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SENATE

Official Committee Hansard

ENVIRONMENT, RECREATION, COMMUNICATIONS AND THE ARTS LEGISLATION COMMITTEE

Reference: Broadcasting Services Amendment Bill 1998

FRIDAY, 21 AUGUST 1998

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SENATE

**ENVIRONMENT, RECREATION, COMMUNICATIONS AND THE ARTS
REFERENCES COMMITTEE**

Friday, 21 August 1998

Members: Senator Patterson (*Chair*), Senator Schacht (*Deputy Chair*), Senators Allison, Eggleston, Lightfoot and Lundy

Substitute members: Senator Tierney

Participating members: Senators Abetz, Bartlett, Bolkus, Boswell, Bourne, Brown, Calvert, George Campbell, Carr, Colston, Coonan, Cooney, Crane, Faulkner, Ferguson, Harradine, Hogg, Lightfoot, Mackay, Margetts, Murphy, Neal, O'Chee, Payne and Tierney

Senators in attendance: Senators Colston, Lundy, Patterson, Schacht and Tierney

Terms of reference for the inquiry: Broadcasting Services Amendment Bill 1998

WITNESSES

CRESWELL, Mr Christopher Colin, Assistant Secretary, Intellectual Property Branch, Attorney-General's Department, Robert Garran Offices, Barton, Australian Capital Territory 2600 301

HAWKINS, Ms Catherine Marea, Senior Government Lawyer, Intellectual Property Branch, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600 301

MEAGHER, Mr Bruce, Manager, Government Affairs, Optus Communications Pty Ltd, 101 Miller Street, North Sydney, New South Wales 2060 301

MOCKRIDGE, Mr Tom, Chairman, Australian Subscription Television and Radio Association, and Chief Executive Officer, Foxtel, Wharf 8, Pyrmont, New South Wales 2009 301

PORTER, Mr John, Managing Director, Austar Entertainment Pty Ltd, 309 Kent Street, Sydney, New South Wales 2000 301

RICHARDS, Ms Debra Shayne, Executive Director, Australian Subscription Television and Radio Association, Wharf 8, Pyrmont, New South Wales 2009 301

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MARQUARD, Ms Jane, Manager, Policy Development, Nine Network, 24 Artarmon Road, Willoughby, New South Wales 2065 301
MASON, Mr Tim, Chief Engineer, Imparja Television, PO Box 52, Alice Springs, Northern Territory 0870 301
BUETTEL, Mr Rohan Nigel, Assistant Secretary, Legal, Parliamentary and Coordination, Department of Communications and the Arts, 38 Sydney Avenue, Forrest, Australian Capital Territory 301
HART, Dr Beverly, Assistant Secretary, Licensed Broadcasting Branch, Department of Communications and the Arts, 38 Sydney Avenue, Forrest, Australian Capital Territory 301
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Committee met at 9.11 a.m.

CHAIR—I welcome you to this public hearing of the Senate Environment, Recreation, Communications and the Arts Legislation Committee on the Broadcasting Services Amendment Bill 1998. Before proceeding, I request that all mobile phones be switched off. The committee prefers that evidence be given in public but, should you at any stage wish to give your evidence, part of your evidence or answers to specific questions in camera, you may ask to do so and the committee will consider your request. I point out, however, that evidence taken in camera may subsequently be made public by order of the Senate.

We have in the past sometimes brought everyone to the table together so that we can ask questions backwards and forwards. We would like to do that today. The department, ASTRA and FACTS are the three groups we will deal with at the same time, to begin with.

[9.14 a.m.]

CRESWELL, Mr Christopher Colin, Assistant Secretary, Intellectual Property Branch, Attorney-General's Department, Robert Garran Offices, Barton, Australian Capital Territory 2600

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CHAIR—Welcome. The committee has before it submissions Nos 76, 65 and 86 from ASTRA, Foxtel and Austar respectively and submission No. 95 from FACTS. The committee has authorised the publication of those submissions. I understand that Foxtel wishes to make an alteration to its submission.

Mr Mockridge—We have provided a letter altering one paragraph of the submission to make the paragraph a little clearer.

CHAIR—The letter has been tabled. Does anyone else wish to make an alteration to their submission?

Mr Mason—Could you confirm that you have received a submission from the Remote Area Commercial Broadcasters in addition to the FACTS submission?

CHAIR—I do not remember reading one. Are they the ones in South Australia?

Mr Mason—Yes, that is right.

CHAIR—I asked yesterday if there was a submission from them, because I wondered why there was not one.

Mr Mason—I was not involved in the actual transmission of the submission.

CHAIR—We have not received a submission from them. Does anyone wish to alter their submission? Does anyone wish to make a short statement on something other than what is in their submission? As no-one wishes to do so, we will proceed to questions.

Senator SCHACHT—I appreciate that we have here, to be blunt, the two main protagonists on some of the issues related to this bill—the pay TV operators and the free to air operators. I will put questions to both sides from time to time to try to delineate where the differences are. I will start with a question to both of you. Some of the submissions recommend that we should not proceed with amending the Broadcasting Services Act relating to retransmission rights until it is dealt with in conjunction with the amendments before the parliament on copyright generally.

Mr Mockridge and Mr Branigan, do you have a response to the suggestion that we may have to revisit the legislation if, in the next year or so, there are subsequent amendments to the overall Copyright Act as that debate wends its way slowly towards a conclusion—hopefully, soon. Do ASTRA and FACTS have a view about that?

Mr Mockridge—The point simply is that, in its press release in announcing this bill, the government announced its intention to also legislate to favour underlying rights holders. In ASTRA, we are happy to recognise that and we are happy to participate in a regime which provides some compensation to underlying rights holders, subject to there being some effective arbitration mechanism.

While this bill opens up the possibility of negotiation with the broadcasters for a further payment, there is a great deal of uncertainty as to how that is to interact with the Copyright Amendment Bill 1997. We believe that the two issues should be handled at once. Obviously, one way to handle that would be for the government to bring on the legislation on copyright now but, alternatively, if that is not possible, we would suggest that the issue be deferred.

Mr Branigan—Can I say a few words on behalf of FACTS? There are two clear issues in this. There are the broadcasting issues—the issues that arise from the Broadcasting Services Act—and then there are the copyright issues. They are linked at a certain level, but they are basically independent issues.

We think that it is critical that the broadcasting amendments go forward. As our submission indicates, we think the bill as it stands is defective in that it presupposes the existence of the copyright amendments to enforce some of the key provisions of the broadcasting amendments. We believe that the bill should be amended so that effectively the broadcasting retransmission scheme is self-contained.

Obviously, it is important that the copyright amendments come on with reasonable speed, but we think that there is a clear and urgent case for making the broadcasting amendments and there are good grounds for approaching it in two stages.

Senator SCHACHT—I have just put the practicalities of the timing to you. I am not going to prejudge when an election may or may not occur in the next six months. But, if the speculation is right that we may have an election in October or November, it is highly unlikely that this bill would get through the parliament in the remaining couple of weeks that we have before us. If the election is put off until next year, we have all the spring session and, hopefully, the Copyright Amendment Bill would come back to be debated because the pressure for that to be resolved is clear.

If the matter were not deferred indefinitely, and hung out to dry for whatever reason, and if there were no election, in the latter part of the spring session this bill and the Copyright Amendment Bill could be dealt with. Would that be an unduly delaying issue for FACTS?

Mr Branigan—If that were the case, it would perhaps not be unduly delaying. But I do not think it is the case. What is going to happen first of all is an exposure draft of the copyright amendments. That is likely to take quite a number of months to work through. It is most unlikely that any legislation will be introduced until some time next year and, on past experience, it is unlikely to be carried for several sessions of parliament.

I think the most optimistic prognosis you could make is that the copyright amendments may, with a lot of luck, get through next year—more likely the year after. We would regard that as an unconscionable delay in making these essential broadcasting amendments.

Senator SCHACHT—Which part of this bill—which deals basically with siphoning/hoarding and remission issues in one form or another—is most urgent and the one that FACTS wants dealt with?

CHAIR—This bill does not deal with siphoning, does it?

Senator SCHACHT—Yes, siphoning/anti-hoarding issues.

Mr Branigan—The retransmission elements clearly are the ones of key concern to us. The anti-hoarding provisions reflect a government decision some time over the last year. It is not one that we pressed for and we are happy for that to take its own time.

Senator SCHACHT—Can you tell me—and perhaps ASTRA might want to make a comment as well—what is the most pressing issue for you in the delay of getting this bill through that you support regarding the changes to retransmission?

Mr Branigan—I am not sure that I understand.

Senator SCHACHT—What is so pressing for FACTS that the issue in this bill about retransmission has to be dealt with as soon as possible, which clearly from your submission you support?

Mr Branigan—It is a commitment by the government that dates back to early 1996. We were hopeful that the legislation would be introduced in the latter part of 1996. The protracted negotiation with an amazing range of interests has held it up until this year.

We find ourselves extremely frustrated that this situation of no applicable legislation—which has existed for almost three years now—seems likely to continue even longer. We think that the issue of broadcasters' control over their signal has to be resolved very quickly, and that that is the basis for sensible long-term arrangements with cable companies about retransmission.

Senator SCHACHT—What are the negatives for your industry? We all like to get things done quickly and cleared up, and matters authoritatively dealt with. But, if it was not dealt with for another year, what would be the negative consequences for the free to air broadcasters by not having it dealt with in the next year?

Mr Branigan—In practical terms we are looking at a higher level of pay television penetration and an even greater number of homes which are served in some form or other by retransmission signals; signals over which we have no control, the quality of which we cannot control and the completeness of which we cannot control. One of the submissions before the committee points out that such basic things as closed captioning simply are not carried on cable.

In other words, we cannot control the way that our signal is provided to our viewers. It is a bizarre situation, where what is represented as our signal is not really our signal at all in terms of quality and completeness. We believe that it has to be dealt with urgently so that we can control what is going to viewers.

CHAIR—When you say there is not quality and completeness, what do you mean by that?

Mr Branigan—With completeness, I have given the instance of closed captioning being stripped off.

Senator SCHACHT—Pay TV is not providing the closed captioning that you are providing?

Mr Mockridge—That is not correct.

Mr Branigan—That is the claim in the Caption Centre's submission, I understand.

CHAIR—You are saying that captioning is stripped off, but Mr Mockridge is saying it is not.

Mr Mockridge—We are saying that is not correct.

CHAIR—Let us deal with that, because that interests me. What else?

Mr Branigan—Teletext, and I think the overall question of service quality. For instance, in a situation where we were able to negotiate long-term arrangements with pay TV operators, we would obviously want to insist that there was very close monitoring of the signal, so that there were not unreasonable outages.

CHAIR—What do you mean by ‘unreasonable outages’?

Mr Branigan—In other words, when the signal is lost for some reason or other.

CHAIR—Do you have evidence that it is lost?

Mr Branigan—We certainly do. As you know, with free to air signals, it is very rare for the signal to disappear for more than a few seconds at a time. With pay TV it is not uncommon for much longer breaks in the signal to occur. Unless there are proper signal monitoring procedures in place, the pay TV company may not pick this up for some time.

Naturally, viewers hold television stations responsible for the signal they are receiving. We inevitably get the blame and we suffer the damage, which is lost viewers and lost reputation. This is a small but important instance of why it is essential in our view to have proper regulation of signal retransmission. The best way to do that is through commercial negotiations.

Senator TIERNEY—Isn’t there another side to that equation? People who get a very poor signal because of where they are located might pick up a pay TV operation. Therefore, going through a pay TV operator in that particular area very much enhances the quality of their signal, doesn’t it?

Mr Branigan—Indeed. That is also the case with self-help, and that is explicitly recognised. We are not saying that retransmission should never be permitted. What we are saying is that, where retransmission is permitted, it should be regulated by agreements between broadcasters and retransmitters—in this case, pay TV companies.

Senator TIERNEY—You have made claims on outages. Are there any figures on that? What are you basing that statement on?

Mr Branigan—We are basing that on the evidence provided by television stations. I am happy to provide the details to the committee. One instance was in Melbourne on the television Logies night earlier this year. Apparently one of the Optus Vision retransmission facilities broke down. People in a number of suburbs in north-western Melbourne lost the signal for something like 45 minutes. They naturally checked the availability via cable of the other television signals and found them there. They naturally blamed Channel 9. In other words, Channel 9 lost quite a number of viewers on a very important night for it—the night it was broadcasting one of the most highly rated—

Senator TIERNEY—Apart from anecdotal evidence, you seem to be indicating that you have hard data on the proportion of—

Mr Branigan—No, not on the proportion, but—

Senator TIERNEY—You have occasional anecdotes of where this has happened.

Mr Branigan—They are not exactly anecdotes. Anecdotes suggest that it is hearsay. This is evidence.

Senator TIERNEY—No, anecdotes do not. Anecdotes suggest that these are occasional examples.

Mr Branigan—Indeed.

Senator TIERNEY—We just want to get some indication of whether this happens 10 per cent, one per cent or half a per cent of the time. Have you got anything like it?

Mr Branigan—I could not put a figure on it. All I am saying is—

Senator TIERNEY—That is what we are trying to establish. That is what you seem to be indicating.

CHAIR—How often would you get, in the same coverage area, a free to air outage of 45 minutes?

Mr Branigan—I cannot remember a single instance in the 20 years I have been in the industry. I do recall, on one occasion over 10 years ago, that Channel 7 in Sydney lost its signal in the course of the evening for 20 minutes.

CHAIR—If a large area lost its signal for 45 minutes in free to air, not retransmitted, you would see that as very serious?

Mr Branigan—I would be surprised if any of the engineering staff were still working there the next day.

Mr McAlpine—I think there are backup systems in place to ensure through free to air that that does not happen. If we have an outage of two minutes, we are very concerned.

Mr Branigan—That is right. I should add, Senator, since that happened in Sydney, all of the Sydney television stations now have backup transmitters on the other tower. So it is virtually fail-safe. The problem with cable television, as I understand it, is that there are relatively low-cost units involved in receiving and effectively retransmitting the television signal. In other words, they are not of the standard and quality that you would expect in a television system. They are presumably not monitored as closely as a television station would monitor its own transmissions. So there is the capacity for much longer outages. They are the anecdotes, if you like, to which we were—

Senator TIERNEY—Mr Branigan, there are some areas 20 kilometres north of Maitland that have permanent outages of free to air signal. They just do not get it at all.

Mr Branigan—I understand that.

Senator TIERNEY—Next week we are actually launching cable television service in that area. So surely it is preferable. You seem to be putting this up as a big problem and not seeing the other side of the equation—that it sometimes enhances the signal for viewers.

Mr Branigan—I am not dismissing the isolated reception problems that you point to, Senator. All I am saying is—

Senator SCHACHT—I think it is a bit more than isolated.

