fairly and efficiently. We have not seen any signs that there has been skewing of it or that it does not work in any way that allows price fixing.

**Senator LUNDY**—What about images, stills? Obviously this has been an area of key contention given the position put forward by some of the sports organisations. What is your view with respect to your internet presence and the management of stills?

**Mr Marquard**—We do not employ our own photographers. We utilise third party agencies to acquire and purchase those photographs and we have commercial arrangements with them. We are certainly keenly aware of the debate in relation to the access issues that have arisen in relation to some events, but it applies because our internet presence is very much a general sports presence. Whilst we have key verticals and each of the sports is one of those key verticals that we look at, we look at it across the board, so we are not as close to that debate as some of the other organisations.

**Senator LUNDY**—Do you have a view on the complaint of the sports organisations that for photographs to be made available in perpetuity by the owners of the copyright, that is, media news reporting organisations, that that somehow is a genuine detriment to those sports? I am exploring whether you have a view on it given that you are in the market and that you purchase those photographs for use on your web.

**Mr Marquard**—I suppose our view stems from experience of what our users want. If we put up a photograph or a gallery, which is different—we utilise galleries but perhaps not as much as others do—the use of that gallery or photograph is contextual and is often linked to a particular story. A gallery around a particular story event is used and is looked at by our users in relatively close proximity to that event, and interest dissipates over time. So a gallery for the 2008 AFL grand final and the events surrounding that is going to be interesting and viewed by our viewers in and around that time but probably not as much in April 2009. I suppose that is the only thing.

As far as the actual erosion of value to somebody by having it in perpetuity, it is hard for us to sit here today and say there is actual real erosion of value by having something in perpetuity. By the same token, the internet is an unusual creature, as you can go to as many pages as you like on the internet and it just takes up server space. But you will find very few visits to those particular pages over time.

**Senator LUNDY**—As a purchaser of broadcast rights, is it the practice of the Premier Media Group to also purchase the internet rights in the way that we heard the previous witness describe NBC purchasing both broadcasting and internet presence rights?

**Mr Marquard**—It is an interesting trend. Historically we purchased broadcast rights. That has changed. Many overseas organisations in particular now only offer you Australian rights, and they include mobile, broadcast and internet rights as a bundle, and then they leave it up to you as the purchaser to then exploit them as you see fit. Historically in Australia it has certainly been the case that those rights were divided and sold by some organisations. That is not to say that some did not go down a different path. As an example, when the SANZAR rugby union rights were sold, SANZAR took a different approach and sold all of its rights in one bundle. Similarly, that has happened with some other sports. It is fair to say that, as we have expanded our operations to now see ourselves as a media agnostic organisation, we do not see ourselves as a subscription television broadcaster. Because we have the largest sports website in the country we do see ourselves serving that purpose, so we are looking to purchase more rights when they become available. But it comes down to an evaluation. Sometimes there is just no commercial value for us.

**Senator LUNDY**—Because you can do it anyway?

**Mr Marquard**—No, because the price sought is too high. There is no substitution for having the rights. If you have an association with an event because you have the rights, it is a very different proposition to just being able to report on an event. The two are wildly different.

**Senator LUNDY**—Are you able to share any views or observations on the exemption that was struck for the Australian territory in the context of the Beijing Olympics that was described by the IOC witnesses? I ask you that because it was obviously a uniquely Australian thing and it sought to codify for the purposes of Olympic coverage what was considered reasonable coverage in an online environment. It is obviously not something that has crossed your organisation's path per se.

**Ms Allen**—It is something that we did not look closely at because we did not seek accreditation for the Beijing Olympics. Our view has always even that the news access rules that the IOC has sought to impose historically perhaps in a sense do undermine the fair dealing provision and the scope of that. We have never accepted the three-by-three-by-three rule as being a codified regulation that we are required to abide by. In a sense, for the Beijing Olympics online, we generally recognised those rules but we did not necessarily confirm whether or not we accepted them.

**Mr Marquard**—To add to that, I think that there are a whole range of factors that go into that. Whilst we were aware of them at the time, as Christina said, we did not actually seek accreditation because it was foreign to how we produced our coverage of the Olympic Games in

an online capacity. We had a co-production with some other journalists from other organisations who were actually being accredited and, as part of that, they were there for signing up to those terms, if you like. We felt we were part of a greater team effort in relation to that, but it did not impact on what we did.

**CHAIR**—Following on from Senator Lundy’s question, can I just clarify that when you reported on the Olympics you applied the news reporting regime?

**Mr Marquard**—We take it as a general tenet that it is an editorial process for us as to how we apply news. We were—

**CHAIR**—What did you apply to yourselves in that situation?

**Mr Marquard**—As I said, the context and the framework of the particular Olympics one was that we were aware of the internet based rules that were set down. Whilst we expressed our position in relation to that we did look at that. You have got to remember that at the time the Beijing Olympics were happening we still had our regular array of sports happening in Australia—the AFL and rugby league finals were on and the A-League had just started. There was a whole range of things that were going on around the world and we as a general sports organisation took the view, as a non-rights-holder, that Beijing was just one of those things. So we reported on those in the mix in the same way that we would with everything else.

We were conscious of the agreement that had been struck by, I think, the rights holder in promoting those particular news internet access rules. We then produced specific Beijing online video moving content to supplement to text and image based content that we had. So it did not impede us in our overall news gathering and other publication processes.

**Senator WORTLEY**—Was that because you were not accredited?

**Mr Marquard**—As Christina said we were not accredited but we were part of a broader pool of journalists in the way that we produced the Olympics coverage. We actually teamed up with some News Limited journalists who were accredited in relation to production of text based stories there.

**Senator WORTLEY**—Was it specifically the restrictions regarding accreditation that brought about that decision?

**Mr Marquard**—For us there was a whole range of factors as to why we did not get accredited—and the fact that it was offshore. For example, we were accredited in 2000 when the Olympics were on in Sydney.

**Senator LUNDY**—To wrap up this point: there was no complaint made about your Olympic coverage in that regard?

**Mr Marquard**—No, not that I am aware of.

**Senator LUNDY**—Apropos previous evidence, if you had breached whatever was considered the arrangement put in place by that Australian territory agreement—

**Mr Marquard**—I would be very surprised if we adhered specifically in the way it was done there. But when we are not a rights holder we are very conscious of the fact that the rights holders have expended large amounts of money to acquire the right to purchase those events, and we respect that because we are rights holders ourselves. We do not misuse it and we do not purposely try to do that. When we are not a rights holder we try to report the news on a literal basis.

**Senator LUNDY**—In terms of the structure of your business, what are the lines of distinction between your pay TV sports news service and your online sports news service? One of the issues that concerns me is that many sports news organisations have effectively converged their news reporting bureaus regardless of the platform on which they put it. I am interest as to how Premier Media Group manages that.

**Mr Marquard**—We have a Fox Sports news channel, which is a 24-hour-a-day sports news television service. It has a substantial pool of journalists attached to it who are devoted full time to that channel and not primarily engaged in any of our other Fox Sports services. We also have a foxsports.com.au pool of editorial journalists. While they are in close proximity in location, one is primarily performing video based functions and the other performing text based functions. There is a fair degree of integration between our organisations, as one would expect. But we currently have different pools of editorial journalists for doing different things. But if there is a text based story—such as the current Brent Harvey chicken wing scandal about whether or not it is creeping into the game of AFL—it is likely that that will be placed in context with a video based story, which may be produced by the Fox Sports news service.

**Ms Allen**—The video clips and reports that are broadcast on the Fox Sports news channel are also repackaged and retransmitted on our web site.

**Senator LUNDY**—Finally, what about the litigation that Premiere Media Group have been involved in? Can you outline that scenario?

**Ms Allen**—That solely concerned the NRL. PMG holds the exclusive pay TV rights to the NRL and Telstra is the naming rights sponsor for the NRL as well as the exclusive licensee of the mobile and online rights. In 2007, they took issue with the fact that we were perhaps pushing the boundaries of fair dealing in terms of—

**Mr Marquard**—That is what they alleged.

**Ms Allen**—That is what they alleged, yes. The alleged that we were pushing the boundaries of fair dealing in terms of online news reports containing NRL match footage and also with the fact that we were supplying news reports to mobile operators that contained NRL match footage. They were unsuccessful in seeking an interlocutory injunction. The issue that was considered, which is perhaps something that we need to clarify in light of the evidence given by the IOC earlier today, was that it was never contested that the fair dealing provisions did not extend to online and mobile. Some of you would be aware that the Digital Agenda Act was introduced in 2000 to expand the scope of the Copyright Act to be a technology neutral legislation. We do not understand where the IOC is coming from when they say that the fair dealing provision should not apply to internet and online content—that is an aside.

The two things that Telstra was not found to succeed on were as follows: firstly, they were unable to establish a prima facie case that we were not entitled to rely on the fair dealing provisions and that we had effectively infringed their exclusive copyright rights; and secondly, the balance of convenience did not favour Telstra. Because there were certain commercial arrangements and business practices of Premiere Media Group and its third party distributors that would be adversely affected, Justice Allsop found that the balance of convenience favoured Premiere Media Group and News Digital Media. The proceedings were settled perhaps three or four weeks after the interlocutory hearing. I am not at liberty to go into the specific details of those terms of settlement. Some of them have been reported in the press. There were certainly terms agreed as to what the duration would be of NRL match footage used in the online news reports and mobile news reports.

**Senator LUNDY**—So the seconds for each video grab, essentially.

**Ms Allen**—It was a matter of minutes.

**Mr Marquard**—We are still reporting on individual matches in the way that we were reporting prior to the litigation.

**Senator LUNDY**—And you are packaging that for a mobile environment?

**Mr Marquard**—As part of sports news? Absolutely—as we have done previously, yes.

**Senator TROETH**—Is it so that the case that you have just described has been the only case brought on the basis of fair trading in the present environment?

**Ms Allen**—Yes, the case involving us and Telstra is the only one in this market that we are aware of.

**Senator TROETH**—I gather from your submission that you do not think it is necessary for the government to legislate on this matter or for any legislation to be devised to cover the areas that we are talking about.

**Mr Marquard**—Yes, that is correct.

**Senator TROETH**—You think the market operates satisfactorily?

**Mr Marquard**—That is correct.

**Senator TROETH**—I am not asking you to speculate but, given that there has only been one case of the fair-trading view brought to the courts, do you think there are restraints operating on either side which would prevent any further cases happening? Do you think there are restraints on the sporting organisations which would inhibit them from bringing any further matter or do you think there are restraints on organisations such as your own which would prohibit them bringing such a matter?

**Mr Marquard**—We certainly think there are low barriers to restraint, that it is open to anybody who feels that somebody is misusing protections afforded under the Copyright Act to

act on those in a digital media environment. Similarly, we think all of the large publishers are certainly well aware of the issues at stake. You have had submissions from a large range of those publishers, though not all of them. Everyone is certainly aware of the issues at stake and that ensures it operates effectively.

**Senator TROETH**—So everyone is working virtually within agreed parameters. Even though not everyone in the business subscribes to them, they are virtually taken as the parameters under which people operate.

**Mr Marquard**—Like anything where you have got a general principle, people may have different interpretations of that. But the fact that there has been, in our view, no case launched and no action taken by the sports bodies or media rights holders who feel so aggrieved probably demonstrates that those things operate at the edges and not in the mainstream, or have done so to date.

**Senator BIRMINGHAM**—Thank you for your evidence today. In terms of the use of still photographs on your website, from where do you source those photographs, traditionally?

**Mr Marquard**—Photographic agencies, traditionally.

**Senator BIRMINGHAM**—That has been the case with the AFL up until the last couple of years?

**Mr Marquard**—Yes, Getty Images was the provider in relation to the AFL, I believe.

**Ms Allen**—We do have a commercial arrangement with Geoff Slattery. I am not too sure of the details of that arrangement. We do get AFL photographs directly from the AFL.

**Senator BIRMINGHAM**—Since the arrangements have ceased that the AFL had with AAP and other news agencies for them to be able to access games and take photographs and onsell them to news agencies such as you, you have accepted the new terms of the AFL as the exclusive provider of such pictures?

**Mr Marquard**—As you are probably aware, we hold the subscription television rights to the AFL as well, so in relation to the marketing and promotion of those we require photographs. So the answer is: we have accepted those. In terms of where we sit in relation to the AFL, they are an important partner of ours, as well as producing their own website. Like with anything, we have robust discussions with various partners at times. In relation to the photographic image site, yes, we do have an arrangement. I do not think Christine or I are actually of the exact terms of that particular one and how it relates to us, but it is a commercial agreement we have with them.

**Senator BIRMINGHAM**—In your submission you have been critical of conditions that may be imposed and the approach to the imposition of conditions by sporting agencies. To paraphrase, you essentially say that ultimately the sport risks losing out; that if they impose onerous conditions that shut people out then they can expect that news agencies will reduce their coverage and the sport will lose. If you have just accepted, as somebody who used to purchase from news agencies still photographs from the AFL, their new rules of ‘Sorry, guys, we’re the

only ones providing them,' isn't that making a mockery of the statement that you made in your submission?

**Mr Marquard**—I think you have misinterpreted what I said. We sit as a commercial rights holder of theirs and have come to a commercial arrangement. I am not suggesting that our arrangement is necessarily the same; I am not aware of what other arrangements are. We have an arrangement with them, but we have a special position as a rights holder as well. We do not necessarily sit outside of the sphere as some other parties do. We are the subscription rights holder. I am not sure what other terms have been agreed. That may or may not have impacted the terms on which we agreed with Geoff Slattery. I am not aware of the details.

**Ms Allen**—If I could perhaps clarify, our arrangement with Geoff Slattery, as far as I am aware, covers both editorial use and commercial use. One of the major reasons why we have an arrangement with him is for the commercial use, to be able to promote our subscription television service—

**Mr Marquard**—Yes, on Foxtel and Austar.

**Ms Allen**—For instance, to be able to use AFL images in posters in pubs and clubs to promote our Fox Sports service.

**Senator BIRMINGHAM**—From an editorial perspective, though, are you happy that your sole source of still photographs is a private contractor engaged by the AFL, operating under the terms of the AFL, rather than an independent news agency?

**Mr Marquard**—It is fairly clear from our submission. Our position is that in a pluralistic society we would like a range of alternative suppliers where possible. That said, the principle of access of the ground is one that we respect is the AFL's domain. In relation to how it utilises that for third-party photographers to come up with pictures, we recognise that is a vexed question in the current environment. We are not, as I think I explained to Senator Lundy, as close to the debate as others are, but our general proposition is that we would prefer to have, like in any environment, more than one source where possible.

**CHAIR**—Can I just jump in there with an example. If I took a cracker photo on my mobile phone at an AFL game and I approached Premier Media Group to sell it to you—I am not an accredited photographer; I am just a punter—and you could see the news or editorial or commercial value of that photo, would you purchase it or would you not be able to because of your arrangements with AFL?

**Mr Marquard**—I think if we wanted to publish that we would ask you if you had the clearance for us to do that. I am not sure if the terms of your entry or your ticket allow you to do that.

**Ms Allen**—Yes, there would be a number of considerations that we would need to investigate before we could make the decision whether or not to publish that image.

**Mr Marquard**—If you purchase a ticket to go to the AFL and you take a camera, I am not sure—

**Senator TROETH**—I think there are restrictions against patrons doing that.

**Mr Marquard**—I believe that to be the case. It is typical that that is the case.

**CHAIR**—I am more interested in your relationship with the AFL with regard to—

**Mr Marquard**—We would seek that from you or anybody else. When we buy rights to an event for broadcast, we would want to know we have clearance for the rights, that somebody actually has the underlying copyright to sell it to us. It is no different. We need to ensure that we have clearance to publish and to transmit those images.

**Senator BIRMINGHAM**—With regard to photo galleries online, you said you do not use them all that much but that where you do use them, I think your words were, usually they were set in context and linked to news stories. Would you consider that to be a reasonable benchmark for how sports bodies might seek to accredit photographic agencies to ensure the appropriate use of photographs in a news context?

**Mr Marquard**—I am not sure I fully understand the question. I will try and answer it in this way. From our perspective, with what we are trying to do with our users, that is the way that we utilise those images. I can certainly see how newspapers, in particular, and others might utilise them in slightly different ways in a contextual way if they would like to do that in an online environment. For us, it just happens to be that that is our practice of how we utilise those photos. So we are probably not in the best position to speculate how others can use them. I know it does not address the issue that I think you are trying to ask me.

**Senator BIRMINGHAM**—I am conscious of the time, so I will quickly move on. Do you have arrangements to provide the news content to mobile providers?

**Mr Marquard**—Yes.

**Senator BIRMINGHAM**—Do you do that to any mobile providers who have exclusive mobile rights for a sport?

**Mr Marquard**—We actually provide news content to all the four major mobile operators: Telstra, Vodafone, Hutchison and Optus in different formats. As an example, we provide a mobile TV channel, which is a sports news channel, to Telstra. We provide particular news clips to Optus and to three others as an example. We provide some of those to more than one operator. So there is a whole range of different things that we do in the mobile environment.

**Senator BIRMINGHAM**—Do any of those agreements to provide that coverage for a particular sport to a particular provider prohibit you from providing coverage to the other providers?

**Mr Marquard**—No. We do have a particular arrangement with one of the providers to provide them with a made-for-mobile rugby television service which is an exclusive one with Vodafone. But we still provide rugby news clips to the other providers. It is very consistent with our approach and it is very consistent with how we believe the internet has evolved. I think I said at the outset that, for us, the internet and mobile is just a different media platform, the way in

which people in this day and age are acquiring news. The debate has got a bit discombobulated in relation to how some people have seen it, but I utilise my mobile to access sports news and other types of news in a way that I did not do 10 years ago and millions of Australians are doing the same thing.

**Senator WORTLEY**—Do you think that there should be different rules applying to the news over the internet as opposed to newspapers, television and other broadcasters?

**Mr Marquard**—In short, no. We have one further thing. We thought it might come up in questions but it has not. There were supplementary materials handed up to you by COMPS last week in relation to a document prepared by one of their consultants.

**Senator BIRMINGHAM**—If I had remembered to bring my copy I may have asked whatever the question was.

**Mr Marquard**—We have a further submission we would like to table in relation to those because we were mentioned in a particular section where it talked about suspect online content. The point we make in this submission we make to you today is that in the three examples, we hold the relevant online rights on each of the occasions that we have been mentioned there. So we do not understand the argument and it was not discussed with us prior. We just want to clarify that and we have asked COMPS to clarify that with you. I think it was an oversight more than anything else.

**CHAIR**—I am sure that the committee, at a later stage, will agree to accept that submission as an additional submission. Thank you, Mr Marquard, and Ms Christine Allen from the Premier Media Group. We appreciate your submission and taking the time to appear before the committee today. Thank you.

[12.29 pm]

**Dr Kayt Davies, Lecturer in Journalism, Edith Cowan University**

**CHAIR**—Welcome. Thank you very much for your submission, which we have received as submission No. 1—the first cab off the rank. Do you have any amendments or alterations to that submission?

**Dr Davies**—No, I am pretty happy to leave that as my statement.

**CHAIR**—Did you wish to make an opening statement?

**Dr Davies**—I will not today. I know time is a little bit short, so I am happy to basically state that that is what I have to say on the topic. One more thing to add is that I am not specifically a sports journalist. I have worked across a whole range of fields of journalism as a journalist and academic. I guess I bring to it a more generic media focus than someone who is embedded in the sports area, and maybe that provides a counterpoint or balance against some of the other people. I know you have spoken to a lot of people who are very involved in sports reporting specifically.

**CHAIR**—Indeed we have. We will go to questions. You make the point throughout your submission—and we take your point that you are a journalist rather than a sports journalist—that journalism is going through a tough time right now and that the sporting organisations, broadcasters and online print and media are all also grappling with the global financial crisis. I would like you to elaborate on how you think that is impacting on the deliberations that the committee is required to consider as part of this inquiry.

**Dr Davies**—There is a bit of a newspaper deathwatch going on internationally. This is being spoken about in many forums. The French government recently bailed out its media sector. Advertising revenues are falling. I am not sure how aware of that situation within journalism many people are. It is being well covered on the blog PressThink, where lots of facts and figures are coming up. Crikey is running a regular section called Newspaper Death Watch. There is a fairly broad understanding that newspapers internationally are suffering, and people are looking at where revenues are coming from. Then you start to talk about areas of reporting being particularly expensive—we recently had all the big layoffs at Fairfax. Yes, money is tight in newsrooms, and that is why there is going to be such an emotional reaction to any suggestion that things become more expensive or limited. I think that where money is tight the arguments about it become a bit inflamed, and that may be one of the reasons why this is becoming a particularly hot topic now. Money is tight.

**CHAIR**—Do you see then that the demise of the more traditional forms of media will channel more sports broadcasting onto the digital media? How are the organisations going to make money out of that kind of sports broadcasting?

**Dr Davies**—The shift is fairly fundamental. The question is how online media makes money. This is a topic that is fairly broadly discussed. A few years ago it had failed to launch as a means of making money. It is starting to do better now. I think that if you looked at the profit figures

within companies like Fairfax and WA Newspapers and had a look at how much money they are actually getting from online revenue and how much they are getting from print, the print revenue is still winning—although it is not a hard thing to look into the financials in specific detail. So while you are getting a lot of content and readership happening online I do not necessarily think that the advertising dollar is following. That is starting to change—the latest figures I have seen show that online revenue is the fastest-growing section of revenue—but I think that it is still a relatively small fish. That is the challenge that the media industry is grappling with: how does online media make money? The problem is that readers do not want to read advertising. Readers are pretty happy getting their news content without the advertising wrapped around it. The issue, therefore, is for the media to look at how that works. Are we going to a pay-for-content kind of model? How are we going to wrap the advertising around the news, using the old model of the provision of news supported by advertising? I think that is the biggest context within which this debate about broadcasting rights actually sits.

**CHAIR**—As an observer of the media in Australia, do you have a sense of what portion of revenue comes from sports news broadcasting and where that is likely to go in the future? How important is it to the media outlets?

**Dr Davies**—I do not have those figures in front of me, and I am a little bit loath to guess. I think it is a very interesting figure that you should acquire, and it is probably not that hard to get. I would imagine that it is in the annual reports of some of the broadcasters.

**CHAIR**—I note in your submission that you talk about the ability of the media to manufacture public curiosity. You draw a distinction between that and public interest.

**Dr Davies**—Yes.

**CHAIR**—I am curious to know how you could ever determine the difference between what is manufactured media curiosity and public interest. Who is the arbiter of that?