Senator TIERNEY—It is more than isolated. Come up to the Hunter Valley and we will show it to you.

Mr Branigan—They are isolated if you look at Australian commercial television overall. They are concentrated in certain areas—I agree with that. All I am saying is that there is a sensible way of dealing with this; that is, retransmission which is properly regulated rather than retransmission which is entirely at the election and at the quality level decided by the retransmitter.

Senator TIERNEY—You are saying that it is urgent that we do this, and you indicate that it must be done before the end of the year. Pay TV has been in operation for quite a number of years in this country. What would be the problem if we did fix this situation the way you wanted it fixed—doing it in, say, March or April next year? I am just trying to pick up the urgency at this point of time. It has not been a problem in 1997, 1996 and 1995.

Mr Branigan—It has been a problem. We have been pushing very hard since 1995 to resolve this problem. We took legal action to try to resolve it under the current legislation. We were unsuccessful. The current legislation is horse and buggy legislation; it is not designed for the current era. It does not envisage pay television.

We have been pressing the present government. The present government gave us a firm commitment in its election policy. We have had undertakings from the minister from his first month in office that he would proceed as quickly as possible with this legislation. We believed in about August 1996 that it was likely to be introduced within a matter of months. For one reason or another, it has not been. We have continually pressed it. We have at no point said, 'There's no hurry, mate.' We believe that, now that the legislation has actually come forward, the parliament should consider it and pass it without delay.

Senator SCHACHT—Mr Branigan, in relation to the metropolitan areas of Australia, would your industry say that, through no fault of your own but for geographical reasons—a hill or whatever—there was unsatisfactory reception for consumers from the free to air signal not only from the commercial networks but from the ABC and SBS, particularly where you agree when a consumer says, 'We have too much ghosting, blah, blah, blah'? Do you have areas delineated where you would like the picture to be better for your consumers and of course better for your advertisers and profits?

Mr Branigan—Sydney is perhaps the best example because the topography is very difficult. There are a number of areas immediately around the harbour and the lower North Shore in particular where reception is very difficult. We have tried to cope with that by installing a number of translators over the last decade or so. There is a translator in Kings Cross that deals with—

Senator SCHACHT—Is that translator shared by the three networks?

Mr Branigan—There are translators for all five services.

Senator SCHACHT—On one tower?

Mr Branigan—Yes, indeed. That deals with problem areas in the eastern suburbs and also with problem areas across the harbour on the lower North Shore. There is now a translator installation—again, shared by all five services—on North Head at Manly. That looks north along the northern beaches, which is shaded by the escarpment from the main signal. It also looks back towards the city to deal with people in the Mosman area and in similar areas who cannot benefit from either the main transmitter or the Kings Cross translator. Similarly, there are translators looking down from the central coast which deal with some of the northern beach areas that are not otherwise dealt with. These deal with all of the substantial areas of poor signal in the Sydney area but there are tiny pockets.

Senator SCHACHT—We have had quite a few submissions from consumers, the viewers. They are mainly one-page letters from viewers who have said that the provision of pay TV has meant they have got a much better picture for free to air than they have ever had before. I think some of them are in the Sydney area.

I just wondered if FACTS would have a look at those letters, see what areas the people are in and tell us whether you think they still have a problem or whether you have tried to address it in some way. I do not know whether these people represent tens of thousands of viewers, 500 viewers, 100,000 viewers, et cetera, but their individual case is very strong in that they say they now get a better picture coming off the cable or from the delivery system for free to air. I do not know how many hours of free to air they watch compared with pay TV.

Without going to too much trouble, could you have a look at those letters? It does not have to be done today. The submissions can be provided by the secretariat.

Mr Branigan—We would be happy to do that. I should make the basic point again—in case it has not come across clearly—that we are not, as a fundamental proposition, saying that retransmission is a bad thing and should not be allowed to happen. Quite the contrary. We are saying that there may well be cases and very general cases where retransmission is in everyone's interests, including broadcasters.

All we are saying is that it should not be something that is totally outside our control and involve a signal which is other than the signal which we generate—whether it is because the quality is not maintained in some way or because it is not the complete signal. We simply want a modicum of control over the way in which our signal is retransmitted—more than a modicum; we think we should have absolute control.

Senator SCHACHT—Mr Branigan, a modicum of control comes to the nub of the issue. This legislation, as it is currently drafted, could be modified to say, 'These are the conditions that both parties have to enter into for retransmission' so that some of the issues that you lay down which might be called a code of practice were laid down in the legislation. If there were a difficulty between both of you in resolving an issue that you could not resolve commercially, there could be an arbitrator arrangement so that you knew that in the end, if you did not reach a sensible solution commercially, you might take a bigger risk of having an arbitrator give you a tougher decision independently. It would be very similar to what we do in communications, in telephony et cetera, where the carriers negotiate commercially an interconnect fee and, in the end, if they cannot agree, the ACCC may do it for them. In nearly 10 years, they have never gone to the arbitrator; they have always preferred to reach a commercial decision. Should there be amendments like that in the structure? From the way it reads at the moment—the phrase may be a bit strong—the whip hand in the legislation is now with the free to airs. Unless you reach a commercial agreement or they reach it with you, you can still say, 'No, you cannot retransmit.' That gives you, the way I read it, a whip hand in the negotiations, because you can say, 'This is the price. Take it or leave it; otherwise we refuse to let you broadcast.' I am going to put the same question to ASTRA in a moment, so we are not just picking on you.

Mr Branigan—We take the view that the signal is our property. That is also the view that the Broadcasting Services Act has generally taken over the years. That is why—

Senator SCHACHT—The board has not said that, has it?

Mr Branigan—Other than for cable, broadcasters have an absolute right to decide whether their signal is retransmitted or not. The exception for cable is simply because cable was regarded as self-help only. In other words, there was a carve out where there seemed to be a compelling public interest reason to derogate from the property rights of broadcasters. We do not believe that you can demonstrate the same clear public interest right outside those cases where self-help retransmission is clearly necessary. Senator Tierney has given an instance where a community of people simply do not get a signal. Clearly, there is a compelling case for either a translator or for permitting self-help for which broadcasters properly receive no compensation at all.

I believe there is no public interest for effectively saying that broadcasters do not have any or much control over their signal—or in the last analysis do not have control over their signal for pay TV. The reason I say is that I do not accept that we have the whip hand.

Senator SCHACHT—In the draft legislation.

Mr Branigan—I do not accept that we would in the legislation.

Senator SCHACHT—In a commercial negotiation.

Mr Branigan—That is right. I do not believe that we would. I think it is fundamentally different from the situation in the telecommunications industry where you have to deal with Telstra—if you do not deal with Telstra, you are dead; you cannot build a business. It is a fact of life.

Senator SCHACHT—Mr Meagher might agree with you on this point, I suspect.

Mr Branigan—Indeed. Clearly, in that sort of situation, for competitive reasons, you must have an arbiter as a back-up. In the case of cable re-transmission, there is no compulsion on cable to carry our signal or die.

Senator SCHACHT—On that point, Mr Branigan, why do we not therefore make the legislation ‘must carry’? In your submission, you rightly point out that in the future when pay TV gets to critical mass of several million viewers they then say, ‘We are now big enough. We will turn the free to air system off.’ So pay TV has got the whip hand—the other way around. Why do we not deal with that—I accept your concern—and say that pay TV must carry under certain conditions, have a code of practice on a number of the issues you have raised. Why do we not turn the legislation into ‘must carry’ and require them to do the following things. For example, if you say they should take the captioning off, that must be there, they must negotiate a copyright payment for the use of the intellectual property that the free to air stations have produced, et cetera. We put all of that in. But in the end they must carry it, which therefore protects you from them turning the free to air service off their cable network, their microwave or their satellite system at some stage in the future. Therefore you get the best of both worlds.

Mr Branigan—I agree that must carriers would be a huge improvement on what we have today, but I do not believe that ‘must carry’ is necessary except in certain circumstances—and the regional-metropolitan overlap areas are a good instance—and areas where the market will not work. I believe that the market will work to assure the sorts of retransmission arrangements that we are arguing for. The reason I say that is that it is simply not the case that all the power is with the commercial stations. The reason for that is, depending on which figure you believe from the ASTRA submission, there are either 500,000 or 800,000 Australian homes which already receive their free to air service via cable. They are, if you like, hostages—our hostages—in the hands of cable. We do not want to lose those people. Many of them no longer have outdoor antennas.

Senator SCHACHT—You are not suggesting that President Clinton should send an Exocet missile into the pay TV studio to get your hostages released, like he did in Afghanistan last night?

Mr Branigan—I am saying that that gives pay TV very considerable bargaining power in negotiations with us.

Senator SCHACHT—But if it is ‘must carry’ with a code of practice, you are therefore protected.

Mr Branigan—All I am suggesting is that a complicated regulatory scheme is not necessary if the market will do the job, and I believe that the market will because both sides have good negotiating positions.

Senator SCHACHT—Yes, but—I use the parallel with telecommunications—I think that is still relevant. In view of the hostility that is in the submissions for this legislation between

the two groups—ASTRA and FACTS representing the two different groups—I do not know whether you are all overplaying your hand as you beat each other over the head and accuse each other of dastardly deeds here and so on, but maybe in public policy terms, in view of the fact that there is some hostility, there ought to be an arbitrated system as a last resort to keep you both honest.

Mr McAlpine—There is a little rhetoric flying around between the two parties, but reality suggests—in all the things Tony said—that we are not denying their access to the signal. We want fair and reasonable compensation for carrying that signal. From an individual point of view, Channel 10 has already commenced negotiations with one of the parties. We believe that, if given a suitable and reasonable amount of time, sensible negotiations will transpire. We are not saying, ‘We don’t want to do business.’

Senator SCHACHT—Okay. I will just move on to another point. In your submission you put an example of a leaflet—that I think Foxtel put out—which is a matter of concern to you, that the salesmen or saleswomen from Foxtel-Optus are convincing people to pull down their outside aerials once they connect, and that you believe that this in the long run makes you totally dependent on pay TV because once the aerial goes down they get almost no picture at all.

Mr McAlpine—I would suggest that we are somewhat restricted then.

Senator SCHACHT—Yes. It was quite clear that the material you tabled in your submission said that the aerial can be removed. I suppose most people would believe that it is less unsightly to have the aerial removed. Once it is gone, it is esthetically more pleasing with the trees and roof or whatever. But, again, could the matter of the aerial staying or not be covered in a code of practice? I accept that fact that, if the aerial is pulled down forever and a day, you are then dependent on the cable deliverer getting your free to air signal into that house and, at a later stage, if they cut you off, the house is dead for you.

But I understand your concern. Again, could that be covered in a code of practice or in the legislation, that the sales people from Optus, Foxtel and others have to give fair warning to people that, if they pull the aerial down, they are no longer capable of getting the signal free to air? Is that what you are really after? On this issue you raise, is that the way to handle it? If you are going to go to a commercial negotiation, in that commercial negotiation will you say to ASTRA members, ‘Unless you leave the aerial up, we won’t give you the right to retransmit’? Is that the bottom line you are going to put?

Mr Branigan—No, I do not think so, Senator. Some stations may choose to do that. I think the concern is with the present situation of no regulation of retransmission where that gives cable television operators effectively the power to box subscribers in so that they really do not have any easy way of reversing a decision to subscribe. Our access to those cable subscribers in future is at the whim of the cable company.

Senator SCHACHT—Do you have any figures on how many aerials have been pulled down?

Mr Branigan—We have not done a house-to-house survey yet.

Mr McAlpine—No, we have not, Senator. We thought, simply as it is in their own presentation material, ‘get rid of your outside aerial’ was sufficient in its own right.

Senator SCHACHT—Mr Mockridge, would you care to respond to that one and to some of the other issues that we have now raised with FACTS?

CHAIR—And then Senator Lundy has some questions.

Mr Mockridge—If I can just make an overview point to a number of the issues raised by FACTS, ASTRA's point of view is that we are happy to accept a regulated regime to retransmit the free to air channels. A lot of the issues that have been raised go to how that regulated regime might work. The fundamental point in this bill is that it provides the free to airs with the absolute discretion to deny cable operators the ability to retransmit.

Again, some of the technical issues do not go to explain why, in a number of countries around the world like the United States and continental Europe, cable retransmission has become the absolute majority way that people receive free to air networks. So, obviously, other countries have very readily overcome these technical problems that FACTS identifies. As to some of the particular problems, closed captioning is something that we do provide. I think there was an issue where, for a period, one of our members that I am chief executive of did not provide it. We are now doing so, and we will provide the committee with details of that.

Senator SCHACHT—So no closed captioning is taken off by ASTRA members at all?

Mr Mockridge—Correct.

CHAIR—All closed captioning?

Mr Mockridge—Correct.

CHAIR—So about 15 per cent is now transmitted?

Mr Mockridge—I am not sure what 15 per cent number you are referring to.

CHAIR—About 15 per cent of the programs are captioned.

Mr Mockridge—In terms of programming.

CHAIR—You are saying that all of the captioning now is retransmitted?

Mr Mockridge—The answer is yes. We will provide you with the detail on that.

CHAIR—All of it?

Mr Mockridge—To my understanding, yes. We will provide you with that detail.

Senator SCHACHT—Does the department have any different figures or any complaints on this caption issue?

Dr Hart—No, we have not.

Senator SCHACHT—No-one has rung up or written in and complained to the minister about particularly the people who push captioning.

CHAIR—We have got them coming.

Dr Hart—The first time we became aware of it was in the submission by the Australian Caption Centre.

CHAIR—They will be here.

Mr McAlpine—They would be the only ones, if the aeriels have been taken down.

Mr Mockridge—Some of the other issues that were raised include the issue of outages in a—

Senator SCHACHT—Can Mr Mockridge just put the couple of things he wanted to say in response to my questions?

CHAIR—I still did not understand what Mr McAlpine said. I was just trying to clarify what he said.

Mr McAlpine—It was only in reference to closed captioning. If there was an issue—and there has been in the past with cable—if the people still had their free to air connection there and cable was a problem, they can still access captioning through free to air. It is another argument to say, ‘Why disconnect the free to air aerals?’

CHAIR—Yes.

Mr Branigan—Can I add a point on the ‘must carry’ issue?

Senator SCHACHT—Madam Chair, before we get a counterclaim from Mr Branigan, can we get Mr Mockridge to respond to a couple of the points I raised?

CHAIR—Yes.

Senator SCHACHT—There are a couple of things to which I want Mr Mockridge to respond about what Mr Branigan has already said.

Mr Mockridge—On the issue of outages, we do not deny that in a very small percentage of cases outages do occur. That is an absolute fraction of transmission time. Again, we can provide you with data on that.

CHAIR—How do you monitor that?

Mr Mockridge—It is constantly monitored. The system itself monitors it.

CHAIR—How?