**Dr Davies**—It is a very hard line to draw. In writing my submission, I found myself looking for definitions of public interest. The one on the government's privacy site talks about common good, and I think that is a really nice, clear definition. There is the same challenge within the privacy legislation. For instance, if someone is doing something then the public has the right to know about it, unless it is not in the public's interest. The government has already been through this process of saying, 'What is the public interest and where does that start to interfere with privacy?' That is where it starts to be different. There was a time when Australia was incredibly curious about who was going to win Big Brother, but that was not something that had anything to do with the functioning of our democracy; it was just a curiosity drummed up by someone who had invented a game and then said, 'Don't you want to know who is going to win this game?' That is an interesting point to look at, because that game was clearly owned by Southern Star or Endemol or whoever it was that had the rights to the actual game. Curiosity about who is going to win that game is, I think, something that you can separate from the question of: 'Is this part of the fourth estate function of keeping a democracy rolling and, therefore, is it in the public interest?' Do you see what I mean about how someone can drum up an interest that can equally just fade away? It is a difficult one to clearly legislate the difference on, but I think it is important issue to be aware that there are differences and that there are different ways of looking at it.

**Senator WORTLEY**—Thank you, Dr Davies. I have a couple of points that I would like to pick up on. In your submission you say:

... as long as the playing field is flat I see no potential harm or need for government intervention, over and above assistance with drafting the guidelines and any protection of company rights that falls within the gambit of the ACCC.

Towards the end of your submission, you say:

If there is continued disagreement about these issues—

this refers to regulation and commercial negotiation—

then it is appropriate that there are clear definitions drawn up outlining the rights of broadcasters (who have paid for exclusivity) and of reporters who have not.

Overall, your submission indicates that you do not think there should be any sort of intervention, but you raise in those two points that there should be intervention. What is your view in relation to that?

**Dr Davies**—Let us look at the situation where a sporting organisation has sold exclusivity of broadcast rights to, for instance, Channel 7. Where Channel 7 has the exclusive rights to broadcast a game and then the sporting organisation gives those rights away, I think Channel 7 has the right to say, ‘Hang on, breach of contract.’ We have laws that cover breach of contract. What I am saying in the submission is that, when a commercial contract is entered into, it needs to be followed through.

**Senator WORTLEY**—Sure. How would that outcome impact on the role of the media and interpretation of what is news?

**Dr Davies**—Yes, it is a slippery one. I think the news organisations are actually pushing it a bit. That is why I came into this saying, ‘Let’s be clear about public interest.’ I think it is not particularly going to hurt anyone if they do not know who won a cricket game until after the cricket game is finished. They might be curious, but there is a difference between public curiosity and public interest. The media will say, ‘No, the public are interested in it and we have the right to report this.’ They will argue that very strongly, and they will argue that it is public interest. I think that is actually their personal commercial interest that they are speaking from, rather than it being something where the public is actually going to be damaged by not knowing this. If we are talking about government corruption, then, yes, the public is damaged by not knowing about it. Is the public actually damaged by not knowing the scores of a game? I do not think so. I think that is where the need to be careful comes in. They need to be clear that, ‘Yes, sure, at some stage you can report who won the game.’ But whether or not you need a blow-by-blow description and whether that blow-by-blow description is actually in the public interest, I think that is a bit vague.

**Senator WORTLEY**—So from your point of view is reporting of sport not news?

**Dr Davies**—It depends. That is where you can draw the distinction. I would not like to say that sport reporting is never news, because public funds go into it. Public funds build stadiums.

Public funds support the Australian Institute of Sport. And Australia is curious about it. There is an interest in having some coverage. If a sport were unwise enough to make itself completely private then no-one would want to know anything about it. There is an interesting bit of history in, I am pretty sure, boxing in the UK. They sold all their rights to Sky Channel. They were therefore no longer shown on public broadcast television. People then lost interest in who was the reigning champion, and the sport fairly seriously suffered from that. Sport wants to be reported. It wants the public to maintain an ongoing interest in it. But it also wants to protect its rights. So I think there is a natural ebb and flow there. Sport will not lock itself off completely.

**Senator WORTLEY**—In your view, should the status quo remain or do you think there need to be some changes made?

**Dr Davies**—As I said in the end of my point 1, I do not think the status quo will remain as it is, quietly. I think that the factions involved in this argument will continue to argue loudly. With the emergence of digital, I suspect that they will, if they are to settle down a little bit, have to come to some sort of agreement. Whether that is done by the establishment of some codes or some kind of recommendation, I think that something is going to be needed. Otherwise they will continue shouting at each other.

**Senator TROETH**—The way I see this—and I would be interested in your view—is a commercial tension between how much the sporting bodies themselves are prepared to negotiate to allow the commercial entertainment providers to pay for the privilege or the right to have those sports displayed for public consumption. Do you really think it is necessary for the government to legislate in this matter? I note in your option i you say that you:

... recommend government support and encouragement in the development of industry guidelines ...

Do you think that that relative level of attention will ever sort itself out in order to negotiate that? It obviously does at the moment, but it is how much the broadcasting organisations—and I use that in its widest sense—are prepared to pay for something that they know the public wants to see, so do you think it is necessary for government to be providing guidelines?

**Dr Davies**—No, I think that side of the equation will happen anyway. If viewers want to watch it then there is a value in advertising around it and broadcasters will pay for the right to have it. I think market forces will look after that part. It is whether there is government support for the right of other media to report parts of it—and that is with sports reporting. I think the sports reporting needs the protection rather than the sports broadcasting, which will happen anyway.

**Senator TROETH**—So the print side of it rather than—

**Dr Davies**—It is probably worth moving away from talking about newspapers and TV stations, because in the digital world everything is becoming a bit messed up. Newspapers have online divisions. TV stations have websites. Everything is going to mobile phone. The way that the media is running, we are getting more and more new platforms. They are even talking now about having Kindle machines, which are little palm newspaper reader things. The technology is just going to continue to get more and more messed up in terms of dividing along radio, television, newspaper lines, so we need to move beyond thinking in those terms and start

thinking about what we are talking about in terms of image, footage, text, voice—dividing the media up along those lines about what kind of content we are talking about.

The other thing that kicks in is that the media is not a bunch of separate companies. It is things that have co-ownership and allegiances and copy-sharing and syndication agreements. You also have digital television bringing in more and more stations, so media is also becoming more and more niched and hyperlocal. These are the broader media trends. Within that, if someone buys rights to broadcast but they are a really niched product, then a whole lot of other people cannot see that. Then again, it might work really well for that media organisation because they are going to get everyone who wants that sport either supporting their advertisers or paying for that content. But that restricts the access of everyone else to view that sport, so are you then going to do anything to protect everyone else's rights to at least broadcast the result?

I do not know if that made it any clearer. Ask more questions about all of that. That was a big summary of media trends.

**Senator TROETH**—I get your drift, thank you. That is fine.

**Senator BIRMINGHAM**—Dr Davies, there is one issue that is mentioned in your submission and you also mentioned it in relation to Senator Wortley's questions. It relates to public funds and their relationship with sport. How do you see that the access of public funding by sporting bodies changes their rights to restrict media coverage in any way?

**Dr Davies**—I do worry about the rhetoric that comes from sport that there is public good involved. They use that rhetoric a lot to get public funding—'sporting arenas and stadiums are very expensive things'—and a lot of the financial support that they get comes with this assumption that sport makes people exercise, makes people healthier, does all these good things for the community. But when you start to get down to the nitty-gritty with these commercial negotiations, I wonder what happens to that. That is why I put in that stuff about public good. If you are getting public funding on the grounds that the public can see this game, can get excited about this game, can get inspired enough to want to play this game, then the public need to be able to see this game without having to fork out, in addition to their taxpayer dollars, extra dollars in order to be allowed to watch it. I think I put in there a suggestion that the ABC and SBS perhaps have some rights there, that if there is public funding involved you need to give these organisations rights to information about it and rights to pictures about it—something like that.

**Senator BIRMINGHAM**—So, in essence, the sports bodies need to be careful that they do not undermine their own arguments by hypocritically presenting a public good argument on the one hand but conducting negotiations like it is private property on the other.

**Dr Davies**—Yes, it is exactly that. I would just like there to be some sort of recognition that if you have public funds then you need to be giving something back to the public who contributed those funds.

**Senator BIRMINGHAM**—Thank you.

**CHAIR**—Thank you, Dr Davies, for your submission to this inquiry and for taking the time to appear before the committee this morning from Perth.

**Dr Davies**—Thank you.

**CHAIR**—Thank you, Senators. We will now break for lunch.

**Proceedings suspended from 12.51 pm to 1.40 pm**

**KEIR, Mr Warren, Managing Director, SMP Images**

**CHAIR**—We will now resume proceedings and I welcome Mr Warren Keir of SMP Images. Thank you for coming along today. The committee has received your submission as submission No. 39. Do you wish to make any amendments or alterations to that submission?

**Mr Keir**—I understand you have received an amended submission, and I would not like to make any changes to the amended edition.

**CHAIR**—Thank you. Would you like to make a brief opening statement before we go to questions?

**Mr Keir**—Yes. Thank you for this opportunity to address the Senate inquiry into media accreditation in Australia. SMP is an independent Australian company working to provide editorial sports images to the print and electronic media. We have been operating for just over two years. When you consider other media groups in Australia, SMP brings, what I believe to be, a different perspective on what is taking place in the area of accreditation and the implications of such. As a new player in the media industry it is clear that, unless you accept the terms and conditions of the accrediting body, you are not granted access. The accrediting body is generally the sporting organisation although from time to time a promoter will be responsible for accreditations. Access is generally granted on the basis that you are supplying a publication—print or electronic.

From our perspective the issues that have brought about this inquiry are related to the commercial use of images. From the submissions I have read I do not think that anyone is disputing the editorial use of those images. Newspapers, online sports news services such as Fox Sports News and associated sporting organisations such as the AFL, the NRL, Netball Australia or Hockey Australia all require images. As the saying goes ‘a picture tells a thousand words’. The question is: what happens to those images after editorial use? Clearly sporting organisations such as Cricket Australia have realised that the news agencies, whether they be newspaper or photo agencies, have benefited financially from the ability to sell these images. Some sports images are simply outstanding and to have a photo of Wally Lewis or Andrew McLeod holding up a grand final trophy at the end of the game, or John Eales kicking the final goal at the end of the Bledisloe Cup or the Australian Cricket Team with Steve Waugh after winning the One Day International World Cup, are photos that not only capture a moment in time but are valuable images. We all remember Ian Thorpe falling into the pool in qualifying for the last Olympics, and there was one photographer there who captured that image and made thousands of dollars out of it.

As organisations, newspapers and other photo agencies believe that it is their right to do with images as they please. As they shot the photograph they believe that the copyright belongs to that relevant company or organisation. However, when you consider that the accreditation is

granted for editorial use, the on-selling of images is a breach of those conditions as was reported by AFP on 6 November 2007 and I quote:

CA insists it holds the intellectual property rights to agency photographs taken at its venues, and that those photos cannot be re-sold without its permission.

It is at this point that I believe some sections of the media have attempted to muddy the waters in relation to media accreditation. On 8 November 2007 it was reported by AAP that: 'The boycott by the global newsagencies will deprive cricket fans in many countries of match coverage.' This was to do with the test coverage between Australia and Sri Lanka. Then on 14 April 2009 the headline in the *Australian* read 'Australians are being denied full sports coverage by media restrictions', which was reported the day after the first day of these hearings. The argument that the news agencies seem to be adopting is that their commercial rights are part of their editorial coverage. If SMP attempted to sell images, accreditation would be immediately revoked. Cricket Australia says that the reason for their terms and conditions is that in a changing media landscape protecting their property is core to their continued ability to generate revenue. As Peter Young stated:

Where cricket generates commercial value, we believe that some of it should be available for investment in the future of cricket.

That was reported on 6 November 2007. As I wrote in my submission, one only has to look at crowd attendances at a Sheffield Shield game to know that these games must run at a financial loss. If a third party that is given access for editorial purposes is selling images for profit, why shouldn't the sporting body receive part of that revenue?

One of the points in the terms of reference deals with fair access. Did SMP get fair access to the test cricket, the one-day internationals and the Twenty20s? Yes, we did. Another question to ask is: did Cricket Australia restrict media coverage of the cricket? From our perspective, no. To cite SMP as an example, our company applied for accreditation prior to the 2008-09 season, which was granted. At the same time, we were aware that certain agencies would not be covering the cricket, continuing with their boycott. Getty Images continued to provide photographic coverage in order to fulfil their contract with Cricket Australia but did not release any images for editorial use. AFP and Reuters did not provide any photographic coverage.

The situation actually provided an opportunity for SMP. With the South African cricket team touring Australia, the newspapers in South Africa were desperate for photographic coverage, which we were able to provide. Not once did Cricket Australia restrict SMP in providing any image to the South African media. Did Cricket Australia attempt to control what and who we photographed and where those images could be distributed? Certainly not, so long as they were for editorial use.

The result, however, was that the company associated to Getty in South Africa, known as Gallo Images, broke ranks with the news media coalition and employed an Australian photographer to provide them with cricket images. Potentially, Gallo were in danger of losing their contract due to not being able to fulfil their clients' requirements. Similarly, SMP were able to supply an Australian magazine with cricket images which otherwise would have been devoid of current, up-to-date cricket photos.

I contend that, if accreditation is granted for editorial use, all media—print, electronic or photographic—should be required to abide by the same conditions. Point a. of the terms of reference seeks to address the balance of commercial and public interests. The way SMP views this situation is that no sports organisation seeks to limit editorial media coverage, as it is essential. Commercial interests through the onselling of images is the sticking point, and SMP supports Cricket Australia's position.

One further issue related to the commercial use of images is who the images should be made available to. In the SMP submission, we raised the point concerning commercial websites that would classify themselves as editorial. Citing cricket as an example, we are aware that 3 Mobile are sponsors of Australian test cricket. I am not privy to the arrangements between Cricket Australia and 3, but I would guess that there is a significant financial commitment from 3 to Cricket Australia. The question that arises is whether a competing organisation—in this case a telecommunications company—should be able to display Australian test cricket images on their website. To be clear, SMP are not sponsored by any telecommunications company, nor does SMP have any commercial arrangement with Cricket Australia. However, for Cricket Australia not to take a stance on this kind of distribution of images could jeopardise a sponsorship arrangement.

Clearly, for a competitor to have access to these images, they could only come from a news or photo agency with third-party arrangements. Is this an unfair position taken by Cricket Australia or other sporting organisations? I do not believe so. Is it technology related? No. Does this stance restrict freedom of the press? Not at all. For a media or photo agency to claim that this restricts freedom of the press or restricts how we can do our job is problematical. For some photo media agencies, gaining the contract to be the official photographer for a sport is quite significant, as this generally gives the group sole commercial rights.

For example, last year SMP was approached by an architectural company about supplying them with approximately 50 images for a sports mural in a well-known restaurant. After making contact with a number of the sporting organisations I was told that Getty have sole commercial rights. That is, for any commercial use of an image where Getty were the official photographers, images can only be purchased from Getty. SMP offered to pay a royalty to one of these sporting organisations. This was refused with the words 'Getty have sole commercial rights'. I suspect that this would be the case with other photo agencies and therefore to maximise the commercial value of an image, access is restricted to some of those events.

I read with interest from the NRL that they support free public access to information yet restrict photographic access with the argument that the scale of the modern media is such that freelance media organisations across photography, moving vision and print are so numerous it is not conceivable that representatives of each and every one could be accommodated. Generally speaking, there are approximately seven or eight photographers at an NRL game, a TV camera in each corner of the field and two roving cameras. By way of comparison, a colleague of mine photographed a European soccer game on Monday—Milan versus Palermo—and there were 147 accredited photographers. At the Wallaby's test matches, which I regularly attend, there are approximately 50 photographers.

In summary, SMP believes that the central issue of the dispute between media organisations and sporting organisations is about the commercial use of images. Certainly modern technology

has made it easier to create better images and to be able to distribute images and vision anywhere around the world. However, in a time where funds are paramount for the success of any not-for-profit sporting organisation, the sporting organisation has the right to set its own terms and conditions. I trust that these comments are helpful to the committee in coming to a conclusion that would help bring about a more equitable and fair association between sporting organisations and the media.

**CHAIR**—Thank you very much, Mr Keir, for your opening statement. Just so the committee for the inquiry has a feeling for the kind of money involved—you talked about your belief that this issue is about a commercial value of photographs in particular?

**Mr Keir**—Yes.

**CHAIR**—You mentioned the photograph of Ian Thorpe falling in the pool was worth several thousand dollars. Can you give us a flavour of what kind of money is at stake?

**Mr Keir**—I have heard it reported that particular image with Ian Thorpe sold for \$10,000 or more. When it comes to commercial use of images you can kind of work it out by actually registering on the Getty website and saying ‘I want to purchase an image that will be used on the front page, a quarter page size, and it will have a distribution rate of, say, 10,000’. You can put all those parameters in and you will get a price and that might come out to something like \$3,000 or \$5,000. They are the kinds of figures we are talking about.

**CHAIR**—Do you just do sport photography?

**Mr Keir**—Yes, predominantly. Very rarely do I cover just general editorial news items.

**CHAIR**—Mainly for Cricket Australia?

**Mr Keir**—No, all sports: netball; rugby league for the Queensland Rugby League; some motor racing, but not a lot; some boxing—a wide variety.

**CHAIR**—The accreditation process that you have to go through—do you have to get accredited for those other sports that you just mentioned, for netball et cetera?

**Mr Keir**—Yes, you do.

**CHAIR**—Is it an onerous process?

**Mr Keir**—It takes time. You read the terms and conditions, and if you are prepared to accept those terms and conditions you sign off and it goes to the accrediting body—normally the sporting organisation—and they approve or disapprove it. As long as you can verify that it is for editorial purposes, generally you are accepted.

**CHAIR**—And you do not have to pay for accreditation with any sports organisations?

**Mr Keir**—No.

**Senator LUNDY**—This issue of the commercial value being derived from a photograph: that photograph is associated with a news story—that is, the photographer photographing images that may or may not be directly associated with a news journalist writing the story—how do you make the distinction at that point in time? Or can you not do that?

**Mr Keir**—Whether it is editorial only or potentially of commercial value?

**Senator LUNDY**—Yes.

**Mr Keir**—The distinction is not made immediately; it cannot be. It would be determined once the world has viewed those images whether they become saleable images. For instance, a collector of sporting memorabilia might say, ‘I like that photo; I want to purchase it and frame it.’ Cricket Australia, with Steve Waugh in his final test or something like that, might do a limited edition print that sells for \$3,000.

**Senator LUNDY**—Right. So you really cannot determine it at the point.

**Mr Keir**—You cannot determine that at the time, no.

**Senator LUNDY**—So any media organisation that is there to collect photographs for the purposes of news is doing it for that purpose.

**Mr Keir**—Yes, that would be correct.

**Senator LUNDY**—There is no legitimate way to discern any difference and therefore block their accreditation.

**Mr Keir**—No.

**Senator LUNDY**—Okay. So we have those photographs. The copyright, under Australian law, is then in the hands of the organisation that takes those photographs, is it not?

**Mr Keir**—Yes. Intellectual property, as I understand it, always remains with the photographer, but the holding of the copyright belongs with the organisation. So, if it were News Limited that employed the photographer, News Limited would hold the copyright. That is the way I understand it.

**Senator LUNDY**—Because that organisation holds the copyright, doesn’t that permit them under current law to derive any value associated with that given that they are the holders of the copyright? I am not asking you to agree with that, but isn’t that what the current law provides?

**Mr Keir**—I suppose it could be interpreted that way.

**Senator LUNDY**—It has been for a long time.

**Mr Keir**—But then you have organisations such as Cricket Australia saying, ‘This is our property, though; if we didn’t hold this event then there wouldn’t be the opportunity.’

**Senator LUNDY**—Sure, but this is the point I want to go to. Given that we have established who holds the copyright and who has asserted that right in the past by evidence that that is how those organisations have conducted themselves, now Cricket Australia are saying: ‘Hang on a minute; we’ve got a new idea about how to extract new revenues. We want to somehow change the application of copyright law or interpret it in a different way that allows the sport to hold the copyright.’ What is your observation of Cricket Australia’s behaviour given your direct involvement with that process?

**Mr Keir**—You sign off on the terms and conditions. Whether it is Cricket Australia, the NRL, the AFL or Netball Australia, you are signing off to say, ‘We accept the terms and conditions for editorial use.’ We are not saying that we can actually sell the images for commercial use. Where SMP have been the official photographers for an organisation, part of our agreement—partly by choice and partly by accepting that some of the sporting organisations realise that there is money to be made out of the on-selling of images—is that we pay a royalty back to the organisation.

**Senator LUNDY**—Sure. I will come to that, but I just want to ascertain something. When you sign those accreditation agreements, do they specify that you are handing over the ownership of the copyright to the sports organisation or not?

**Mr Keir**—Not that I recall.

**Senator LUNDY**—That is not our understanding either. So, in essence, what you are signing attempts to modify the behaviour of that copyrighted material. You are challenging the law without having to go through the process of asserting a legal right over those images. Is that a fair reflection?

**Mr Keir**—I think that would be correct, yes.

**Senator LUNDY**—So where does it leave how you, as an organisation engaged in the business and happy to sign that accreditation agreement, understand your rights to those images? Crucially, what responsibility do you have if you sell one of those images, given that you are the holder of the copyright, and commercial gain is subsequently derived from that in breach of your accreditation agreement anyway?

**Mr Keir**—So far we have been able to protect that and not allow the onselling to any third party or even to somebody that might pose as an individual. So I am aware of those terms and conditions. I do not want to breach those conditions. As an example, I had an anonymous phone call last week from someone saying that they were an authorised—or licensed—promoter for Football Federation Australia. They wanted to know if they could use one of our images that we had photographed at one of the World Cup qualifiers. My response straightaway was that we were not the official photographers therefore we did not have any commercial rights to release that image. I said that if they wanted that particular image they would either have to go to FIFA or to Football Federation Australia and get that release in writing before I could do anything. So I am aware of my—

**Senator LUNDY**—But it would not be their choice anyway, because if they have engaged an official photographer then the copyright is held by that official photographer, not the FFA.

**Mr Keir**—Which means I cannot release the image. So if Getty or AAP or whoever are the official photographers for that particular event, I cannot release that image. That image can only be used for editorial purposes.

**Senator LUNDY**—How do you sell your photographs?

**Mr Keir**—Through either newspapers or magazines.

**Senator LUNDY**—How do they pick them?

**Mr Keir**—They look at the website.

**Senator LUNDY**—Is that open to the public?

**Mr Keir**—Yes, anyone can view them.

**Senator LUNDY**—So aren't you deriving commercial value from that for your business?

**Mr Keir**—By viewing, but there is no purchasing.

**Senator LUNDY**—But you are selling it to news organisations.

**Mr Keir**—But it is still for editorial use. It is not like it is being used, as I said before, with sports memorabilia or anything like that.