Mr Mockridge—We have a technical means of monitoring it by having, in the master control suites, the signal received back into our transmission centres. Secondly, our business is a subscription television business, meaning that we have call centres where our subscribers will very readily tell us if there is a problem. Often when an outage problem does occur, it is due to construction activity or something like that and can be readily fixed.

CHAIR—If you identify an outage and cannot correct it, can you put in a message that says, ‘We are temporarily off the air; Foxtel apologises—it is not from the transmitter’?

Mr Mockridge—Generally an outage would take the system down in, for instance, a street because someone is building something at the end of the street and a backhoe goes through it. The subscribers will ring us up and tell us there is a problem and we will go out and fix it. That is a fact of cable transmission throughout the world, because it was infrastructure.

CHAIR—That is when the whole cover goes down—Mrs Mop sits there, she goes boom, boom, boom, and says, ‘God, Foxtel’s gone because they’ve all gone.’ The example we were given before was when a free to air channel goes out but they flick along and find the other cable stations are there.

Mr Mockridge—That example is certainly unheard of in my experience at Foxtel. I will speak to my other colleagues. I would be very surprised if an instance like that occurred.

CHAIR—So what are you saying?

Mr Mockridge—The signal would be pulled down and it would be inserted as one complete package. The cable is carrying a whole package of channels.

CHAIR—We were just told that during the Logies there was an outage of 45 minutes in one particular area—

Mr Mockridge—For one channel.

CHAIR—Yes, for one channel. People were able to go along and find that other channels were available. You are saying that you cannot understand how that happened.

Mr Mockridge—I cannot understand how that would occur.

CHAIR—Are you saying it did not happen?

Mr Mockridge—I am not saying it did not happen. But I cannot understand how it would happen.

Mr Meagher—As I understand it, that was supposedly an Optus Vision problem. I do not have any details of that. Perhaps I could investigate and report back to the committee on what, if anything, did occur in that instance.

CHAIR—Please take that on notice. Tell us whether the Optus channels were out in that area or whether just one was out. If one channel—the Logie channel—was out, why was one channel out? We need to know if that can actually happen. You are telling us you do not think it can happen. We have been told it did happen. I want to know if it happened. If it did happen, was it all channels or just the one channel?

Mr McAlpine—If I could respond to that, I have an example here. There were some communications between Network Ten and Glen Carrick from Optus where they admitted that there was a disturbance on the 10 signal only for a period of 15 minutes, that normal transmission was resumed after that and that no other channels or networks were affected.

CHAIR—Was that the Logies night?

Mr McAlpine—No, this is a separate issue. It only affected 10's transmission in isolation.

Mr Branigan—That was earlier this month.

Mr McAlpine—It was only this month.

CHAIR—Mr Mockridge, you say you cannot understand how that would happen.

Mr Mockridge—It certainly has not happened in our experience but we will follow it up. A further point I should make, though, is that over three years we at Foxtel have approached each of the broadcasters in an effort to put in landlines to make the current distribution of their channels even more secure. In each case they have frustrated us from doing that.

Senator SCHACHT—So you still take it off the airwaves?

Mr Mockridge—We take it off the airwaves.

Ms Marquard—As for the Logies complaint, our Melbourne television station, GTV, received 86 calls, which is a fairly high number of complaints to receive in one night, about that particular incident. The people who were complaining all said, 'Look, it's only a Channel 9 problem.' We have some documents which give evidence of that.

We also had a similar problem in 1996, again with Optus Vision. It related to audio problems which only affected Channel 9. The problem was that when the incoming calls came into our reception the receptionist did not realise that they were talking about transmission via cable and the people who were complaining felt that it was a Channel 9 problem. Obviously this is something which can affect ratings, and does affect reputation.

What it points to really is a principle—that is what we are talking about here—and that is control. It is all very well to say, 'We'll fix this up' or 'We'll put closed captioning on' or whatever. In general copyright law the reason you give that the property is recognised and that people are able to negotiate arrangements for their copyright is so they are able to control how it is used and be recompensed for the fact that they have created a work, and the work we are talking about here is the programming schedule. So it is more of a principle that we are concerned about, and it is articulated in these amendments.

Senator LUNDY—I have a brief question. Perhaps ASTRA and FACTS could take it on notice. It is with respect to a submission the committee has received from CIRCIT, prepared by a Mr Douglas Ross Kelso. I am interested in getting a response from both organisations with respect to the issues raised in the particular submission, particularly the fact that it suggests a ‘must carry’ provision. It also raises a series of issues for people in transmission areas where reception is not high quality, and suggests a minimal service with respect to free to air could be supplied over cable. Could you please take that on notice? I would be interested in the response of both organisations to those issues.

CHAIR—Do you want it in writing?

Senator LUNDY—Yes, if that is possible. It is a fairly short submission.

Mr Meagher—Senator, is the submission effectively saying that with a ‘must carry’ you can guarantee improved quality reception?

Senator LUNDY—That is one of the recommendations of that particular submission. I am interested in your response to it. It is raised in a context that traverses issues of distributing the signal in multidwelling units, et cetera.

Mr Meagher—We have not had the opportunity to read the submission, so we will take it on board.

CHAIR—We will make sure that both of you have a copy of the submission before you leave so that you can prepare a short written submission to the committee which Senator Lundy can examine.

Mr Mockridge—I did not have an opportunity to finish. A couple of other points were raised. One was this issue of taking down aerials. It is not the policy of any of the three pay TV operators here to remove aerials. I understand that Mr McAlpine himself believes that that has happened on his home and we will undertake to rectify that if there have been some misbehaving people. It is certainly not our policy. Clearly, some subscribers who are prepared to pay to get multichannel television see it as a benefit that they no longer have an aerial on their roof. They do not have to purchase an aerial. This is an alternative way of getting television service. They see that as a consumer benefit which goes to a key point—

Senator SCHACHT—Do the salesmen, for any of the operators, have instructions to say, when they make the sale, ‘One of the advantages of taking the free to air through the cable network is that you can get rid of your aerial?’

Mr Mockridge—In our case they do not have instructions, but I am certain that many of them would say that and people would see that as an advantage. One reason people come to us is that they do not have to buy an aerial.

Senator SCHACHT—I take the point of FACTS here: if most of the aerials are removed over a period of five years and there are a couple of million subscribers to pay TV, then under this present legislation the whip hand will shift. At the moment it is to your advantage because they will not be able to go back and get it free to air because there is no aerial left.

Mr Mockridge—I will make a couple of points in response to that. First of all, if that is a consumer decision it is the individual’s decision and—

Senator SCHACHT—But I bet your salesman does not say, ‘By the way, once the aerial goes down you will always be dependent on us.’

Mr Mockridge—I do not think that is the case, because our subscribers are generally pretty savvy people who understand that they are paying good money to buy the service. They

understand that, if they do not have an aerial, that will require them to purchase an aerial to receive a free to air service. The equivalence to keep in mind here is that, in order for our cable service to enter a home, an investment has to be made in cable technology. Similarly, for people to receive a free to air service over the air they require an aerial. Again, we are very happy to accept a 'must carry' regime which includes a requirement that, where aerials are pre-existing, they remain—presumably where the consumer does not for some reason want to take it down.

Can I quickly go to two other points that we raised earlier. The first is that Mr McAlpine raised the issue of some commercial negotiations that have taken place. I think it is worth pointing out that those discussions have been at the initiative of the pay TV operators, not at the initiative of the free to air stations. In those discussions, certainly to my knowledge, the technical issues of the type raised today by FACTS have not just been raised as an issue.

Senator SCHACHT—What is your response to that, Mr Branigan?

Ms Marquard—I would like to respond to that, because I know that in our case the initiatives actually crossed. They actually happened on the same day, from my understanding.

Mr Mockridge—With respect, Jane, that is not correct.

CHAIR—I do not want to have an argument across the table.

Mr McAlpine—I would like to respond to Tom on that point. The end result is that there were verbal discussions, and in our written submission to Foxtel and others it will detail all those concerns.

Senator SCHACHT—Mr Mockridge, would ASTRA accept that if the legislation were 'must carry' in the end there would be an arbitrator if there was a dispute that could not be settled commercially between both sides? FACTS is unhappy with the proposal that I have put. What is ASTRA's view about that?

Mr Mockridge—ASTRA's position is that we would accept a 'must carry' regime with an independent arbitrator.

Senator SCHACHT—Do you have any idea who would best fill the role of an arbitrator?

Mr Mockridge—I think our suggestion would depend upon the specific issues—either the ABA or the copyright commission. There may be a role for both.

Senator SCHACHT—Mr Branigan, I know that you do not like the idea of having an arbitrator. You think this could be settled commercially. But, if the parliament were of a mind to put an arbitrator into the legislation, do you have any view on that? Even though it is not your first option, who should be the arbitrator—the ABA or the copyright organisation?

Mr Branigan—I do not believe we do as an industry, Senator. Perhaps I could add one point on the 'must carry' issue. One of the particular reasons why we find it unattractive is that the legal advice from the department was that in a 'must carry' environment payment to underlying rights holders if required by the cable retransmitter would constitute a tax. The only way of organising this, in effect, would be to enforce the payment on the broadcaster. So we would find ourselves in the ridiculous position of paying underlying rights holders for the benefit of their receiving cable retransmission. Not surprisingly, that did not appeal to us.

Mr Lake—We do have advice from a QC, David Catterns, about that taxation issue, and his advice is contrary to what Mr Branigan has just suggested.

Mr Branigan—We had the same advice but it did not sway the department at all.

Senator SCHACHT—So what is new—two QCs have disagreed. They will both take you to the cleaners when they send you the bill.

Mr Lake—It was our bill.

Senator SCHACHT—Yes, but it was theirs too. One of them is going to end up recommending that you both go to the High Court and spend about \$3 million, and both of you lose your shirt to the lawyers. We all know that caper. Does the department or the Attorney-General's Department have a view on that advice?

Mr Creswell—We have considered this issue but we have not felt obliged to take a definitive position on this because the government has made a decision to have a consent regime rather than a 'must carry' regime. That seemed to be the fundamental decision, so we did not pursue the issue to a conclusive degree.

CHAIR—Mr Buettel, do you have a response?

Mr Buettel—We did obtain advice at one stage in relation to the question of, if we were going to develop a 'must carry' regime, whether we may have to include a separate tax bill for constitutional reasons. I think the advice was that we would, but I would really have to check that before giving any sort of definitive answer.

CHAIR—Can you take that on notice and respond?

Mr Buettel—Yes, we will.

Senator SCHACHT—Even though it might include a tax bill in the package, it is not an unusual device for government to have to do that in a whole range of regulatory matters, is it?

Mr Buettel—That is correct.

Senator SCHACHT—So it is not rocket science or theory of relativity material you have to deal with here; there is plenty of experience of where government has done this before.

Mr Buettel—Yes.

Senator SCHACHT—I want to ask Mr Branigan and Mr Mockridge about the negotiation arrangements and what I call the code of practice. Should they be written into the legislation or would it be better to have a reserve power with the regulator, that it from time to time says, 'These are the issues in the code of practice that satisfy both sides on issues of pulling people's aerials down and putting them back up and issues of outage'—that range of issues to make sure the consumer knows what is happening. Would it best be left as a last resort that the regulator could do those by public declaration, or should they be written into the legislation?

Mr Mockridge—We have not had the opportunity to think in detail as to what our regime would be because it is not the proposal before the parliament, and so that is something we would like to address. Again, this is not an issue where other countries have found it particularly difficult to come up with an effective workable arrangement. It is an issue in Australia merely because of the fact that the pay TV industry has been prevented from starting for such a long period. I am confident that there are examples throughout the world that we can utilise.

Senator SCHACHT—Any comment from FACTS?

Mr Branigan—Firstly, to the extent that there are in this legislation elements of 'must carry' or elements of permitting carriage without the consent of licensees, as in remote areas, for instance, we believe that some of these requirements should be spelt out in the legislation. We

note as an example that in the United States legislation a number of these points are spelt out. I can instance those for you, if you like.

Senator SCHACHT—Are they in the submission?

Mr Branigan—No, they are not.

Senator SCHACHT—Could you table those?

Mr Branigan—I am happy to do that.

Senator SCHACHT—Before we get to the dreaded issue of intellectual property and copyright, I want to turn to the regional issue: whether regional operators are in a single or an aggregated market and how pay TV operators would handle retransmitting. I will give you an example of which I am aware in my own state of South Australia. In the Iron Triangle, at Port Pirie you have station GDS4. As I understand it, one of the regional operators—I think it might be Austar—is providing pay TV to that area. Are they providing free to air retransmission?

Mr Porter—No, we are not.

Senator SCHACHT—So in that area there is no retransmission?

Mr Porter—No. In fact, we attempted to discuss that in that area with the owner of the station when we were trying to negotiate co-location on their tower. He was not interested in that, and because free to air reception is quite good—

Senator SCHACHT—There is not a demand for it.

Mr Porter—There was no demand.

Senator SCHACHT—If the legislation had a ‘must carry’ provision, and therefore you would have to carry the free to air signal, would you have the capacity in that regional area to provide the signal for what would be a number of free to air carriers?

Mr Porter—Right now in the analog environment we have very limited capacity with wireless spectrum. There is only so much spectrum licensed. It enables us to carry approximately 19 channels in most cases. If we were to convert that spectrum to digital use, that would certainly be something that we would pursue. There are also isolated cases where reception is not that good and, as a public service, we attempt to negotiate a retransmission agreement with a local broadcaster, for example, in Tamworth.

Senator SCHACHT—Why do you have to negotiate? You do not need to negotiate. You could do what you do in the metropolitan area: pinch the signal off the air and retransmit it.

Mr Porter—We do not actually negotiate.

Mr Mockridge—We are not legally pinching it.

Senator SCHACHT—Sorry. You are not legally pinching it; you are just taking it and retransmitting it as you are legally able to do in the city.

Mr Porter—Right. We work quite cooperatively with the free to air broadcasters in the regions. In many cases, we are co-located and pay rent for tower space. They recognise the advantages of improving the distribution of their signal in those areas.

Senator SCHACHT—So Austar does some free to air retransmission, but not in the market I have just described.

Mr Porter—Not in that market, no. The topography is not that demanding in that area.

Senator SCHACHT—The issue that the regional people raise is that—and it is not in the GDS4; it may be in Mount Gambier CSA—where you have a regional broadcaster, plus the aggregated signal coming out of western Victoria, you might only retransmit the metropolitan signal rather than the regional signal, so that people watching do not get the local news, the local footy, the local sport scores or whatever—because they are only getting Channel 9 rather than the affiliate in that area. Does ASTRA have a view about how you would handle the query that they would demand that they be retransmitted as well?

Mr Mockridge—It is ASTRA's policy that members retransmit the relevant station in the relevant licence area.

Senator SCHACHT—So it would be.