**Senator BIRMINGHAM**—So can I buy a picture off your website?

**Mr Keir**—It would depend on what the image was. If it was, say, something from the AFL, no. If it was something from the NRL, no. If it was something from the World Cup qualifier, no. There is no purchasing ability given there for it.

**Senator LUNDY**—So what could we buy off your website?

**Mr Keir**—You might be interested in rugby league in Queensland, where the Queensland Rugby League has given us the rights to sell any images to family, friends or media organisations.

**CHAIR**—How would you ascertain whether I am the family or friend of a Queensland Rugby League player?

**Mr Keir**—It does not really matter for the QRL. People have to register their application. They put their contact details in and I can crosscheck those details—phone numbers, address and email.

**Senator BIRMINGHAM**—Thank you for your time and evidence today. You are quite critical about some sports bodies' approaches to regulating access and terms and conditions yet quite defensive of others in terms of their rights to exploit their ability to market their sport.

**Mr Keir**—Yes.

**Senator BIRMINGHAM**—How do you rationalise those two perspectives and where do you think the line has to be drawn?

**Mr Keir**—As I think I said in my submission, in considering the issue of going down the line of restricting what is a legitimate business from having access to a sporting event, I reviewed the Trade Practices Act. I looked at some of those conditions. I do not know if I have time, but one of those parts is part IV, to do with contracts, arrangements or understandings that restrict dealings or affect competition. Part IV(2)(ii) says a corporation shall not make a contract or arrangement or arrive at an understanding if ‘a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition’. Part 3 says a similar kind of thing, and then if you look at section 46 it talks about the misuse of market power.

The way I made the distinction was Cricket Australia did not restrict SMP from having access. We signed on the dotted line. We supplied images for editorial use. That was it. But other organisations do this and I know it is not limited to one. There are several organisations that restrict and we are not the only organisation that is restricted in access. To me it seems like an unfair use of their market power.

**Senator BIRMINGHAM**—So you are accepting, in a sense, almost all sorts of terms, conditions and restrictions that may be applied as to whom you can sell photographs to, in what quantity they might be able to be used, in what manner they might be able to be used by those whom you onsell them to, or when they are used by you, as long as there is no exclusivity of rights over that still photography.

**Mr Keir**—For instance, with the cricket, we were not restricted to supplying one publication only. During the actual cricket season we were approached by another media organisation about whether we would be able to publish cricket images in their newspaper. I double-checked, because it was not one of the letters of commission that we had supplied to Cricket Australia. They said, ‘Not a problem.’ So long as it was for editorial use there was not an issue there because the access was granted so long as we abided by the conditions. For editorial use only there was no issue.

**Senator BIRMINGHAM**—Do you believe that those sports bodies that have instituted exclusive arrangements with photographic agencies are now paying a price in terms of reduced coverage of their sport in any way?

**Mr Keir**—It would not appear to be. I just looked out at the paper today. There is plenty of coverage of the AFL in the newspapers today. In the eastern states there is always plenty of coverage of the NRL. It always runs to about three or four pages.

**Senator BIRMINGHAM**—Sure, but those are instances of major newspapers that have their own photographers still accredited to attend those games versus regional newspapers or the like whose capacity is dependent upon their ability to purchase from agencies or companies such as your own.

**Mr Keir**—I recall an incident that happened at the start of 2007. We had been accredited to go and photograph an AFL trial game—I think—between Collingwood and North Melbourne or the Kangaroos up on the Gold Coast. We had them displayed—not for sale—and about a month went by and I had an email and a phone call from the AFL legal department saying, ‘Remove those images.’ I said, ‘But they’re for editorial use.’ ‘I don’t care. Remove them.’ Not wanting to upset anybody, I removed them.

However, what I do notice—and I have heard this because we supply a couple of rural newspapers as well—is that they tend to struggle for access to the larger sporting events such as the NRL or the AFL. So whether editorial coverage is restricted to some degree, I have to agree that it is.

**Senator BIRMINGHAM**—Mr Keir, thanks for your time.

**Senator TROETH**—Following on from your last answer, was any reason given by the AFL?

**Mr Keir**—The explanation given was that the official photographers pay a lot of money to have the exclusive rights to those images and therefore they were protecting them as much as possible.

**Senator TROETH**—But you would have thought that you had a right to take the photos and display them, otherwise you would not have done it.

**Mr Keir**—They allowed us accreditation in there in the first place, yes.

**Senator LUNDY**—So that was extending, in your view, beyond the accreditation terms that you had been required to sign?

**Mr Keir**—Yes. We had not done anything illegal. We had not tried to make some kind of commercial gain from those images. They were just for editorial use.

**Senator LUNDY**—So that goes a step further than even you were willing to tolerate.

**Mr Keir**—Yes.

**Senator TROETH**—You mentioned in the course of your remarks today that you would like to see more equitable and fair arrangements made for the protection of both sides. Those last few words are my words. Do you think it is necessary for the government to legislate or provide guidelines in this matter?

**Mr Keir**—I suppose whenever there is legislation and, if people or organisations are looking at ways, if it does not suit them they ask, ‘How can we get around this?’ I suppose if organisations together can come to some kind of arrangement that would be a better option rather than a legislative option.

**Senator TROETH**—I think we mentioned before that in the testimony provided by Mr Edgar from the International Olympics Committee that—and I did verify this later—there was perhaps

one case which had been brought to try to define fair trading. Do you think we need more test cases like that or do you think that would just inflame feelings on both sides?

**Mr Keir**—I feel that I probably cannot answer that question appropriately.

**Senator TROETH**—All right, that is fair. Are you interested then in this? One of our previous witnesses suggested guidelines, if not legislation—and I am not sure under what auspices we would make those.

**Mr Keir**—As to your comment about fair and equitable, I suppose that if the sticking point is commercial use of images, then why not let us have an agreement between all? If it is not just editorial, then let us build into the terms and conditions a commercial arrangement as well?

**Senator TROETH**—Yes, a commercial arrangement to be negotiated between the two commercial providers, the sport organisations and the media?

**Mr Keir**—Yes.

**Senator TROETH**—Thanks very much. That is all.

**Mr Keir**—

**Senator TROETH**—

**Mr Keir**—

**CHAIR**—Thank you very much, Mr Keir, for your submission and for your attendance today before the committee. We appreciate those very much.

[2.12 pm]

**FULLAGAR, Mr Ian, Partner, Lander and Rogers Lawyers**

**LYNCH, Ms Amelia, Lawyer, Lander and Rogers, Lawyers**

**CHAIR**—Welcome and thank you for coming along to talk to us today. The committee has received your submission as submission No. 33. Do you wish to make any amendments or alternations to that submission?

**Mr Fullagar**—No, Chair.

**CHAIR**—Do you wish to make an opening statement before we go to questions?

**Mr Fullagar**—Yes, please.

**CHAIR**—Please proceed, thank you.

**Mr Fullagar**—Thank you for the opportunity to appear before the committee. The key points that we would like to make to the committee by way of summary—from our submission and having had the benefit of reading the other submissions—are these. Sport has very few rights to exploit. Sporting events and performances are sports key products and the law does not recognise, let alone protect, such rights. The rights in sporting events and performances must be defined and, as we say, protected by legislation. The exclusivity of those rights must also be protected with the consequent ability of sports rights holders to commercially exploit those rights and to take such action as necessary to protect them. Reporting sports news, however, must be maintained but we say, and I think this is a common theme in many of the submissions, that the fair dealing provisions must be clarified to address all forms of reporting and communication media. The fair dealing provisions do and should continue to allow for reporting of sports news, which we say is in the public interest. The public interest in receiving sports news is not in question. Sport clearly performs functions which serve the public interest. Again, we say sport is in the public interest. For a sport to be prejudiced by its rights, being misused or used without any return, is contrary to the public interest. Sport needs to generate revenue to sustain itself and to grow and to continue to deliver sport to and for the community. Consultation between key sport and media stakeholders must be undertaken to develop a set of guidelines regarding sports news reporting against the context of legislated ownership by sport of sports rights. These guidelines would address duration and frequency, volume and context, archiving and dissemination of content of sports news. If such protection is not provided, we think the value of sports rights will be further eroded and diminished, which will impose a greater funding burden on sport and on government. The dependence of most sporting organisations on government funding will only increase if sport's ability to commercialise rights is limited, as proposed by a number of the media organisations who made submissions.

**CHAIR**—Thanks very much.

**Senator LUNDY**—Putting aside the issue of the relationship between governments and sporting organisations, what is the basis upon which you are saying sports events ought to be copyrighted? Inherent in that is that there is some intellectual property right associated with the sport event per se. Where is the embedded intellectual property that you are basing a copyright claim for sporting events on? Can you articulate that for the committee?

**Mr Fullagar**—That is the issue: there is no intellectual property right in sporting events. Thus sports must take steps, as they do through their control of the venue, through accreditation—

**Senator LUNDY**—Sorry, you are missing my point. For a copyright to be asserted, there has to be some form of intellectual property embedded in the copyrighted material. What in your view constitutes the embedded intellectual property in the event?

**Mr Fullagar**—The sports performance, the event itself.

**Senator LUNDY**—The performance by the sporting organisation or by the athletes?

**Mr Fullagar**—The sporting organisation who owns the event.

**Senator LUNDY**—But they do not do the performing; it is the athletes.

**Mr Fullagar**—That is right.

**Senator LUNDY**—So who owns the intellectual property rights?

**Mr Fullagar**—The sport.

**Senator LUNDY**—Why isn't it the athlete?

**Mr Fullagar**—This is a chicken and egg question.

**Senator LUNDY**—It certainly is, and it really goes to the heart of what you are asserting. I am happy for you to take it on notice, because I think the issue warrants some contemplation.

**Mr Fullagar**—I am happy to answer it but I will take it on notice as well. An athlete becomes an Olympian by being admitted into the Olympics and participating in the Olympics on the terms and conditions as dictated by the relevant NOC, the IOC and the organising committee. They do not become an Olympian just because they swim. I think the sport comes first.

**Senator LUNDY**—I think that is very interesting, because the sport would not exist without the athlete.

**Mr Fullagar**—That is true, and I was going to say that I am not saying we undermine or take away the athletes' rights. We would have to have some submissions from athletes, and they must be recognised and somehow brought into this as well. For cricket, the elite athletes are well paid for their performance, and that would become an issue between the sport and the athlete. Obviously the athletes, as you have just said, would have considerable leverage with the sport if they said, 'We're not going to play unless we are paid for our performances.' I daresay many

NSOs would be very happy to be in the position of cricket or AFL, where their athletes have that leverage, because that means they are making enough money to pay their athletes to participate in their sport. To answer your question, I think we need to create a new intellectual property right—a sports right in the event and the performances from that event. The AOC athlete agreement says that the AOC owns the performance of the athletes. There is a whole raft of issues around that, but that is what that contract says. Again, that is the AOC in this case trying to regulate, as cricket and other sports do, through accreditation and other terms what the media can and cannot do at events. So it is a new right we are looking to create in intellectual property.