Mr Mockridge—If it was a regional operator in Victoria, it should be the regional operator that is retransmitted. It is not so much an issue for the cable operators at the moment because the cable operators are generally confined to the metropolitan areas, with the particular exception of Darwin and Cairns, to which Mr Porter can speak in a second. But the policy is to take the relevant licence area and rebroadcast it.

Senator SCHACHT—Does FACTS have any response to that? Is that how you see it operating at the moment?

Mr Branigan—Manifestly it does not operate—

CHAIR—Mr Branigan, would you come closer to the microphone.

Mr Branigan—Sorry—where Foxtel carries only the Brisbane services and not the other licensed services which are coming from New South Wales. So, effectively, only half of the licensed commercial services are carried.

Mr Mockridge—It is correct that on the Gold Coast we carry the Brisbane services. We would be quite happy to substitute the Gold Coast services if they approached us and asked us to do that—it is not a difficulty. But, again, because of the lack of commercial interaction on this issue, we have been doing it without the cooperation of the free to air broadcasters. We are very happy to do it with their cooperation. In this area, where it is an overlap area, we would be happy to substitute the goalpost.

Senator SCHACHT—It overlaps. You have got a regional broadcaster in the Gold Coast station.

Mr Mockridge—I understand that they are dual licence—

Senator SCHACHT—Are they in an aggregated market? What is it?

Mr Branigan—It is one of the few areas where there is licensed overlap. In other words, the aggregated market and the metropolitan market overlap. It is not just an accidental signal overlap; it is a licence overlap involving, I think, several hundred thousand people on the Gold Coast.

Senator SCHACHT—Do they have a choice between the Ten, Nine and Seven networks out of Brisbane—

Mr Branigan—Yes.

Senator SCHACHT—as well as the aggregated Nine, Ten and Seven—Optus—putting out their signal in the Gold Coast area?

Mr Branigan—Indeed.

CHAIR—Does that happen anywhere else? Are there any overlaps anywhere else?

Mr Branigan—The Central Coast of New South Wales.

CHAIR—Anywhere else?

Mr Branigan—I believe Perth and south-western Australia—Bunbury.

CHAIR—So there is more than just one area?

Mr Branigan—There are some quite minor overlaps elsewhere, but I think they are the only three.

Senator SCHACHT—But it is accepted in the regulatory structure that that can happen in this area?

Mr Branigan—Yes, it is. That is correct.

Senator SCHACHT—That means that, if you have a ‘must broadcast’ provision, you may well have to say that in those areas the pay TV operators will have to provide the metropolitan Brisbane signal as well as the regional signal to be fair to everybody.

Mr Branigan—Yes, the legislation tries to address that by effectively saying, ‘If you wish to carry a metropolitan service, you must carry the equivalent regional service.’

Senator SCHACHT—Mr Mockridge, is Foxtel capable of providing what would be three extra signals in the Gold Coast market?

Mr Mockridge—We would be able to do that. If we had an approach from the relevant broadcasters we would be happy to discuss it. But certainly under a ‘must carry’ regime, we would contemplate that.

Senator SCHACHT—Does the department have any view about this overlap, these unusual circumstances, being allowed to take place?

Dr Hart—The legislation does try to address the particular circumstances where there are these six overlap areas. The concern is that pay subscribers will not choose to take the regional service, and that is obviously going to undermine the viability of the regional service. So it is, if you like, an elective ‘must carry’ regime. If the pay TV service chooses to transmit a service, they must either take the regional one or, if they take the metropolitan one, also take the regional one.

Senator SCHACHT—So, in the end, it is the regional that gets first drop?

Dr Hart—That is right.

Mr Mockridge—I should point out again it is not a significant issue with our subscribers on the Gold Coast. I come back to the fact that consumers are an important consideration in our business.

Senator SCHACHT—It may not be now, but in 12 months or two years time it possibly will become an issue. If we do not get it right now, we will have to try to untangle it later on.

Mr Mockridge—Absolutely.

Senator SCHACHT—But you can live with that. In a ‘must carry’ provision, or even in the existing legislation, if you want to do the metropolitan coverage to the Gold Coast and the local people insist on regional broadcasters and the aggregated market want it as well, you could handle the extra three stations?

Mr Mockridge—From a technical point of view we do not want to give an impression we can live with the existing proposed legislation because that is, as I understand it, dual consent—we have got to get the consent of the regional broadcaster and the consent of the

metropolitan broadcaster. But the answer is yes, if there is a ‘must carry’, we would be happy to accommodate it in overlay periods.

Senator SCHACHT—Do any of your other members have a problem with perhaps operating in the regional market down at Bunbury or wherever it is in Western Australia? Is Austel operating in that market?

Mr Porter—That is not our market.

Senator SCHACHT—Mr Mockridge, those other markets which the department has identified—is it six?

Dr Hart—Yes.

Senator SCHACHT—Can you ask your members who work in them—because you are not in all of them—if they see any difficulty, if it is a ‘must carry’, that they would have to carry the regional as well as the metropolitan? Could they technically provide it?

Mr Mockridge—We will take that on board.

Mr Porter—I can tell you that, if we had a cable system with the capacity to do it, we would certainly do it.

Senator SCHACHT—But your satellite signal cannot.

Mr Porter—Our satellite system cannot because it broadcasts over the whole country and we would run afoul of copyright boundaries and things like that. So it would be technically impossible to do it from a satellite.

Senator SCHACHT—So to get you around this technical difficulty, as I would describe it, you would seek an exemption for a ‘must carry’ rule?

Mr Porter—For wireless technologies, yes, that is correct.

Senator SCHACHT—What do you think about that, Mr Branigan?

Mr Branigan—That is one of the obvious problems with a ‘must carry’ regime: it cannot be a one size fits all. In the past when there have been ‘must carry’ arrangements in the United States, it has involved a very, very complex scheme because it has had to take account of the fact that there are very small cable operations, there are wireless subscription operations and, of course, nowadays there are satellite operations. It is very, very difficult to come up with a legislative scheme which is equitable and which takes account of the huge variation in pay television systems.

Mr Porter—Could I address that, having recently emerged from that morass? The ‘must carry’ regime was quite workable. There were two regimes. One was for cable systems with under a thousand subscribers which sprang up in rural areas primarily as a way to get free to air signals to areas that were not otherwise served. ‘Must carry’ never applied to wireless in the US. In the larger areas it was quite a workable regime for the first 30 years of the cable industry. In fact, it served with great benefit to the free to air television business, as it did not have to invest extensive capital in translators and types of propagation technology because there was good take-up of the cable service to get the signal. So it was quite a simple regime which resulted in a standard copyright payment and was of great benefit to both industries and consumers.

Mr Branigan—When ‘must carry’ was reintroduced in 1992 as part of the new retransmission regime in the United States, there was a unanimous chorus of protest from the American cable industry to the effect that, if they had to carry broadcasters, they would have

to drop pay services wholesale and that this would cost them dearly, disadvantage subscribers, et cetera.

Senator SCHACHT—And did they have to?

Mr Branigan—Only to a limited extent. But they certainly did not welcome it, as Mr Porter may have been prepared to suggest.

Mr Porter—These were in certain markets; for example, the Los Angeles television market had 17 free to air signals, and cable systems at that time had capacity for anything between 35 and 54 channels. So to designate 17 of those channels to very narrow cast free to air—probably analogous to the community stations that we have here—was certainly problematic but only in certain markets.

Senator SCHACHT—I have a question about copyright payment. As I understand your submission, Mr Branigan, the view from FACTS is that you want not only a payment on copyright but also a commercial payment, a two-tiered payment. Is that correct?

Mr Branigan—No, I do not think that is entirely correct. We simply do not know what a copyright tribunal might at some stage in the future decide about copyright recompense. It may well be that broadcasters, in copyright terms, would receive very little for their compilation right, so to speak. But they might, of course, be eligible for payments for the material that they own, that they originate.

I would imagine that, with the sort of approach we favour and which is reflected in this legislation, broadcasters and pay television companies would agree on a single payment. I say 'payment', but it may not involve money. It may be some sort of recompense which is entirely money, partly money or it may not involve money at all. But that presumably would also involve some sort of a copyright waiver: they would forgo any entitlement to receive formal copyright payment. In other words, I do not think anyone envisages for a moment that cable would be required to pay twice for retransmission.

Senator SCHACHT—So you are saying that, whatever the payment was, a subpart of that, in one form or another, would deal with the copyright?

Mr Branigan—I am sure it would. I am sure that cable would insist on that as a condition for negotiating retransmission.

CHAIR—What implication does that have for the cost? Some of the arguments by people who have written or e-mailed have been that it was going to increase the cost of cable TV and put it out of the range of some of them, or they were getting it for free and would now have to pay more. What implications do you think it would have for added cost to cable TV?

Mr Branigan—I simply do not know. It obviously depends on the deals that are negotiated between broadcasters and cable operators. All I can say is that, if we look at the situation in the United States, it has not been the case that these have involved large amounts of money; it has not been the case that they have led to increases in cable subscription rates. I would not expect the situation to be significantly different here.

Mr Mockridge—If I may respond, Chair, I think Mr Branigan's comments just illustrate the fundamental problem. He has been asked to speculate on what might occur in an unregulated negotiation and he correctly points out it is difficult to predict that outcome.

Senator SCHACHT—Could you speak up a bit?

Mr Mockridge—Mr Branigan has been asked to speculate on what might occur in an unregulated negotiation and he correctly points out it is very hard to say what that might be,

which is our very point: that there is no framework in which these discussions can occur; and in that framework, and given the current relative strength of the pay TV industry in Australia as a start-up industry relative to the free to air broadcasters, which are a protected industry, an incumbent industry, we do not have much leverage against them. The outcome of that could very possibly be that a significant fee is charged for this which will leave us with the choice of either paying that and having to pass it on to our subscribers, or attempting to pass it on, or not paying it and not carrying the service.

Senator SCHACHT—Do you disagree with having to make some payment for the intellectual property of the program; that you are getting an advantage, even though it is the same market in the sense that consumers are choosing which way they receive the signal?

Mr Mockridge—We accept the argument to be paying the underlying rights holders. We would prefer a regime which ensured that it was the Australian rights holders that were compensated. We already pay very substantial rights to Hollywood studios and others. We are not particularly convinced of the need for them to have further compensation, and we think—

Senator SCHACHT—Most of that was self-inflicted—the high price you pay to Hollywood for movies—

Mr Mockridge—Absolutely.

Senator SCHACHT—I am not sure that I can be that sympathetic, Mr Mockridge.

Mr Mockridge—I was not asking for sympathy. There is a complex web of relationships there. But I think an arrangement would be silly which just passed more money on to people who were already well compensated. I think there are proposals around that we might hear from other people at this table as to how that could work.

CHAIR—You pay copyright for overseas material?

Mr Branigan—Correct.

CHAIR—Why do you think you should be quarantined from copyright for overseas material?

Mr Mockridge—No, I am saying they are already paid—

CHAIR—No, for the material that you are retransmitting?

Mr Mockridge—I am saying that both the free to airs and we already pay, and we believe it is not necessary to pay twice, which would be the effect of a regime which paid for that.

CHAIR—I might be simple but I do not understand that. You are paying copyright for something that you are transmitting on one of your cable channels. The free to airs are paying copyright for a program, X, that they are transmitting. You retransmit it. Why shouldn't you bear some of the copyright costs?

Mr Mockridge—We retransmit the free to air signal. The very term 'free to air' is the point. The signal is being provided, once the broadcaster has compiled it, as free to viewers. We are retransmitting that signal, unaltered, in its existing channel position, in order to provide a better reception to our subscribers. If our business—

CHAIR—But they are paying for it out of their advertising, aren't they?

Mr Mockridge—Their revenue is generated by advertising products.

CHAIR—They pay for that copyright out of revenue and you get it. I buy cable because of the area I live in. I am not really interested in your cable, but I desperately want to get clear free to air. I made the decision to get cable because I am going to get free to air. It seems to

me that you ride on their backs because they pay the copyright. I need you to argue more strongly that that is not the case. You have not convinced me yet.

Mr Mockridge—The first point is that if it is a bad reception area we are providing a service which they cannot otherwise get.

CHAIR—Yes, but I am paying cable to get it. Otherwise I would not pay it, so you are getting an advantage out of it.

Mr Mockridge—You are paying cable for a whole spectrum of channels, 30 to 40 plus—

CHAIR—I do not want it. I just want to watch free to air and I could not see it.

Mr Mockridge—Then, presumably, you will have an aerial and get the free to air service?

CHAIR—No. I cannot get free to air. I do not have much time to watch television. I chose to get cable so that I can see it, because people from North Sydney told us that this is what they do.

Mr Mockridge—Which is why there should be a ‘must carry’ so that you can get—

CHAIR—No—do not take me off the copyright. Everyone who buys your cable does not necessarily buy it to get cable. Some will buy it to get clearer free to air. If they are buying it to get clearer free to air, you are getting an advantage out of that. Why should you get free copyright when they pay?

Mr Mockridge—We do not argue that we are getting an advantage. The revenue—

CHAIR—Are you not getting an advantage?

Mr Mockridge—The revenue we derive from our subscribers goes to paying the programming fees and the infrastructure costs of that service.

CHAIR—Why do you retransmit it, if you do not get an advantage? Why bother?

Mr Mockridge—We retransmit it because many of our consumers like that.

CHAIR—But you just told me you did not get an advantage? Why do it? If there is no advantage, why bother? Why have the hassle of people ringing you up and saying, ‘We cannot get Channel 9. It has gone off the air.’ If there is no advantage, why do you do it? That is illogical to me.

Mr Mockridge—It is an issue of providing what subscribers expect and what consumers expect. In this case, it is a free to air signal which subscribers expect, as part of their television service, to get through a channel line-up which goes from 1 to 30 and includes 2, 7, 9, 10 and 28. The rights holders have already been compensated very well by the terrestrial broadcasters. In addition, the rights holders are being compensated by the cable companies for the programs the cable companies are providing. There is an issue about underlying rights holders, and we are happy to address that.

Senator SCHACHT—But the reason you provide the free to air service is that it encourages people to take up pay television. It adds to your marketability that you get a better picture for free to air—right? That is an advantage. You earn more revenue from it. There is no argument about that. Some people would not take pay television in North Sydney or in Mosman unless they got the free to air picture and better reception.

Mr Mockridge—I accept that point.

Senator SCHACHT—If that enhances your marketability, at least in that suburb, you get some value added as a result of putting out free to air; therefore, why should you not pay—even if it is some dreadful Hollywood movie—some basic copyright payment for that?

Mr Mockridge—I have a couple of points. First of all, I accept that basic point. There are some—a minority of subscribers—who buy the service because they do not get an adequate free to air service, and that is an incentive to them to buy it. If I confused you by using the term ‘no advantage’, I withdraw that because, clearly—in some circumstances—that will lead to a pay television subscription that does not otherwise occur. The point is that the free to air service is already paying rights holders to distribute a service free to air. We are retransmitting that service unaltered. In addition, we are prepared to pay underlying rights holders.