**Senator LUNDY**—In that sense, particularly relevant to the sports you represent in your submission—they are not the big commercial sports where the athletes have any market power—what you are suggesting is that their sporting organisation own the intellectual property right to any performance and the capacity to derive commercial benefit from that, without any associated return to the athlete. I did not see anything in your submission about recognising, for the purposes of the athlete, that value derived from the organisation’s control of the copyright of that performance.

**Mr Fullagar**—That would create a whole new terms of reference.

**Senator LUNDY**—It certainly would, so you have to be careful what you wish for, in my view. Taking your proposition to its logical conclusion at both ends, I think you need to consider the impact on the performers per se.

**Mr Fullagar**—Yes. It is about giving the sport the platform, in terms of ownership of the sport, that it can hopefully grow the whole sport from, including performers, as you call them, be they referees, officials or athletes, so that they can then start generating a living from the sport as opposed to just being a participant.

**Senator LUNDY**—Yes. I understand the difference. Through the Senate inquiry into women’s sport I have explored the capacity for sports to derive enough revenue to be able to pay professional athletes. That highlighted what is described as the vicious cycle of lack of coverage revenues and therefore lack of capacity for the sport to compensate the players or athletes at what would be considered relatively fair levels compared to their counterparts in other sports that do have that broadcast coverage and sponsorship cycle in place. Looking at it from the other perspective and considering how sports make money and survive in the 21st century, you are asserting that somehow there ought to be a new right created to earn revenue from a new source that, as we know from this inquiry, impinges upon another pre-existing right that is asserted. That has been challenged by other sports. On what evidence do you base a diminution in the current revenue sources of sport that warrants an exploration into someone else’s right to derive revenues?

**Mr Fullagar**—The professional sports would probably argue—and I think they have argued—that this is diluting the commercial revenue they can derive from their media and digital rights, which are being exploited wrongfully by some media outlets.

**Senator LUNDY**—Or potential new sources of revenue as opposed to existing sources of revenue.

**Mr Fullagar**—Just the fact that they will have a product to sell, as opposed to now—

**Senator LUNDY**—They are asserting that. I do not think you can say it is theirs to assert, given they are not owners of the copyright—

**Mr Fullagar**—Yes.

**Senator LUNDY**—under Australian law.

**Mr Fullagar**—Correct. Currently, they have to define their event contractually, which makes it harder for them to then exploit. So they are all the time looking to create new revenue streams through their merchandising sponsorship or wherever. Most of them do not have the ability or the resources to do that. So I come back to the initial submission about protecting and creating this right, because sport is not protected; we could go and set up our own competition tomorrow if we wished to, wherever we liked, as long as we could hire a ground and players. Sport itself needs protection. Then it can go and exploit, as the AOC has done—because it has vast intellectual property protection under federal legislation—to generate revenue to sustain, develop and field its teams at Olympic Games. I have said this many times. I think more sports need that protection for their events so that they can generate revenue from whomever, be it the media or otherwise.

**Senator LUNDY**—If they were to be given that protection via legislation, what makes you confident that they would be capable of deriving revenues from that, given that most of those sports would not have the resources to manage that content anyway? I can say that with some confidence because their greatest difficulty in being caught in the coverage sponsorship vicious cycle is that they do not have the human resources needed to break themselves out of that in the traditional media environment, let alone innovate to the extent necessary to derive revenues by virtue of the production of high-class content that they can then sell themselves. So how realistic is it that it is a genuine future source of revenue for sports, given their cash strapped state and the fact that, in many respects, they are retaining an inherent community character within those organisations?

**Mr Fullagar**—I expect they will do what they do now and licence the ability and the rights to other parties—various agents—to try and sell and exploit those rights for them. Obviously, they would have to pay those agents a commission or some other fee if they were successful in doing that.

**Senator LUNDY**—But it means they do not have to buy the cameras.

**Mr Fullagar**—I do not see how they would have to buy the cameras.

**Senator LUNDY**—No, but if they are going to do it themselves—buy the cameras or buy the people providing the services to do that. We have had a lot of evidence about news reporting being an absolutely key part of that symbiotic relationship with broadcast coverage, and in fact a lot of value of the broadcast rights is inherent in the sport getting news coverage; that creates interest in the event within the community in the first instance and helps build the value of the rights. I do not see how that nexus is fixed or created by providing a sports organisation with the copyright itself, because isn't the issue still the fact that you need the news coverage per se to

create the value inherent in the content being produced? For the sport to be able to derive the revenue from it in the first instance, you are still reliant on the interest of the news media anyway, aren't you?

**Mr Fullagar**—The interest of the news media obviously does help the sport. If the sport has a clearly defined and protected product to exploit, that is of more value to an investor, where they sponsor, or to whomever than saying, 'We've got a championships and we're running it here.' I agree; it is a symbiotic, necessary relationship and we must have, as we submitted, sports news reporting, but not to the disadvantage of the sport.

**Senator LUNDY**—Do you think news reporting is to the disadvantage of the sport in all circumstances or in any circumstances? Or is it all good?

**Mr Fullagar**—Well, we have read a lot that it is not all good, and the sports think it is not all good.

**Senator LUNDY**—The big sports think it is not all good.

**Mr Fullagar**—We would not be here if it was all good.

**Senator LUNDY**—No; I know. But I would be interested if any of the sports you represent thought that there was anything bad about any news coverage that they received. I thought that they would be grateful for any coverage.

**Mr Fullagar**—I am sure they would be grateful for any coverage.

**Senator LUNDY**—You mentioned the bill in the Victorian parliament about the protection of major events.

**Mr Fullagar**—Yes.

**Senator LUNDY**—Can you just describe for the committee the purposes of that bill and how that relates to the proposition that you submit.

**Mr Fullagar**—The bill is a consolidation of a number of existing Victorian pieces of legislation around major events, but it also seeks to protect event organisers' rights—so it is starting to go down the track that we would like to go down—around those events, particularly from ambush marketing. Victoria has had—

**Senator LUNDY**—Is this like when a blimp goes over the top of the MCG?

**Mr Fullagar**—That is right. Victoria has had a fairly strong history of legislating significantly to protect its major events and the investment the Victorian government places in those events, and gives the event organisers, whether they are the World Swimming Championships Corporation, the Grand Prix Corporation or the Commonwealth Games Corporation, very strong powers in regard to prohibiting ambush marketing and then enforcing that prohibition. This bill now extends that. The limitation is that this would be only for events that are declared major events by the Governor in Council. So it would be our major international events, I suspect. But

it is just a way to start to define and protect those rights in the events and give the event organisers additional protection and enforcement powers in respect of their events.

**Senator LUNDY**—So does this proposed bill rely on existing copyright or intellectual property law in any way, shape or form, or does it create a new right?

**Mr Fullagar**—I do not think it creates a new right.

**Senator LUNDY**—Okay. Do you represent any other sports—other than those listed in your submission?

**Mr Fullagar**—We represent between 50 and 100 national and state sporting organisations around Australia.

**Senator LUNDY**—Are you able to provide the whole list to the committee?

**Mr Fullagar**—Possibly.

**Senator LUNDY**—I am happy for you to take that on notice.

**Mr Fullagar**—I would have to seek consent from the clients to disclose that we act for them.

**Senator LUNDY**—And I understand that you made this submission essentially speaking—and correct me if I am wrong here—on behalf of those five sporting organisations, but you as a company act for a lot of others as well.

**Mr Fullagar**—We do. That is right. Generally, we issue a request: ‘Would you like us to act for you in this particular submission?’ and these five actively responded and provided feedback for us.

**Senator LUNDY**—Thank you.

**Senator BIRMINGHAM**—Thank you for your evidence today. When it comes to the use of still photographs or visual imagery what do you consider should be treated as news?

**Mr Fullagar**—My colleague was just saying that it is not the photo, it is how it is used. That is very difficult, because what might be newsworthy to you I might not consider newsworthy.

**Senator BIRMINGHAM**—In terms of the rights you are seeking for exploitation of sporting events by event organisers, should those rights extend to them being able to provide exclusivity for the taking of photographs? So if ‘Birmingham Photographics’ has the exclusive rights to take the photographs—God help the sports organisation!—News Limited should not be allowed to send along their snapper?

**Mr Fullagar**—Potentially, yes. If it was full control of the event then it can determine who can access the event and on what terms. If cameras are removed from people’s bags—I am sure this occurs at a number of venues—then you cannot take photographs. It happens at most arts events that you cannot take photographs.

**Senator BIRMINGHAM**—Should the same level of capacity to restrict access to the event apply to scribes?

**Mr Fullagar**—At one extreme, yes; it should. At the second extreme, it is very difficult to police. So one has to take a reasonable approach to how one can enforce these rights. I guess there are temporal issues around writing about an event and then publishing or disseminating that, as opposed to a photograph, which can be taken on a phone and sent around the world immediately.

**Senator BIRMINGHAM**—So, in essence, whilst you are submitting that current rights for news coverage should be maintained and that the current legislative framework that protects those rights for news coverage be maintained, you are equally submitting that these news organisations are free to write what they want and say what they want to say and, if they have legal rights to the photographs, to print those photographs, but that the sports organisations are equally right, as private organisations, to shut everyone out but their preferred provider, essentially.

**Mr Fullagar**—To your first point, subject to clarification of those fair-dealing provisions, yes, the sports news should still be able to be reported and disseminated and, yes, sports should be able to regulate their events and determine how their events are reported. Indeed, accreditation of photographers or journalists could dictate, ‘We would like to see copy before it is provided back to your newspaper or we won’t grant you access.’

**Senator BIRMINGHAM**—To go to the clarification of those fair-dealing provisions and how that might be codified or regulated in some way, would you envisage a system that actually specified length of footage that may be used, amount of time, numbers of photographs or any of those types of things? Do you want to give us a little bit of a feel for how you think such a codification process might work, and particularly how it would work across multiple sports?

**Mr Fullagar**—It is difficult to give you an accurate picture of how it might work and I think that could only be determined by consultation between media and sport to determine how the frequency, duration and dissemination could be determined and applied. Different sports would require different things for these issues in other media outlets. So I think it is for the media to sit down to determine the content of the guidelines which, I would suspect, should be incorporated somehow by legislation, regulation or other document or instrument.

**Senator BIRMINGHAM**—If we were to go down the path of establishing such guidelines, how would we accommodate different sports? By way of example, could we have sports bodies individually registering guidelines with the ACCC or some other independent body, as a way of ensuring that horses for courses could be accommodated within a broad framework, rather than a regulator attempting to set out guidelines that would apply equally to lawn bowls as to test cricket?

**Mr Fullagar**—I would not say no to that approach, but I suspect that it could drive media outlets crazy if there were a whole raft of different guidelines. As much uniformity as possible should be achieved in the guidelines. That is why I suspect broad consultation will be required.

**Senator BIRMINGHAM**—And yet that uniformity becomes the great challenge because of the very diverse nature of sport.

**Mr Fullagar**—Yes.

**Senator BIRMINGHAM**—In terms of the rationale behind seeking this additional copyright power for sporting bodies, the major sports codes have obviously done pretty well out of their rights over the years. That is hard to dispute in terms of the way those that are significant in the Australian consciousness today have grown and profited over recent years. Do you foresee that, in the new digital world with multichannelling and the abilities online and so on, the increased demand for content will provide opportunities to some of the less well-covered sports that perhaps you represent?