Senator SCHACHT—You concede the principle that you will pay underlying rights.

Mr Mockridge—Correct.

Senator SCHACHT—What I got a bit confused about is that you do not want to pay double for imported material.

Mr Mockridge—That is correct.

Senator SCHACHT—Let us put it another way. They are selling a right for a movie—channel 9 or 7 or 10 buys the movie from Hollywood. The sharks in Hollywood, those wonderful negotiators over there, would know enough about Australia to say, ‘By the way, we notice that there is an improvement in the distribution of your signal via pay television; therefore more people are watching and at a higher quality, et cetera; therefore, instead of you paying us \$100,000 for this movie, we are going to charge the free to air operators \$120,000 because we know that, in one form or another through pay TV, a broader range of people is seeing a better picture.’ So, whether they like it or not, if they want the movie they may have to pay an extra percentage. In the negotiation, if that is true—and you might not believe them—you will negotiate that a proportion of that has to be paid by you because ‘we got charged for it by those sharks in Hollywood’.

Mr Mockridge—I think the comment I was making is that while, if the parliament believed that the ‘sharks in Hollywood’ as you call them—and I have to be careful—

Senator SCHACHT—That is what you all call them privately.

Mr Mockridge—No, we treat them with respect. If the parliament decided that the ‘sharks’ in Hollywood should have some further compensation, then presumably that would be the decision. We would think it preferable that any payment to underlying rights holders went into some sort of copyright pool that could be used for Australian production or something like that.

Senator SCHACHT—Okay. But I am talking about a commercial level outside our control where the movie goes first to free to air before it goes to pay TV, as I understand it. Which way does it go? Is it pay TV first and then free to air?

Mr Mockridge—That is correct.

Senator SCHACHT—Even so, they may argue at a commercial level that the rights will be more because they know that a bigger range of audience is getting a better picture through pay TV—they will use any excuse to increase their income.

Mr Mockridge—I do not believe that it occurs that way overseas, so I do not think there is a reason to expect that it will here.

Mr Meagher—In any event, you have yourself given the rationale that the studios could argue on a commercial basis for the increase because the free to air broadcaster gets a benefit through improved reception, greater dissemination and greater advertising revenue—

Senator SCHACHT—And they should wear it.

Mr Meagher—The rationale for the increase is that there is a benefit to the broadcaster.

Senator SCHACHT—Forget about Hollywood—

CHAIR—Let's see what Screenrights has to say about that.

Senator SCHACHT—And also what the legal eagle down at copyright says about this.

Mr Lake—I am representing Screenrights, which is a collecting society authorised by the Attorney-General. I am also representing the retransmission coalition which includes all the underlying rights holders and creators, including the Australian Film Commission, the Screen Producers Association, the Writers Guild, and the Screen Directors Association. We have put the organisations that we are representing today in our submission. I think there may be some confusion in the conversation about copyright in terms of copyright for the broadcast signal or copyright for the underlying rights holders.

Senator SCHACHT—We certainly concede that dealing with copyright is like standing in quicksand upside down, isn't it?

Mr Lake—We are talking about people's rights and, with retransmission, we are talking about an unauthorised third party use of someone else's rights. The actual process of retransmission is that unauthorised third party use of someone else's rights. It is a separate use, and that is recognised under the Berne convention. That is what we will be seeking compensation for within the statutory licence, which will be dealt with should the copyright—

CHAIR—What you are arguing is that you should pay all over again because it is now another market. Is that what you are saying?

Mr Lake—That is right. We are not making any comment on any of the broadcasting issues relating to signal and payment for signal. We are merely concerned with the establishment, as the government has flagged, of a statutory licence for retransmission for underlying rights holders, which will be dealt with when section 199(4) of the Copyright Act is repealed.

Senator SCHACHT—Mr Lake, I do not want to get into a long philosophical argument about copyright but, in this case, the same consumer is choosing whether they watch the signal coming via the pay TV infrastructure or the free to air infrastructure. It is exactly the same signal, once we agree to all of that. There is no change, no deviation, from the signal. The consumer chooses to press a button and watch it via the pay TV subscription or to press another button and watch it directly over Channel 9 through the airwaves, if the aerial is still up, et cetera. Either way, they get exactly the same signal. There is no argument, theoretically, in increasing the audience. What is the justification to say there is an extra copyright to be paid when all the consumer is doing is choosing which infrastructure provides them with exactly the same content?

CHAIR—I would like to add to the question and say, 'Or, if I do not choose because'—

Mr Lake—Sure, stack it up.

CHAIR—I will stack it up. If I do choose—because the reception via free to air is so poor that I choose to watch it over cable—I actually have to pay, in essence, copyright twice because I am paying for the one I cannot see and I am paying for the one I can see. Do you see what I am saying?

Mr Lake—Yes.

CHAIR—I think that adds to Senator Schacht's question.

Mr Lake—The Berne convention certainly recognises that it is an additional use. So in terms of the copyright owner's perspective—

Senator SCHACHT—Are you telling me that the Berne convention has already dealt with this issue of the pay TV retransmission of free to air as the same signal as an additional right to be paid?

Mr Lake—Yes.

Senator SCHACHT—Out of curiosity, when did the Berne convention—which we are signatories to—and all the copyright lawyers representing governments get together to decide that?

Mr Brennan—I do not exactly know the time. It is article 11*bis*, which is the relevant article. I could not answer exactly when that was introduced to the Berne convention. It may have been in 1971.

Senator SCHACHT—For pay TV?

Mr Brennan—Yes. Do you want me to read the article out?

Senator SCHACHT—For pay TV for retransmission of exactly the same signal in 1971?

Mr Brennan—Yes.

Senator SCHACHT—What we are now describing—

CHAIR—Does Attorney-General's have a comment to make on that? Do you need the time to study the Berne convention?

Ms Hawkins—No, I do not need time to study the Berne convention. I have studied it adequately in the past.

CHAIR—Ms Hawkins, can you give us your view of it?

Ms Hawkins—I think I can clarify what is going on here, Senator. In answer to your question, the Berne convention does not actually refer to cable retransmission by pay TV operators of free to air broadcasts. What the Berne convention does is give copyright owners, in underlying works, the right to wireless broadcasting and, effectively, the cable transmission of their works—article 11*bis*(1) of the Berne convention.

Then there is a second provision in that part of the convention which says that it is up to contracting parties to reduce that exclusive right to a right to remuneration if they so choose. So what it means is that, under the Berne convention, effectively pay TV operators would be able to retransmit broadcasts, including underlying rights holders, subject to payment of remuneration to the underlying rights holders.

Senator SCHACHT—But does the Berne convention specifically mention retransmission in article 11?

Mr Brennan—I could read out the provision. It is quite short. Article 11*bis* states:

- (1) Authors of literary and artistic works shall enjoy the exclusive right of authorising:
 - (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one;

It is fairly specific.

Senator SCHACHT—Mr Mockridge, what do you say to that? Game, set, match.

Mr Mockridge—I do not claim particular expertise. I will defer to Mr Meagher.

Mr Meagher—Senator, I think the point is that we have already said that we would accept a payment to underlying rights holders in accordance with that principle. As Ms Hawkins said, that would also conform to your suggestion of a 'must carry' because it is possible to enact a scheme—I think I am right in saying this—that would permit a statutory licensing

arrangement, provided there was a right of remuneration. We accept the principle of the right of remuneration to underlying rights holders. Then we say that is not inconsistent with sitting alongside a 'must carry' arrangement for the broadcast right, which necessarily then entails a statutory licence for the underlying right.

CHAIR—But you do not think you should have to pay a portion of any other copyright that is being paid by the free to airs?

Mr Meagher—We would be paying a licence fee for our use and the Copyright Tribunal would determine what that was.

CHAIR—But you said for Australian before—

Mr Meagher—I do not think Mr Mockridge was suggesting that. As a matter of policy, the government might like to consider whether there might be some variation on those themes, but that is not the fundamental point we are making.

CHAIR—But you have shifted a bit, because I thought I heard Mr Mockridge say very clearly at the beginning—and I do not want to take words out of your mouth, Mr Mockridge, because that is unhygienic, and you can correct me if I am wrong—that it would be for Australian written material and for authors in Australia.

Mr Mockridge—I was expressing a preference.

CHAIR—It was a preference.

Senator SCHACHT—You do not want to pay the sharks in Hollywood twice. That is fine.

Mr Mockridge—Yes. I think most people in this room would prefer a regime which left the money in Australia for developing Australian intellectual property rather than it going to the underlying rights holders in the United States or the United Kingdom. But, if the parliament in its wisdom suggests otherwise, we will obviously live with that.

CHAIR—You are saying that you do not want to pay overseas people twice.

Mr Mockridge—It is a preference.

CHAIR—I do not understand why—

Mr Mockridge—I am sorry. Obviously, I have confused the point. We accept that there should be a fee for the underlying rights holders—

CHAIR—You would like Australian, but you are not too fussed about it.

Mr Mockridge—May I summarise and attempt to draw it out?

CHAIR—I just want to get it clear—

Mr Mockridge—That is what I was attempting to do.

CHAIR—because it keeps shifting on me.

Mr Mockridge—I am not trying to shift on you, with respect, Madam Chair. I am saying that we accept the principle that there should be a fee on underlying rights holders. Some of those underlying rights holders will reside in Australia; some will reside overseas. I expressed a preference that that money be allocated to the Australian underlying rights holders but, if a regime dictated that it go as well to the overseas, we would absolutely live with that.

Senator SCHACHT—Mr Branigan, do you expect that the fee for intellectual property, for copyright, will be negotiated as a flat fee, so it could be \$1 million a year for the retransmission right to cover intellectual property? If that is done, do you expect that, when you buy property to show free to air—such as a movie from Hollywood—you would have

to pay them extra, because you would be getting some payment in a broad lump sum per annum for the intellectual property? Or do you expect the intellectual property will be paid per program?

Mr Branigan—Ideally, we should be looking at two quite separate containers here—one of which is the copyright, as such, for retransmission. That is to be determined by the Copyright Tribunal.

Senator SCHACHT—So that is one payment.

Mr Branigan—Yes. We would sincerely hope that would be paid by the beneficiary—namely, the retransmitter—rather than the broadcaster.

Senator SCHACHT—And you do not object to that, Mr Mockridge?

Mr Mockridge—As a matter of principle, no.

Senator SCHACHT—And they would determine what it is?

Mr Branigan—Yes. We obviously do not know whether they would decide on a large amount or, as has happened in the United States, on a zero amount. Effectively, retransmission within a licence area is zero rated for copyright purposes.

Senator SCHACHT—Can I ask the legal eagles this: if the copyright organisation in Australia said, 'It's zero rated. You don't have to pay a copyright fee for the right of retransmission,' does that stand up under the Berne convention?

Mr Creswell—I will ask Ms Hawkins to fill in the details but, as a matter of general principle, copyright is a piece of private property. If the copyright owner for whatever reason chooses not to claim payment for it, that is their right. There is no convention obligation that payment must be made if it is not being demanded. I hope I have answered that particular question. If I have not, then please tell me.

Senator SCHACHT—I am just trying to work out a practical arrangement. Mr Branigan has suggested that the free to airs would accept the copyright organisation setting whatever the fee may be for the copyright side of the retransmission. Whatever fee it is, the money goes into the pot and is redistributed, I presume, to the people who have the copyright. Do I have that wrong?

Mr McAlpine—I believe that is right.

Mr Creswell—There are a couple of different copyrights concerned here. First of all, there is the copyright in the broadcast signal itself in which FACTS has the proprietorial interest. Then there is the copyright in the underlying works. That is where Mr Lake's organisation comes in. My understanding is that in respect of retransmission of free to air broadcasts the cable service provider will be dealing with Mr Lake's organisation in regard to whatever remuneration is payable for the underlying—

Senator SCHACHT—So there are in fact two payments on copyright. There is one for the general right of copyright from the free to airs, and the second negotiation on copyright is with Mr Lake's organisation for the individual copyright holders—the producer of the movie.

Mr Creswell—That is right.

Senator SCHACHT—Is that how you understand it, Mr Mockridge?

Mr Meagher—The distinction has to be drawn between the broadcast right—and that is the Broadcasting Services Act question, I think, broadly speaking, which is the 'must carry' or consent regime on that front—and a second question of the underlying rights holders' interests, which are the different forms of copyright. In part, the very complexity of this is

part of the reason we think that this discussion is premature—because we do not know what that second limb is going to look like. We have not seen the Copyright Act amendments; we do not know where that is ending up. So we cannot tell you definitively how this sort of stuff is going to play out and what our obligations and rights and what the copyright holders' rights and obligations—

Senator SCHACHT—Mr Lake, what do you think they are, from the perspective of who you represent? There is a underlying right that will be paid to the free to airs—whatever that may be—determined by the Copyright Tribunal and, on top of that, you will go along on behalf of your screenwriter, actor, producer of whatever the program is and say, 'On top of that, we need another \$500, \$1000, or \$5 million.' Is that correct?

Mr Lake—In terms of the underlying rights holders, if the statutory licence is created, that will cover all of the underlying rights holders. One of the elegant aspects of a statutory licence is that it covers all of the class of underlying rights holders available. So the answer is that if we cannot reach an agreement with the pay TV operators—as we understand it and as Bruce Meagher has just said; we are at a disadvantage because we do not have the Copyright Act in front of us—if we cannot reach an agreement as to price, then the tribunal will be able to determine a price, I understand although I am not sure, with regard to concepts of equitable remuneration. So if all falls out with the negotiations, the pay TV operators are able to go to the tribunal and say, 'This is not equitable for these reasons.' In terms of the payment for the broadcast signal, we have no role whatsoever. The only thing we are interested in is the underlying rights of the people who make the programs.

Senator SCHACHT—But that means 'per program'. If the basic broadcast copyright is agreed between the free to airs and the pay TV people—whatever the figure is—will you or your producer, on behalf of the list of people you represent in, say, an Australian movie which is retransmitted, then say, 'Now it has been retransmitted, we should get an extra \$5,000 in addition to what we have already received. Whatever long and tortuous rights are held for that movie, we now deserve to have another \$5,000, because the free to air is being retransmitted by pay TV?' Will your members expect to get that service if they want it?

Ms Marquard—Before Mr Lake answers, I wonder if I could clear up a confusion that has arisen here about the copyright. If I can explain it this way, what we are dealing with here are two completely separate sets of copyright. The set of copyright that we are interested in is the copyright in the broadcast signal. The copyright in that broadcast signal is not the copyright in individual programs which make up that signal.

Senator SCHACHT—I understand that.

Ms Marquard—It is the creativity which has joined those programs together into an interesting schedule. That is the creative process which is being rewarded.