**Mr Fullagar**—You would have to say yes. When pay TV came upon the marketplace, everyone thought that it was going to be a great saviour for many of the small sporting organisations who signed up to 10-year contracts with agents for pay TV, most of which fell over. So they never made it onto pay TV, and still rarely do. So I would say, yes, but with that proviso—that the last great new medium did not provide the solution to sport that everyone thought it would, in terms of giving them a platform of greater exposure and some return.

**Senator BIRMINGHAM**—Maybe popularity will still drive the return and the coverage, regardless of the size of the medium. Lastly, in terms of the public sponsorship and public funding that sports bodies enjoy, is there not a commensurate obligation that comes with that public funding to provide a greater level of public access?

**Mr Fullagar**—By public funding do you mean government funding?

**Senator BIRMINGHAM**—Yes.

**Mr Fullagar**—I do not think so. There is no doubt that the government could make it a condition of funding that they have to increase levels of access. I have always held the view that sport should be given its funding and given broad strategic goals that the government wants it to achieve with its funding, and if it fails to achieve those goals then it should no longer be funded or its funding should be reduced. All sports would agree that increased access to the sport, greater attendance at the sport and greater participation in the sport are goals. They are certainly goals set by the Sports Commission for all its sports and are the criteria against which they set the funding for sports. They would all want that. I think they would probably agree to that and say, ‘Yes, the more money you give us the more we will increase all those things for you. We will create more referees and we will train more officials.’ Whether it is made a condition, I think government funding of sport is overregulated in terms of the conditions that are imposed upon sport. Perhaps you need someone full time to manage the funding contract let alone to deliver on what the contract requires. That was a longwinded answer, but the short answer is that I am probably not.

**CHAIR**—Mr Fullagar, you mentioned in your evidence that you have a belief that sports organisations should have more control over how sport news is broadcast and reported. That flies in the face of a lot of other evidence the committee has had that that sort of control in the hands

of sporting organisations is de facto censorship and it is a slippery slope to the end of democracy as we know it. What is your comment about that?

**Mr Fullagar**—True sports news reporting, the fair dealing of sports news, should be permitted without the sport's interference. Again, it is how we define that sports news reporting by what media. Going back to our threshold point, if there is a legislated right in sports events that may be subject to fair dealing sports news reporting, again, it is about how that is clarified across the new forms of media. Going back to Senator Lundy's point, I cannot see too many of the sports blocking too much fair sports news reporting. If they want greater exposure, I cannot see them censoring—

**CHAIR**—What about in terms of sanitising their sport, so they have the ability to restrict the way certain incidents are reported or how certain sports performers are reported on for their behaviour off the sports field or something like that? A number of people have put the point of view to us that they think that a push from sporting organisations partly controls how their sport is portrayed in the media. They do not want all the unpleasant stuff to come out.

**Mr Fullagar**—I would probably have to say that that may be a consequence in certain sports. They may be sanitised.

**Senator BIRMINGHAM**—Lawn bowls has been particularly vulnerable!

**Mr Fullagar**—Not one that leapt to mind!

**CHAIR**—I appreciate that you said that you represent a number of sports. I do not know whether you will be able to answer this question or not, but do you represent the AFL and NRL in Australia?

**Mr Fullagar**—We undertake some work in Australian Rules football.

**CHAIR**—Is that the AFL?

**Mr Fullagar**—Yes. We do not undertake any work in rugby league. We do undertake some work in cricket, but not directly for Cricket Australia.

**CHAIR**—You do not work for Cricket Australia?

**Mr Fullagar**—Not at this time.

**CHAIR**—The other question I had was about the fact that in your submission you make the point that:

It is submitted that this exemption—

you are talking about the Copyright Act, of course—

applies equally to new and digital media.

However, it is not specifically mentioned in the Copyright Act that the exemption applies to them and you say that the parties to your submission would not object to clarifying that in the copyright act. We have had an alternate view that the exemption does not apply to the new and digital media. On what basis do you claim that the exemption does apply to new and digital media?

**Ms Lynch**—There are two parts to the answer. My understanding of the other submissions is that they are saying that it does not sufficiently assist the sporting organisations in relation to digital media because the news agencies' ability to access content is much greater. They are able to go directly through the sports. The provisions allow the news agencies to access the sports news. That can transpose, in a theoretical context, across to the media and digital platform. Where it falls down and why we said that we would not oppose any more specific detailing of restrictions is because in practice it is very difficult to confine their use of that sort of content to strictly sports news—and we acknowledge that that is a difficult definition. The theory applies, but in practice it is difficult to put it into place without having to initiate legal proceedings each time the sport disputes that the agency is reporting 'sports news' or is going further than that.

**CHAIR**—Okay. Do you anticipate that there will be further cases that might give enough precedent to deal with this issue without having to go down the regulatory road?

**Ms Lynch**—Each of the sports and, in a slightly different context, the media agencies made the point that leaving it up to legal proceedings and the courts is a particularly expensive and onerous way of resolving any ambiguity. There probably will be at some point, because some of the sports have enough money. I am sure that Bowls Australia, which we talked about, is not going to race off to the High Court. Some sports probably will make a commercial decision that it is worth spending the money on further defining that right but that is not a very satisfactory way of determining what is and is not sports news, the level of content and the type of content. It will leave it ambiguous for some time.

**Senator LUNDY**—Do you do any work for the Sports Commission?

**Mr Fullagar**—Not at the moment.

**Senator LUNDY**—Have you provided any advice to them in relation to these matters?

**Mr Fullagar**—No.

**CHAIR**—Thank you, Mr Fullagar and Ms Lynch, for your submission and for taking the time to appear before the committee this afternoon. We appreciate it very much.

[2.55 pm]

**MALLAM, Ms Mel, Director, Australian and New Zealand Sports Law Association Inc.**

*Evidence was taken via teleconference—*

**ROSS, Mr Martin, Director, Australian and New Zealand Sports Law Association Inc.**

**CHAIR**—I welcome Ms Mallam and Mr Ross from the Australian and New Zealand Sports Law Association. The committee has received the association's submission as submission No. 8. Do you wish to make any amendments or alterations to your submission?

**Mr Ross**—Only to point out to the committee that the Ice TV and Channel 9 case that is referred to in the submission has proceeded before the High Court, and they handed down their judgement last week. But I do not think that in any way impacts on ANZSLA's submission.

**CHAIR**—Thank you. Do you wish to make a brief opening statement before we go to questions?

**Mr Ross**—Yes. Firstly, thank you for inviting the Australian and New Zealand Sports Law Association, ANZSLA, to appear today. I am a Melbourne based director of ANZSLA. I am a lawyer and I have worked in the sports area for a number of years. I am attending this inquiry in my capacity as a board member of ANZSLA. My comments are not to be taken as being made on behalf of my employer, Brown & Co., nor on behalf of any of the clients we have acted for. Similarly, Mel Mallam, who is joining us by telephone from Canberra, is also a director of ANZSLA. She is an in-house lawyer for FIFA and she is based in Switzerland. Again, Ms Mallam's comments today are made on behalf of ANZSLA, not on behalf of her employer.

ANZSLA is a non-profit organisation. Its mission is broadly to provide education, advocacy and networking opportunities on legal issues in the sports industry throughout Australia and New Zealand. It was formed in 1990 and has a membership that includes lawyers, sporting administrators, academics and government representatives, but it is open to anyone who wants to join.

This inquiry has arisen in the context of the opportunities that are offered to the media and to sports in the digital age. One of those opportunities is for sporting organisations to commercialise further their intellectual property. ANZSLA accepts the following propositions: firstly, that the difference between sports news content and sports entertainment content can be or is blurred in the digital media environment; secondly, that sporting organisations should be free to grant media rights and develop new commercial revenue opportunities; and, thirdly, that, as the sporting organisations have told you, the actual or potential impact of excessive unauthorised use of their audiovisual content in the digital media environment can undermine the value of those rights.

ANZSLA sees its role in this inquiry as raising and making some comments on legal issues and possible reforms. Commercial and technical matters are best addressed by the sports and the

media themselves, and I understand that they have already spoken to you. ANZSLA sees two main legal issues arising from the terms of reference. First is the law of copyright and in particular the application of the fair dealing exception for the purpose of the reporting of news that applies in the digital age; the second legal issue is accreditation—and to some extent there is an overlap between the two areas.

Turning first to copyright, ANZSLA's submission sets out a brief history in relation to copyright and the relevant fair dealing exception. I do not propose to take you through that. The terms of reference for the inquiry correctly raise the fact that this is all about the balancing of interests. ANZSLA's view is that the public interest is well served by the fair dealing exception for the purpose of the reporting of news. However, the media that utilise this exception do not need to pay for content which is the intellectual property of the sporting organisers. Unfair use of that intellectual property is a breach of the sporting organisers' rights and is unlawful. It should also be noted that there is an incentive for the media to push the boundaries of that fair dealing exception—to creep over the mark, to use an Australian football expression.

As this inquiry has already seen in the written submissions, there are significant differences between the sporting organisers and media organisers in relation to, firstly, the extent of the problem and, secondly, ways to deal with it. It is ANZSLA's position that the current fair dealing for the purpose of reporting of news exception in the Copyright Act could be improved to give clarity for all the stakeholders. Further, ANZSLA supports the imposition of some sort of restriction on media using excessive amounts of sporting organisers' IP in the form of sports entertainment offerings under the guise of the fair-dealing exception.

The second legal issue is accreditation—effectively, the terms and conditions upon which sporting organisers allow media to access venues under the sporting organisers' control for the purpose of reporting of news. ANZSLA's position is that accreditation arrangements are standard worldwide practice. Accreditation arrangements reflect balance between what the sporting organisers require and what the media will accept. ANZSLA's view is that accreditation arrangements can be used to restrict content if it is agreed by all the parties.

**CHAIR**—Ms Mallam, do you have anything to add to the opening statement?

**Ms Mallam**—No, I do not.

**CHAIR**—Mr Ross, I think you were in the room when the previous witnesses gave evidence. Do you have a view about their proposal that copyright should vest in the performance of sport?

**Mr Ross**—I was not in the room when they were dealing with that specific issue. As I understand it, they say there should be effectively a new copyright such that the performance of a sporting event would attract a right that could be protected at law. My view, and it is ANZSLA's view as well on this particular point, is that that is quite a novel approach. It is certainly not reflected by the current law. If that was to be adopted, a lot of issues would have to be thought through, such as the creation of multiple rights in respect of the same event. As things currently stand, copyright for a sporting event is created by virtue of the recording and the creation of a film of that content and also, subsequently, by the broadcast. If there was to be copyright in the event itself, there potentially could be an issue, and I will use my son's Auskick game on a Saturday to give you an example. If there is copyright in that particular event, that

would be copyright owned by the organisers; I could stand on the sidelines and videotape that, I would own a separate copyright in relation to the recording; and if I license that to someone else to broadcast then they might have a separate right. I am not sure how all those copyrights would be reconciled. This particular issue was raised quite recently at an ANZSLA board meeting and the proposition that was put forward in the previous submission received support.

**CHAIR**—You noted in your opening statement that the exceptions under the Copyright Act perhaps could be better articulated. Do you have any concrete proposals about what you think the committee should consider in that regard? Does ANZSLA favour legislative change?

**Mr Ross**—There are two questions there. Firstly, in relation to clarifying the current exception, one reform that would be open to the government would be to try to give some criteria around what constitutes fair dealing. Some of the other fair-dealing exceptions have a non-exhaustive list of criteria that is to be considered. We have pointed out the relevant section in our submission. ANZSLA would certainly encourage that sort of change. Secondly, in terms of a regulatory approach to overcoming what is perceived to be possible excessive use of content, ANZSLA would support regulation that basically picks up the same sorts of limitations and restrictions that are put forward in the proposal by the Australian Sports Commission, who are not a client of ours and I do not think Mel works for them either. The reason that ANZSLA would support a regulatory approach is simply because, given the different strategic agendas of the media and sporting organisers in this space, we think it would be very hard for those parties to all come to some sort of consensus, therefore there is a need for an umpire to step in and determine where the mark should be.

**CHAIR**—But they are big businesses; why can't they just work it out amongst themselves?

**Mr Ross**—I think there have been some disputes in the past that show that they cannot always work it out amongst themselves and that there is an inherent incentive in the media to constantly creep. If there is no bright line test then the media will continue to push that boundary.

**CHAIR**—What encourages the media to, as you say, tend to step over the mark?

**Mr Ross**—Because there is commercial value in a sporting entertainment offering.

**Senator BIRMINGHAM**—Thank you both for your evidence today and your submission. The previous witness put the proposition that we should create new rights and likened those rights to those of dramatic works in copyright law. You explained some of the problems that might exist for, say, a little league game in regard to taping of matches and establishing a new copyright principle. Dramatic theatre and the arts exist from community level right through to professional level and obviously restrictions around that are overcome; why couldn't a similar framework exist in the sporting world?

**Mr Ross**—It potentially could and I am sure the sporting organisers would embrace that expansion of copyright.

**Senator BIRMINGHAM**—It potentially could, but do the main practical limitations that you see, in terms of its applicability, relate to the easier access to outdoor sports, the greater scope of sports coverage compared to dramatic theatre and the like?

**Mr Ross**—I think that is right to the extent that the main issue would be with sports that are conducted in an open environment where you cannot regulate access and therefore cannot have some contractual arrangements around who owns the broadcast and the film rights. That is probably a greater issue for sporting competitions that are conducted outside—like a triathlon running along a beach, for example—but I still see some practical issues with that proposal. I am not aware of that being the law anywhere else in the world either.

**Senator BIRMINGHAM**—Indeed. Some of the ideas that have been put to us during this inquiry are extreme proposals. In terms of where the law currently sits, if I were a national sporting organisation and wished to protect the copyright of the visual imagery of my sport and I sought your advice on my legal powers to do so, how would you advise me in terms of restrictions around accreditation? What steps would be appropriate if I wanted to maximise the commercial value by owning all copyright to all visual imagery of my sport?

**Mr Ross**—I might let Mel answer the question in relation to accreditation but perhaps I will take the aspect of that question that deals with broadcast rights. Generally speaking, the advice would be to ensure that your contractual arrangements with the broadcasters ensure that you own copyright in both the broadcast and the recording so that you can control the copyright.

**Senator BIRMINGHAM**—What about if I wanted to extend that beyond video images to still images?

**Ms Mallam**—May I answer here, Martin, so I do not speak over you?

**Mr Ross**—Yes, Mel.

**Senator BIRMINGHAM**—He was looking anxiously at the speaker!

**Ms Mallam**—Sorry, it is hard to know when to speak when you are on a telephone, as I am sure you can appreciate. I would concur with everything that Martin has said and I think the accreditation guidelines or accreditation protocol that a national sporting organisation would develop would cover both still imagery in relation to photographs and broadcast. It would be about advising the development of certain accreditation terms and conditions which cover all aspects of media reporting, if you like, or all aspects of media, whether that be still or broadcast, so that any media representatives who gain access to a particular area are in agreement with and accredited to the level of terms and conditions of that national sporting organisation.

**Senator BIRMINGHAM**—Is it thoroughly within the current legal rights of national sporting organisations to decide if it is practical within their sport not to accredit any photographers and to instead operate their own photographic agency?

**Ms Mallam**—My understanding, as far as I am aware, is yes. In practice, however, it requires a balance between the two because a national sporting organisation of course requires a good working relationship with the media as well.

**Senator BIRMINGHAM**—Around those issues of access and, in particular, of photographic rights, it has been put to this committee that we should consider some type of legislative right of

access that extends into photographic news reporting as well as print based news reporting. How would your association respond to such a proposal?

**Mr Ross**—It would not agree with that sort of proposal. Firstly, there would be capacity issues with the number of photographers et cetera coming in. Secondly, the main sports that you are talking about are sports that are conducted in venues that are hired by the sporting organiser. As the hirer of that venue, the sporting organiser should have the right to regulate who comes in. It should not be a right of the media to come in. I am not sure if the submission that has been put to you simply relates to the conduct of a match or seeks to extend to other events relating to sport, such as press conferences and possibly tribunal hearings. Such hearings could relate to things like racial vilification and they can be conducted in an in camera environment, which has traditionally excluded, or which potentially excludes, the media. Again, ANZSLA has talked about this particular issue quite recently as well and its view was that it did not support that proposal.

**Ms Mallam**—I would like to add two points to what Martin has just said and also add that there are two other issues that are wrapped up in that as to why ANZSLA would not support it. It is also to do with the later use of photographs by photographers and the ability for an organisation to control that. By way of example, that may have an impact on sensitive issues particularly in relation to children. Secondly, the greater number of photographers also may devalue the rights themselves or the value of the photographs themselves and then in turn have an impact upon the sports.

**Senator BIRMINGHAM**—I will pick up on that second point. I am sure there would be ways and means to address the first point but, on the second point, in terms of the devaluing of the sport from a greater number of photographers, why do you believe that would devalue the rights of the sport in relation to their broadcast rights when we are talking about still photographs?

**Ms Mallam**—I think that is an open question in that it would depend on what degree a sport was able to control the use of those photographs by whoever was taking them. Ordinarily, in relation to accreditation, if a photographer is accredited to take photographs at an event, they will agree as to who will ultimately retain the copyright and in what situations and circumstances those photographs can be used. By having more photographs out in circulation the saturation of photographs within the public means that it could be argued that public interest may decrease or that the value of an image may decrease simply because there are more in the marketplace. But, again, as I said, that would really depend on the situations and circumstances in which photographs were able to be used and the degree to which they were able to be controlled.

**Senator BIRMINGHAM**—Presumably such right of access, if someone were to actually try to codify it, would be a right of access for editorial purposes and for news reporting purposes. We then run into the other major issue that this inquiry seems to be facing—that is, how one defines news. I would have thought, if you were to pursue a right of access, that you would have to be very clear that it was for genuine news reporting by genuine news outlets in a genuinely editorial manner, which would overcome a good number of the concerns that you raise, Ms Mallam. I did not necessarily phrase a question at the end of that, but you are welcome to comment if you like.

**Ms Mallam**—Sorry. I was not sure. No, I have nothing to add.

**Senator BIRMINGHAM**—I will jump to the other main area, which, of course, relates specifically to digital coverage. On page 8 of your submission you state:

The crucial element is whether the primary purpose of the use is to report or comment on news.

Around that paragraph, when I get to these issues about the use of photos in an online context and so on, we run into these questions of whether an online photo gallery is news and at what point it is pictorial news related versus entertainment related. How, if you think we should be looking to provide greater certainty and codifying these issues, do you think we should tackle those issues around visual usage that have been raised by the sports organisations?

**Mr Ross**—Are you talking in terms of audiovisual content or just visual content?

**Senator BIRMINGHAM**—Staying with stills for now—so still just visuals.

**Mr Ross**—I think that is probably the harder of the two concepts. Having said that, it is ANZLA's position that it could be possible to impose restrictions around the number of photographs on the basis that an excessive number of photographs can constitute a sports entertainment offering as opposed to a genuine reporting of the news.

**Senator BIRMINGHAM**—Do you say it is easier in the video and audio visual based approach because you think that the current free-to-air provisions have settled some sort of framework that could be applied elsewhere? Why is that half of the equation easier?

**Mr Ross**—It is probably easier for me because I have got more experience in the audio visual side of things.

**Senator BIRMINGHAM**—How would you suggest we approach regulations, guidelines or framework on the audio visual side of things, if it were to be pursued?

**Mr Ross**—As I said before, along the lines of the limitations or restrictions that have been suggested in the Australian Sports Commission proposal, particularly around the length of video clips and the timing of the video clips in relation to the event. My impression is that there is an acceptance, by the media industry at least, that they can cross the line under the fair dealing exception if they show video clips that are too long or if they show video clips too long after the event. But where that line is, is the debate.

**Senator BIRMINGHAM**—Is it your belief that the fair dealing provisions are currently being abused or breached in any way, or just that everyone is pushing at the margins?

**Mr Ross**—Someone—I think it was the person from ninemsn—acknowledged that some breaches were currently occurring in terms of audiovisual content. As to the specifics of those breaches, I think the sporting organisers would be able to point them out to you. But there is certainly the potential for breaches to occur, if not actual breaches occurring right now.

**Ms Mallam**—I would agree with that from my experience with my current employer. It is common for breaches by online reporting organisations to occur.

**Senator BIRMINGHAM**—And where those breaches by online organisations are occurring, are they larger established media companies operating online sites, or what we might call smaller or rogue-type activities?

**Ms Mallam**—In my experience, it is a combination of the two. Often the larger organisations will have a secondary organisation set up for that purpose and, when you trace it back to the host, it will trace back to the larger organisation. Often a series of video clips is presented, close to the broadcasting of an event, in consecutive form, so that online viewers may be able to view a significant portion of, if you like, ‘highlights’ in quick succession.

**Senator BIRMINGHAM**—I note that you are not here as a witness from FIFA, Ms Mallam, and this question is to both of you: are there examples from overseas where such potential breaches have been pursued by the sports organisations?

**Ms Mallam**—I cannot provide details, but I can answer yes.

**Senator BIRMINGHAM**—Okay. It may be that, without going to enormous lengths of research, you could provide further details on notice; if you could, that would be useful; I will understand if not. What is the reason that such cases have not been pursued in Australia? Is it that there have not been breaches or because you are not sure that the law allows for their pursuit, or because the respondents are too big and well funded and scary?

**Mr Ross**—I think mainly the latter—

**Ms Mallam**—Yes.

**Mr Ross**—but also, secondly, because of the cost of running litigation and, thirdly, because of the potential uncertainty around this area. There has not been any fully litigated case in relation to the sports news reporting fair dealing exception in Australia. There was a case in 2007 in New Zealand that squarely raised this issue. However, that was a television broadcasting case. I think that explains the lack of litigation. It is not because sporting organisers do not have the right and are not on the right side of the argument; it is because, for various reasons, they have chosen not to take that action at this stage.

**Ms Mallam**—I would like to add that is also the reason for many overseas cases not going to full litigation as well. It is also important to bear in mind that it is important for a sport for these issues to be resolved quickly and efficiently, and that often needs to occur without litigation which, as we know, can be quite lengthy. From my experience, it means that these things are resolved almost as soon as they occur.

**Senator BIRMINGHAM**—Lastly, do you believe at present that the value of the rights that the sports organisations currently have is being eroded by the current framework?

**Mr Ross**—Yes, that was one of the propositions we said that ANZSLA accepts.

**Senator BIRMINGHAM**—Thank you.

**CHAIR**—Thank you very much Ms Mallam and Mr Ross for your submission to this inquiry and for taking the time to appear before the committee today, we appreciate it very much. That concludes today's proceedings. I would like to thank all the witnesses for their informative presentation. Thank you also to *Hansard* and broadcasting and to the secretariat for their assistance. I declare this hearing closed.

**Committee adjourned at 3.26 pm**