Senator SCHACHT—That is the broadcast copyright?

Ms Marquard—That is the broadcast copyright which we say we should be recompensed for when it is retransmitted by pay. It is completely and utterly separate to the copyright which underlying rights holders, which are the script writers, producers and everybody else, are claiming in each individual program which is being transmitted.

Senator SCHACHT—I had roughly got that right about 10 minutes ago. You have reached commercial agreement on broadcast copyright. You have negotiated sensibly and a broadcast copyright is being paid by the pay TV people and they have conceded that point. They

understand that they should pay a broadcast copyright. Is that correct, Mr Mockridge? You have agreed that you should pay a broadcast copyright?

Mr Branigan—No.

Mr Mockridge—That is not correct, no; underlying rights holders.

Mr Meagher—You must remember that the broadcasters would receive some payment under that to the extent that they held underlying rights.

Mr Branigan—Maybe I can help by using Mr Creswell's useful clarification. Mr Creswell talked about a proprietorial right. I think that is what Jane was referring to.

Senator SCHACHT—What I have just called a broadcast copyright?

Mr Branigan—Perhaps it is clearer if we talk about a proprietorial right, which is broader than copyright, on the one hand, and then the specifically recognised copyrights of underlying rights holders, in other words the people who own the individual programs.

What we are saying is that we should be able to negotiate the proprietorial right with cable and the issue of strictly defined copyright is a matter for Mr Lake and, when those negotiations inevitably fail, the Copyright Tribunal.

Senator SCHACHT—Is that the underlying right?

Mr Branigan—Yes.

Senator SCHACHT—Mr Lake will argue that ASTRA are willing to pay the underlying right as a lump sum on an individual basis direct to the people who hold the underlying right; is that correct?

Mr Mockridge—Correct.

Ms Richards—Subject to negotiation.

Senator SCHACHT—And, if that negotiation is unsuccessful, can you go to the Copyright Tribunal and have it resolved?

Mr Lake—That is right. If I can just clarify that?

Senator SCHACHT—But what the free to airs are asking is that, irrespective of the underlying rights, you want what Mr Branigan has described as a proprietorial right to a signal which you will negotiate direct. If you cannot reach agreement under the present legislation, you will withdraw the right for retransmission; correct?

Mr Branigan—Correct.

CHAIR—Can I ask you a question? You get a commercial advantage by cable or pay TV retransmitting your signal into an area where people do not get good transmission. Would that be taken into consideration in terms of proprietorial copyright because you are getting a commercial advantage? It is not that all the advantage is to pay TV; there is a mutual advantage.

Mr Branigan—In that sort of situation where there were problems in getting a signal throughout the licence area, that may well be the case. I think the explanatory memorandum suggests indeed that in some cases the carriage of the signal might be the remuneration to the broadcaster. Certainly, that is the way—as I understand it—the ABC and SBS are approaching this, simply as a way of extending the reach of their signals.

In our case, we believe that there are very few viewers in licence areas who do not receive a commercial signal already. So the commercial benefit of retransmission is difficult to discern, frankly. There may be some very marginal benefit, but it is not significant.

Senator SCHACHT—Can you tell me anywhere in the world where a proprietary right is paid separately from the underlying right?

Mr Branigan—Yes, in the United States under the retransmission consent section of the cable act.

Senator SCHACHT—Even under ‘must broadcast’?

Mr Branigan—No. There are two possibilities for broadcasters. Broadcasters can opt either to negotiate with cable, and that is called retransmission consent, and that is a no guarantees negotiation. If they cannot reach agreement on carriage, then it is all bets off. Or, if they are not confident about the outcome, they can opt for ‘must carry’. They can tell the cable company, ‘You must carry my signal’ and the cable company must do it in ways that are specified in the cable act.

But, if they pursue the retransmission consent approach, then it is market negotiations. That could conceivably end up with broadcasters having to pay cable for carriage. More normally it ends up with some sort of market agreement which may involve money or other considerations.

Senator SCHACHT—Do you know of any example where there is a separation and an underlying right or a proprietary right is paid?

Mr Mockridge—Not other than the recent example in the United States which Mr Porter will provide some perspective on.

Mr Porter—The fundamental difference between here and the US is that the US operated under a ‘must carry’ copyright regime for the first 35 years of the cable television industry to the benefit of broadcasters, the cable industry and consumers. I do not remember the exact date when the ‘must carry’ or ‘must pay’ or ‘must negotiate’ regime was re-implemented in the revision of the telecommunications act. Negotiations did commence. The problem is that at that point the cable industry was 65 per cent penetrated in the US market. So there was a legitimate market; it was a legitimate opportunity for cable operators to make a choice relative to these negotiations.

In Australia we are dealing with a nascent industry that has spent billions of dollars deploying state-of-the-art infrastructure and will not get a return on that infrastructure for many years.

Senator SCHACHT—That is not our problem; that is yours. I have to say that that is your problem; it is not our problem.

Mr Porter—My point is that there is no market. With only 15 per cent penetration the free to airs have the oligopoly market power over a nascent emerging industry as an encumbrance, so legitimate negotiations cannot be conducted in that situation.

Mr Meagher—You asked for an analogy with the United States. If we were to take the conditions that exist in Australia now and go back to that time in the United States, you would find a ‘must carry’ regime. You would not find a ‘must carry’ consent alternative.

Senator SCHACHT—Does the present draft legislation take account of the fact that there are two rights at stake here? One of them is the underlying right, which Mr Lake and Mr Brennan are out there fighting for. Pay TV has accepted that they have to pay the underlying right. Does the legislation separate the underlying right from what Mr Branigan has described as a proprietary right of the signal itself and the free to airs?

Dr Hart—Yes, it does and the broadcasting right is principally a matter for the Broadcasting Services Act. The underlying rights issue is principally dealt with through the Copyright Act.

Senator SCHACHT—Under the present legislation, whatever that right is, the way it is drafted it will be whatever the free to airs decide it is because, if pay TV does not agree and wanted to be nasty about it, they could stop the broadcast. Is that right? They could stop the retransmission.

Dr Hart—It is based on a consent regime. That is correct. The idea is that, if you give somebody a consent with one hand, to take it away with another has a certain illogicality to it. At the same time, there are protections built into the legislation for particularly vulnerable areas such as remote areas and so on. But, for the general consent regime, that is true.

Senator SCHACHT—In the balance of all of this, if there is going to be a proprietorial right, I cannot see at the moment how the negotiation is even-handed because one side has got the drop to say ‘If we withdraw our consent, you are off the air, so therefore what we charge you, what we think you should pay, you have to pay.’ I think that in another 10 or 15 years it might all be on ASTRA’s side because of the growth of pay TV, and if they have taken all the aerals down they have got a different advantage. I accept that as well. But who would be a reasonable arbitrator for the proprietorial right—we know what it is for underlying right—if there was going to be in the legislation an arbitrator to force the outcome for a proprietorial right if they could not agree?

Ms Richards—There is no such arbitrator within the current legislation for that situation, except in the particular area where there is the ‘must consent’ and the ‘must carry’ regime for particular—

Senator SCHACHT—I know that, but who should be arbitrating the proprietary right? Have you got a suggestion?

Ms Richards—We have suggested the Copyright Tribunal in our submission.

Senator SCHACHT—I know that FACTS does not want to have a tribunal in any form, but if you had to live with one which would you suggest?

Mr McAlpine—We would prefer to come back to you on that if we could. Because we are insisting on the other approach, we really have to give that due consideration.

Senator SCHACHT—Would you make this committee the arbitrator? It would be a useful process, would it not?

Mr McAlpine—I am sure.

Senator SCHACHT—So you want to come back on that, Mr McAlpine.

Mr McAlpine—We would prefer that, yes. Thank you.

Senator SCHACHT—Do the legal eagles from Attorney-General’s have a view about a suitable body to handle that issue—other than you, of course?

CHAIR—Senator, does it take away the concept of ‘consent’ if you then have to put in an application?

Ms Hawkins—In answering that question, I might just make a point of clarification. That is, it is quite accurate to say that the broadcasting regulatory policy issues are dealt with in the legislation that is before the committee at the moment and that the copyright issues will be dealt with in a forthcoming copyright amendment bill, but it is not entirely accurate to say that it will only be underlying rights holders who are dealt with in the forthcoming copyright bill. To clarify: in the forthcoming copyright bill, broadcasters will actually get an exclusive

right of communication to the public. That entails both wireless and cable transmissions, so there will be an exclusive right provided to broadcasters under the forthcoming digital agenda copyright legislation.

Secondly, there will be a statutory licence for pay TV operators to retransmit free to air broadcasts without seeking the permission of the underlying rights holders in those broadcasts. So there will actually be a two-pronged approach in the copyright legislation.

Senator SCHACHT—That actually made me feel a bit more confused.

Mr Meagher—From our point of view, the point of that is that there is the possibility that—assuming the bill currently before us goes through—we could end up paying the free to air broadcasters three times: firstly, to get a consent under the Broadcasting Services Act; secondly, to pay for the broadcast right recognised in the Copyright Act; and, thirdly—assuming what we think the regime in copyright will be ends up being the case—to the extent that they are underlying rights holders and hold rights in programming, again under the Copyright Act. So the layers of payment there are quite complicated.

Mr Branigan—A poor negotiator may well end up in that situation. I would have thought that any half-smart commercial lawyer would ensure that the other party agreed to waive all future rights.

Senator SCHACHT—Mr Branigan, you are right about that—there are poor negotiators. Knowing where you are both coming from, you will have teams of legal eagles well armed with baseball bats, et cetera, to take it on. But, if the law is drafted to give one side of the negotiation or the other an advantage—no matter how good your QC is with a baseball bat—they have got a real advantage in the negotiation. And that is on either side of the argument.

Mr Branigan—It remains to be seen how substantial the copyright amounts are likely to be.

Senator SCHACHT—The underlying ones?

Mr Branigan—The underlying copyright amounts—those that will either be decided by negotiation between Mr Lake's organisation and cable companies or which will go to the Copyright Tribunal. Clearly the Copyright Tribunal would take into account what broadcasters have already paid underlying rights holders for the primary use of that signal throughout the licence area. So the amounts that are paid for this secondary use, so to speak, are likely to be relatively modest, I would suggest.

Senator SCHACHT—Mr Lake, if there were a proprietary right paid for whatever reason and under whatever conditions, would your organisation then say to the people with the proprietary right, which are the free to airs, 'Some of that has to come back to our members as an underlying right'?

Mr Lake—No. They are two different rights, two different ball games. I wanted to pick up on one point which Tony Branigan made about retransmission within an area and a nil value. The latest report of the US copyright office on this particular issue says:

It is a common belief that carriage of local signals by cable systems is on a royalty free basis. This is a fiction . . .

Mr Branigan—It is not royalty free; it is zero rated—like GST.

Senator SCHACHT—Say that again.

Mr Branigan—It is not royalty free; it is simply that the value is rated at zero. It is accepted, but—

Mr Lake—I will continue on with the quote. It says:

This is a fiction, however, for the statute does provide for a minimum copyright royalty fee to be paid by every cable system, whether or not it carries any distant signals.

Mr Branigan—And that, I think, is \$550 a year regardless of the size of the system. So it is not quite zero rated; I apologise.

Senator SCHACHT—What does that mean, Mr Lake? Are you ahead on points? I am confused, as usual.

Mr Lake—I would never say that.

Dr Hart—Perhaps I can help. The issue is that the US system is principally designed to address outside area retransmission and so in that sense the carriage of the local signal is seen as incidental; it is an add-on to the carriage of the distant signal, if you like. That is why, where they also carry the local signal as well as the distant signal, it is effectively, as Mr Branigan says, zero rated, although there is also a provision, as Mr Lake says, to actually charge. There is provision to recognise charging for the local signal; in practice it is very small.

Senator SCHACHT—What did you call it—long distance?

Dr Hart—The signal is from outside the local service area. The regime that we are talking about today is principally dealing with carriage of signals within the licence area. The US system is principally about carrying distant signals from outside the licence area.

Senator SCHACHT—Will that affect the regional operators? Is that an example of what we have with the Gold Coast operation?

Dr Hart—No, that is a separate thing again; that is an overlap situation.

Senator SCHACHT—So that issue is not really germane to our discussion today. That issue that Mr Lake and Mr Branigan have just argued over has only created confusion for us.

Dr Hart—There is an argument about whether there is a ‘new use’ or not. In copyright terms there is certainly a ‘new use’. That, I think, is what Mr Lake is suggesting.

Mr Branigan—But as to how that use is valued, the American experience suggests that an arbitrator—

Senator SCHACHT—There was an arbitrator?

Mr Branigan—I think it is the equivalent, in very rough terms, of the Copyright Tribunal here.

Senator SCHACHT—So the tribunal in America set it at a very small amount of money, if any.

Mr Branigan—Yes.

Senator SCHACHT—Again, it leads, in one form or another, to an argument that there ought to be an arbitrator on these issues.

Mr Branigan—We are dealing here with pure copyright.

Senator SCHACHT—But isn’t a proprietary right a copyright issue, Mr Branigan.

Mr Branigan—It is broader than a copyright issue. It recognises the skills—

Senator SCHACHT—You say that proprietary right is not just purely copyright, but surely it gets its justification and its clout from being considered a copyright issue.

Mr Branigan—It is broader than that. There is a limited pure copyright there, if you like, in the sense that some compilation right is accepted.

Senator SCHACHT—But, if it is not in the Copyright Act, where else do you get the standing for it? Under common law?

Mr Branigan—The Broadcasting Services Act, which gives broadcasters control over reuse of their signal, except in the case of this cable exception.

Senator SCHACHT—I see. In that case, you are saying the parliament can decide what it means, the proprietary right, if it is the parliament's act.

Mr Branigan—Parliament has given broadcasters that right, with this one exception. The new legislation extends that across the board.

Senator SCHACHT—So it is the Broadcasting Services Act power.

Mr Branigan—Indeed.

Senator SCHACHT—So you are arguing that the proprietary right, though it has an element of copyright, is an issue because of the peculiar nature of broadcasting.

Mr Branigan—It is a communications right.

CHAIR—So if I video it and use it for other purposes—to run a fundraising evening using your material—there are copyright rules about the fact that you have broadcast over free to air, and I am not permitted to do that.

Mr Branigan—The main copyright issue arises, in that instance, in relation to the underlying rights holders, the people who own the movie.

CHAIR—Not the proprietorial right.

Mr Branigan—Rather than the broadcaster.

CHAIR—But you are saying that the putting together, the timing, everything else constitutes a whole, a gestalt, of your service.

Mr Branigan—The investment in the service.

CHAIR—Yes.

Mr McAlpine—It is also the brand, Senator. The networks have spent 30 years constructing a business and a brand and you cannot ignore that there is value in our business and our brand. That has not been mentioned here. People are deciding to 'pirate' our brand, with no conversation, no discussion, no compensation. In that instance, our brand has some proprietary value.

CHAIR—Yes, but the other thing is that you are not able to broadcast free to air and you have particular benefits that you get because you are free to air—we saw that in the digital TV debate. My memory has not gone so badly that I cannot remember that debate. You claimed some advantages there—that you had served the community for 30 years, et cetera—and our majority report agreed with that, in essence. One of the things is that we expect you to try to be as far reaching as possible—although you cannot because of topography and so on. So the cables are doing you a favour in the sense that they can get to places you cannot get to or you choose not to get to. Do you always put up transmitters where you could? I do not know. So there is a quid pro quo, to a point.

The problem I see is: how do you make sure that you get your recognition—whether that is also financial—and also how do you get guarantees that the transmission will be at the standard which you think it ought to be? Also, it could mean that people who are in an area

where they cannot get it will pay twice to get it. That is the problem I have, that somebody who happens to live in a hilly area cannot get free to air, but you get advantages in other ways because you are free to air, because you are a community service, you have been doing it for 30 years, whatever else.

Mr McAlpine—On the issue of signal and reception, if you take the markets of Brisbane, Perth, Melbourne and Adelaide out of that equation, I do not think you will find our transmission is of concern. There are areas, certainly in the Sydney market, where we have a problem. But I would say that, out of our 98 per cent penetration, 97 per cent of that penetration does not have a reception problem, that is, a problem with the broadcaster. The individual may have a problem with his antenna being 30 years old, but, with our penetration in those areas, I would put it as close as 97 per cent would not have a problem with reception.

CHAIR—Mr McAlpine, you go down and try to get reception in Tuross Head. Do you know where Tuross Head is?

Mr McAlpine—No, I do not.

CHAIR—It is down on the south coast of New South Wales. You have to put an aerial up to billyo at some places there to get transmission.

Mr McAlpine—Is that in terms of the regional signal, getting their transmission signal?

CHAIR—It is in terms of getting a signal—I do not care. Try to watch television in Tuross Head and, if you have a reasonable sized aerial, you have great difficulty. There are pockets all around the place, but let us not argue about that. I doubt your penetration rate. Some people will tolerate fairly second-rate transmission just to watch it. They will put up with it being fuzzy or ghosting, or whatever else, and they will live with it.

Senator TIERNEY—Is that an accurate figure, Mr McAlpine? You said 97 out of 98 per cent.

Mr McAlpine—It would be very high. It would be over the 90 per cent mark.

Mr Branigan—Mr McAlpine is talking about the metropolitan markets other than Sydney, I think.

Mr McAlpine—Yes.

CHAIR—I am talking about overall, full stop, over the whole of Australia.

Mr McAlpine—I cannot speak for the regions.

CHAIR—What I am saying is that, as cable expands and rolls out, it would be an advantage to you. How do we make sure that you do not put the bar so high that cable cannot jump over it, but that they are not actually using something that you really own. That is the argument, is it not?

Senator SCHACHT—It is the balance.

Mr Branigan—We accept that there are potential mutual benefits. That is why I am confident that market negotiations will work, because it will differ from one area to another. You have instanced some particular problems on the south coast of New South Wales. The likelihood is that there will never be a commercial cable system in that area. That is, of course, where the self-help provisions come in. It is a matter of fact that most of the self-help systems around the country—probably over 95 per cent of them—are outside the capital cities. They are in regional areas where you do have pockets of people who cannot receive an off-air signal. That is where these come into their own.

On the general point, it may well be that in some cases the benefits of cable to broadcasters are considerable and that broadcasters would make their signal available at no cost without any quid pro quo. In other cases the benefits to broadcasters may be far less obvious and other arrangements may be worked out. That is one of the reasons why we believe an arbitrator would not be appropriate, because there would be a mass of different arrangements which will reflect the particular circumstances in particular markets. We think the commercial negotiations are a perfectly adequate way of progressing those negotiations.

Senator SCHACHT—The issue of whether you have a proprietary right is a grey area. There is a good argument about it but I have to say that if there is then you would have great trouble convincing me that it should purely be left to a commercial negotiation because the imbalance in a commercial negotiation is too one-way. Which ever way the balance is, if people know that the loser can go to an arbitrator and take a chance of getting a better outcome, it means that people will be sensible in getting a commercial outcome.

I think that the record here cannot compare with telecommunications. If we did not have the arbitrator as a last resort through, first of all, Austel, and now the ACCC, there would be mayhem in the telecommunications area about getting any commercial arrangement. The fact that they both know that they cannot take a risk of going to the independent arbitrator means they reach a sensible commercial arrangement.

Mr Meagher—The other very important point on that, of course, is that if you have a ‘must carry’ arrangement with an arbitrated outcome and at the end of the day someone is not satisfied—either the broadcasters or the pay TV industry because they did not get things quite the way they wanted—under the current arrangement, if things go wrong, the consequence falls on the consumer and the consumer loses a signal.

We are saying let us make sure the consumer benefit is protected and we are happy then to talk about the way that a ‘must carry’ regime would work. For example, different to many other copyright arrangements where it is a simple matter of a monetary remuneration, we would argue that channel placement and making sure of signal quality and all the other things are valid considerations. We can talk about that and we can argue about that, but what we do not want to see at the moment is a situation where the end game is to pull the plug.

Senator SCHACHT—Whatever the outcome, whether it is the underlying right or the proprietary right, do any of the people around the table have any objection to the payment being a public document?

Mr Branigan—I would have thought that, if the approach that we favour and the approach that is reflected in the legislation were to carry through, it would take the form of commercial negotiations, and the outcomes of commercial negotiations are rarely in the form of public documents.

Mr Mockridge—As a matter of principle, if it was a properly structured regulatory arrangement, for instance, the Copyright Tribunal making a decision, we would not object to that being public.

Senator SCHACHT—Because the proprietary right issue is based on the value created by the Broadcasting Services Act, in part, maybe at some stage in the future a government might say that, as that proprietary right value is established by the Broadcasting Services Act legislation, some of that value should go to the public.

Mr Branigan—It does already, indeed, through television licence fees.

Senator SCHACHT—I know, but you know what treasuries and finance departments are like, Mr Branigan—they are always looking at ways of increasing revenue. I am not automatically one of their devotees, but, if it was held under the Broadcasting Services Act, they might say that, as that right was established by the Broadcasting Services Act, 10 per cent of the payment should go into consolidated revenue. That is a possibility, isn't it?

Mr Branigan—Never exclude the possibility, Senator.

Senator SCHACHT—Has the department thought about currying favour with Finance by suggesting this new source of revenue?

Dr Hart—No, Senator.

Senator SCHACHT—I am sure that Finance has probably heard about this already and will send you a missive.

Ms Marquard—Senator, in terms of what you have been saying about the bill being weighed in our favour, I really think we should not underestimate realistically what is in it for us. If we were to inconvenience that fairly substantial number of subscribers, that is not going to be a sensible decision for us to make. I think everybody involved in the free to air industry understands that what they want to do out of this process is reach agreement with pay television, whatever that agreement may be, so this idea that there is a problem with the balance is not quite accurate. As well, the scheme has provision for a review of the way the provisions are operating after, I think, two years. That review could serve to make sure that consumers are not in any way disadvantaged or inconvenienced by the negotiations that have taken place, so I think that will answer that difficulty.

Mr Mockridge—The 'trust me' argument.

Senator SCHACHT—I agree with the review: whatever structure we have that comes out of the parliament ought to be reviewed in two years. Irrespective of what we have, I think that is a reasonable thing you should do. Anyway, it is good public policy to do it.

I do not like to sound untrusting, but the vigour with which this industry argues, debates and lobbies its particular interest—not just free to air; now we have ASTRA, pay TV and all the sundry groups—means that, firstly, if you listen to the evidence on a number of these issues, go to the digital legislation, where it was argued that if it went one way it was the end of motherhood and Christianity as we know it, and vice versa. And the way that people have argued that they do not trust the outcome means that, for public legislators and the public process, it is not unreasonable to put a couple of mechanisms in place, in my view.

I think the goodwill will be better if you know that there is a regulatory structure that means that, if it gets out of hand, the person being done over—and it may in the future be the free to airs—has got a place to go. It is just that this industry is noted for vigour of argument and abuse of each other—in a friendly sort of way—and I just think that having a regulatory structure in place creates a better outcome.

CHAIR—Mr Branigan, I guess my concern is as a consumer: if you can get free to air and you get a good signal—I am not quite so concerned about whether it is on cable or not—if I cannot get a good signal, and I am in a metropolitan area or an area where there is cable or pay TV, how can there be a guarantee that the person gets the best signal that is possible, and in this situation it is through pay TV? Is it to your advantage to negotiate, in that situation, almost cost free because you are getting the advantage of transmitting it, or are you likely to raise the bar? Is it to your advantage for cable TV or pay TV to retransmit into areas where your transmission is poor or not available?

Mr Branigan—Imagine a situation where there are a substantial number of people—let's say a couple of thousand—who do not get an acceptable signal. The calculation the broadcaster has to make—and this is more typically a problem in regional areas with very widespread coverage areas—is whether to put up a translator or whether there is some other way of getting the signal? Effectively, there are three choices: a translator that the broadcaster pays for, a self-help translator, or cable. In that situation, a broadcaster may well welcome a commercial cable system offering to retransmit the signal, because it may well save the broadcaster a considerable amount of money.

CHAIR—What does the consumer do if the consumer says, 'I really want to watch Channel 9 or Channel 7 and I cannot get it.' What mechanism would work to make the market provide that consumer with that service?

Mr Branigan—The self-help provisions have been in place—

CHAIR—Let's get rid of self-help provisions. Let us say I live in a community that is not as tightly knit as that. We do not have a mining company to retransmit or provide another translator. I do not live in a small community but somewhere like North Sydney, or somewhere else, where that kind of community structure does not exist. Is there self-help in North Sydney?

Mr Branigan—No. I would not think so.

CHAIR—No. So let us say we are in an area where there is no self-help. How do I, as a consumer, get that transmission if you are failing me on the 'trust me' test which Mr Mockridge has just made a bit of an aside about?

Mr Branigan—The normal problem in a place like North Sydney is reception in multistorey buildings, and self-help in one form is the normal response to that. In other words, either the strata title owners or the building owner installs a master antenna system which reticulates the service to the people who live in the building. Failing that, it is difficult for individual consumers to have much effect. Certainly, cable is one way in which people who do not have any other way of improving their signal can do so. We recognise that. We are not denying it. Our point is that it is a smaller percentage of the population than the cable operators are suggesting. Regulated or negotiated retransmission agreements are a very good way of providing that option to a great many people.

CHAIR—What would you say to a concept of a certain length of time in which to do it and, if you could not come to some arrangement within that time, there would have to be some concept of regulated arbitration: you are given the chance to negotiate and, if you cannot come to some arrangement, down the track a review process would look at possible arbitration. That is another alternative, Senator Schacht.

Mr Branigan—We think the review process is a good one—the notion that after a couple of years parliament should look at this again—because we are confident that commercial negotiations will work. That is, in any case, a bit of a baseball bat in case people are digging their toes in. There is the prospect that, if they do not make it work, then some sort of arbitration—

CHAIR—Mr Mockridge, what do you think about having some sort of Damoclean sword hanging over you so that, if you could not come to some agreement, there would be an arbitration process or a review process within a certain time limit?

Mr Mockridge—Clearly, we would prefer an arbitrator immediately—

CHAIR—I know what you would prefer, but, say you cannot get what you prefer?

Mr Mockridge—relative to the current legislation, having an arbitrator after a certain period would be an improvement. There is still a risk that if there is no agreement during that period there could be no retransmitted signals and consumers will suffer.

Senator SCHACHT—Mr Mockridge, you do not concede that there is a proprietary right that you should pay?

Mr Mockridge—That is correct. We concede an underlying right of which the broadcasting would be an element.

Senator SCHACHT—The issue of a proprietary right has been suggested, in America, to be worth almost zero because of other benefits. Mr Branigan has suggested that you do it in other ways—by promotional ads or so on—as it is a small amount. Could you live with that, if there was an arbitrator to make sure that it did not get out of hand in the end?

Mr Mockridge—Any legislative regime which includes an arbitrator at any period is an improvement on the current legislation. The current legislation means that, the minute it is passed, the free to air operators can withdraw the signal if an agreement is not in place. There is not even a transition arrangement so, if that were passed by the parliament, the signals would be off if there was not an agreement. Anything which puts some balance in there is an improvement in what is an unbalanced structure at the moment.

Mr Branigan—Very sensibly, the government foreshadows that there will be a number of months between enactment and proclamation to allow for negotiation. I would imagine that if the pattern that emerged during that period was no agreement at all then the government would think very carefully about proclaiming the legislation.

Senator SCHACHT—That is a very commendable suggestion. I do not think that many of us in the Senate are overly enthusiastic about passing the power over to an executive proclamation at a later stage. Once the horse has bolted from the stable, the parliament has no power to bring it back.

Mr Branigan—To the extent that a review after a couple of years was built into the process, there clearly would be the power to revisit it.

Senator SCHACHT—That is clearly a different issue. I think what Senator Patterson was raising as a compromise—and maybe the compromise could or could not work—was that, with the review process, you get a period to try to reach agreement and then the review or something else clicks in place. If the bill is passed, the fact that three months down the track a government, without any reference to parliament or anywhere else, could still proclaim it does not automatically have any attraction for me in this particular climate where there is a clear dispute between the two main protagonists.

Mr Buettel—If I could make a contribution at this point: the bill essentially commences on a date to be proclaimed because the commencement will need to tie in with the amendments to the Copyright Act. We have not been able to put those standard provisions in for ‘commencement six months after royal assent if not earlier proclaimed’ because it will need to await passage in parliament of those copyright amendments.

Senator SCHACHT—In that case, I want to ask a question of the Attorney-General’s Department. Everything else being equal, when are you planning for the exposure draft and so on to be completed and then come back to be debated in parliament? It has already been through one Senate committee and basically got a hung position and now you are going through it again. Under your dream plan, when are we looking at that process being completed?

Ms Hawkins—It is not so much our dream plan, but the Attorney-General has said that he hopes to release an exposure draft by late August that will implement the digital agenda copyright reforms, and that will include retransmission of broadcasts. We have not actually seen a copy of the draft bill yet, but I have been talking to the drafter and the drafting of the bill is quite advanced, so if it is not late August it will be early September. The Attorney-General and the Minister for Communications and the Arts are hoping to have at least a month for copyright stakeholders to consider the exposure draft and feed their comments into the two departments. After that, the Attorney-General would be hoping to be able to introduce the bill in the next sittings.

Senator SCHACHT—When you say the next sitting, do you mean this year or March next year?

Ms Hawkins—The next sittings that we have, so that could well be this year.

Senator SCHACHT—Are you asking for it to be exempt from the cut-off date?

Ms Hawkins—No, that would not be the intention at the moment.

Senator SCHACHT—So that means that it could be carried at the best by the end of the March session of parliament?

Ms Hawkins—Indeed.

Senator SCHACHT—So that is April next year.

Ms Hawkins—Yes.

Senator SCHACHT—That is implying that every process is going to go well with a bill that has been bedevilled by controversy—not ideological controversy but just confused arguments all over the place and going around and around. We have had one Senate inquiry. I must say that to get it through by April of next year is a heroic and courageous assumption by the Attorney-General.

Ms Hawkins—To use your words, Senator, it is a best- case scenario.

Senator SCHACHT—Yes, I know. So that means we hurry this bill through and then we wait 12 or 18 months for it to be proclaimed when the copyright bill goes through? I have to say that is a bit out of kilter. It is a bit like bowling underarm at one end and bowling bouncers at the other. Any advice from Attorney-General's?

Mr Creswell—As my colleague reminds me, the bill that she referred to covers quite a range of things. The copyright consequence of retransmissions is one of them, but of course the main thing is introducing the new technology neutral right of communication to the public to deal with copyright on the Internet and the various—

Senator SCHACHT—Much as we try as parliamentarians to roll this through, it does raise an issue which I think the committee may have to bear in mind—whether this bill on retransmission ought to be debated as a package with the copyright bill, because there has been some suggestion that implied rights will flow over out of your bill as well. I do not know whether that is correct or not or whether proprietary rights could be affected. I think Mr Meagher said you might actually have to pay three times. Whether that is a scare campaign by Mr Meagher I do not know, but he has suggested it. So the proclamation in the bill means that we can hurry this bill through and then wait 12 or 15 months for the other before it can be proclaimed. Is that right, Mr Buettel?

Mr Buettel—We would not expect to proclaim it until the copyright amendments have passed.

CHAIR—Senator Schacht, one of the things is that if the bill is through it means that the parties can start negotiating with a surer foundation about what the likely structure of that legislation is going to be.

Mr Buettel—That is right. Once the public exposure draft of the copyright legislation is released, parties will have a very good idea of the likely framework.

CHAIR—I am wondering how much more we can get. I am beginning to think that we have drained the—

Senator SCHACHT—I just wanted to get some of the timetable for that other bill.

Mr Branigan—I suggest that the linkage between the two pieces of legislation is not necessarily as tight as has been suggested by Attorney-General's and the department. We do not think it is necessary to hold this legislation in effect until the copyright amendments are—

Senator SCHACHT—So you would go for an earlier proclamation?

Mr Branigan—Indeed, and we think that there are some fairly simple ways in which this could be done. The most important is to include in this bill an amendment to allow enforcement of the consent regime. One of its defects as it stands—looking at it desirably as self-contained legislation—is that it would not in practice allow a broadcaster, or the ABA, for that matter, the consent regime. It says that a pay television operator may only retransmit effectively with the consent of the broadcaster, but there is no remedy if the pay television operator goes ahead and retransmits without the consent. That is because it presupposes that these copyright amendments have been introduced and that the broadcaster can use the new right it will gain under those copyright amendments to enforce its control over its signal.

We think that a relatively simple amendment, to take that particularly important instance, would allow the broadcaster to enforce control over its signal. It may well be that other relatively simple amendments would deal pro tem with some of the other copyright related deficiencies of the bill as it stands. That would allow separate proclamation before this very uncertain date on which the copyright amendments are likely to pass through both houses. This is set out in our submission.

Senator SCHACHT—I turn now to the hoarding issue involved in this bill. I do not think this will take as long as what we have just been through.

Mr Mockridge, in your submission you make a pretty trenchant criticism of the existing siphoning rules, leading onto the hoarding provisions. As I take it, you want to reduce the programs on or the content of the siphoning list. Can you provide us with a list of what you want to take off the siphoning list?

Mr Mockridge—Yes.

Senator SCHACHT—If a free to air broadcaster buys the right to a program but cannot show it, you do not agree with the fact that the right has to be offered to other free to air operators, including the national broadcasters. You would like it to be made equally available to you. Is that correct?

Mr Mockridge—To go specifically to this so-called anti-hoarding issue, we see it as an extension of the existing anti-siphoning regime. As you correctly point out, we believe it is not working as it was intended to and, again, in principle we have problems with it. The problem with this additional anti-hoarding regime is specifically that its intent is very unclear. It allows, as I understand it, any event to be designated.

Senator SCHACHT—By the minister, who has to publicly justify his position.

Mr Mockridge—Sure, that could be up to a preference; there are no criteria as to how these events are going to be designated. They are going to be passed on to the national broadcasters for a nominal fee with no requirement for the national broadcasters to broadcast them, so it does not even seem to solve the hoarding issue and it denies the pay TV operator an opportunity to access that programming.

Senator SCHACHT—As we are now dealing with hoarding, I wonder if the representatives of the SBS and ABC could come to the table because some of these questions on the hoarding provisions relate to them.

CHAIR—It is getting a bit overcrowded. I do not want it to get out of hand. SBS and ABC indicated they wanted to come separately and I said, 'No, they can come together.' Now you want them to come with everybody.

Senator SCHACHT—Only on the hoarding issue.

Mr Lake—If it would assist the committee: we do not have a view on that.

Senator SCHACHT—We thank you very much for your contribution.

CHAIR—Mr Lake, I think we have finished with copyright issues. If you and Mr Brennan would like to remove yourselves, we could have the SBS and ABC representatives at the table. Thank you.

Mr Mason—Madam Chair, I am from Imparja Television. I believe we tried to get a submission to your office in time for Friday. I was not actually involved in that process. As it is an issue which affects us very deeply, is it possible to table or to give you the submission now so that it can be released? Can I pass that over to you now?

CHAIR—Yes, you can table the submission now.

Mr Mason—Thank you.

Senator SCHACHT—Mr Mockridge, you have said that, under the present legislation on the anti-hoarding provision, if the free to airs cannot show a program, they have to pass it off; they have to give first offer at a nominal rate to the national broadcasters but that those broadcasters are not forced to show it.

Mr Mockridge—That is my understanding.

Senator SCHACHT—Is that your understanding also, Ms Walker and Ms Sharp?

Ms Walker—Yes, it is.

Ms Sharp—Yes.

Senator SCHACHT—Isn't that a deficiency, that you can then hoard it? Let us get this straight. Under the present legislation as drafted, Channel 9 bid for the Test cricket in England—this is the example everybody knows about—and Wimbledon is on at the same time, so they cannot show both together. They cannot hoard, so they make a decision to offload the cricket. The first offer goes to SBS and the ABC. You then pay a nominal rate. You are saying that you then do not have to show it?

Ms Sharp—You would have to show it if you took it.

Senator SCHACHT—But you do not have to take it.

Ms Sharp—No.

Senator SCHACHT—If you do not take it, that means that the program does not get shown at all.

Ms Sharp—That is right.

Senator SCHACHT—In effect, it is still hoarded inadvertently, you might say. You do not want to show it, Channel 9 cannot show it and pay TV is prevented from bidding for it. Is that correct?

Ms Marquard—If I can just correct that—

Senator SCHACHT—I am not picking on Channel 9, but it is the example that everyone knows about.

Ms Marquard—I am happy to use that example. What it shows is that in fact this is not about hoarding. There were two problems with the Ashes. The problem which got most of the publicity was that Channel 9 decided it was unable, partly because of other programming commitments and partly because of contractual arrangements with rugby league, to show the first session, before the lunch break, of the Ashes cricket.

Senator SCHACHT—All the wickets kept falling too, which made it even worse.

Ms Marquard—The issue was not that we were hoarding, because Optus Vision had the first session. The issue was that it was not shown on free to air television. It is a separate issue. There is no issue of hoarding. Overall, what we are saying is that the anti-siphoning list is working very effectively to ensure that all those sports that traditionally have been shown on free to air television are in fact being shown. I think it is very difficult to find examples of that not happening. All the sports which people have always seen on free to air television remain being seen on free to air television, and that was what the anti-siphoning list was about.

Senator SCHACHT—A complete session of the cricket went west.

Ms Marquard—What I am saying is that the Ashes is an exception to this.

Senator SCHACHT—But that is the exception that has led to this legislation.

Ms Marquard—Yes, but the Ashes are not about hoarding, because pay television had the first session that was not shown on free to air television. It was not being kept away from—

Mr Meagher—I think that is a classic case of how the rules are used to manipulate the arrangements. What Channel 9 did in that circumstance was to license Optus Vision to show the first session and the first session only live, so we would babysit their audience for them so as not to interrupt their schedule, and then when it suited them to show the other sessions. Optus Vision was not entitled to show them live. Optus Vision viewers then had to switch back to Channel 9. I know it is a separate argument, but it is a very good case of how you can manipulate the rules.

Ms Marquard—But the consumers are still benefiting by having two sessions rather than nothing on free to air television, and that is the point. Do we want a system in which most of major sport is shown on free to air television, or do we want a system where nearly all sport is shown on pay television? That is the balance we are trying to strike in this list.

Mr Mockridge—This particular clause does not go into that. We are happy to debate that, but I thought we were talking about the specific anti-hoarding clause. If I can just reiterate the point, our reading of the act means that it can end up at the ABC and SBS with no requirement for either of those broadcasters to actually broadcast it.

Senator SCHACHT—They can be offered it; right? And they can refuse to take it.

Mr Mockridge—Our reading of the act is that one or the other ends up with it without any requirement to broadcast it.

Senator SCHACHT—Is that right?

Ms Godwin—That is right.

Senator SCHACHT—So you could end up with it with no requirement to broadcast it?

Mr Mockridge—Yes.

Senator SCHACHT—Is that right, Ms Walker?

Ms Walker—That is right, Senator. But I cannot imagine a situation where we would accept the right and then not proceed to exercise it. The public criticism of us would be enough, I would have thought, to stop that ever happening.

Senator SCHACHT—Certainly at the Senate estimates committee it would be, I can tell you.

Mr Mockridge—But it does beg the question of what the intent of the clause is, and it seems somewhat peculiar drafting.

Senator SCHACHT—But, if the ABC or SBS, or both of them, refuse to take the offer as put by Channel 9—say they could not show the first session, and you say, ‘That’s just ridiculous programming; we want the lot; we are not just going to play one session’—you have the same argument as Mr Meagher, that is, ‘We are not going to babysit your audience and then have you switch back,’ or whatever. If you refuse to take it, then what happens? Channel 9 is still stuck with the fact that for other programming reasons they cannot show the first session, ABC and SBS refuse to take that first session, so it does not end up on free to air. This legislation does not overcome that problem, does it?

Ms Walker—No.

Ms Sharp—Senator, there would be a problem in passing legislation that mandated for a national broadcaster to take programming. In fact, it is an attempt to make sport on free to air, I suppose, more readily available if it can be accommodated by one of the national broadcasters. Certainly, I think, speaking only for SBS, we would have no problem with there being something in the legislation that said that if we did take it we had to show it. I think that is reasonable.

Senator SCHACHT—But put it this way: if you said, ‘We don’t want just the first session. We want the whole day’s play,’ and then Channel 9 said, ‘No, we’re not going to sell you that,’ and then you say, ‘Bad luck, we’re off,’ then the viewer is stuck with the fact that there is a black hole which the cricket has fallen into for at least one session. That is what the viewers are screaming about. How do we get over that?

Ms Marquard—Programmers have all sorts of viewers with all sorts of demands. The cricket viewers, while they are very vocal, are not necessarily the majority of viewers. So the programmers are in the position of having to cater for people who want other types of programming as well as the cricket.

Senator SCHACHT—Why do you bid for the cricket, then?

Ms Marquard—That is in the prime time zone that we were talking about. But, overall, we show the cricket live in the overwhelming majority of cases.

Senator SCHACHT—But the one session when most people are awake—unless they are maniacs and aficionados, et cetera, sitting up until 3 or 4 o’clock in the morning—is the one that starts at roughly Eastern Standard Time 7 o’clock. I accept for program reasons that more people want to watch other than cricket, and you do not want to lose your market share, but how do we overcome that? I do not blame ABC or SBS for saying, ‘We should not be the babysitter for Channel 9 to get them off their own marketing book.’ What do we do then?

Mr Mockridge—Could we proffer a solution? The problem is that a terrestrial broadcaster, as Channel 9 correctly points out, being a single channel, has to make allocation decisions between certain programming, whereas the strength of a multichannel system, as the pay TV operators are, is that they can run multiple services for people who are prepared to pay a bit extra for that multiple service.

Our wider proposal on anti-siphoning, of which this anti-hoarding is a subset, is that there should be two separate rights: there should be a right for the free to air broadcasters and a market for that where they can make their allocation decisions, and a pay TV right where, presumably, the pay TV broadcasters will compete for that. The net effect of that is that you will generally ensure that there will be some television coverage somewhere of all major sporting events—or other events, for that matter.

Senator SCHACHT—That is an advantage for pay TV because you can then start offering—

Mr Mockridge—It is also an advantage for the viewer.

Senator SCHACHT—But they have to pay \$40 a month or whatever it is.

Mr Mockridge—Sure. But there are people prepared to do that, to pay for that extra choice. It is like buying a magazine or a newspaper.

Mr Meagher—And bearing in mind, Senator, as Mr Mockridge points out, short of requiring free to air broadcasters to broadcast something, you cannot cure the evil that you perceive. You cannot do it. It is simply not possible.

CHAIR—Not all of us see not broadcasting the cricket as evil, Mr Meagher. There might be a case when it comes to tennis, but cricket, maybe not.

Mr Meagher—That is the conundrum here: what is being attempted is not possible, and we say there is another option which may not mean ubiquitous coverage but at least means some coverage. At the moment the anti-siphoning rules actually stop that outcome, or hinder it.

Senator SCHACHT—What you are asking is that at the same time, if Channel 9 chooses to show part of the cricket, that is fine, they choose that, but you have a separate right to bid for pay TV rights only and if you choose to show that, the whole 10 hours a day, whatever time it is on, you will do so and people will switch backwards and forwards, right?

Mr Meagher—Yes.

Senator SCHACHT—So the anti-siphoning list is still there to say that there are certain programs—

Mr Mockridge—That would prevent us buying exclusive rights. Obviously, overseas has been a contentious issue where pay TV companies have acquired exclusive rights and taken product off free to air. We are happy to acknowledge that principle.

Mr McAlpine—So commercially, then, for the free to air networks to survive that process, if there is no exclusivity provision in there for us in a commercial sense, those sports will disappear off free to air television, without question.

Senator SCHACHT—But it is disappearing now in some limited area where the most interesting session the punters were awake to watch in cricket was not on air anyway.

Mr McAlpine—To be fair, I think in 1996 to 1998 something like 700-odd hours of live sporting events went to air; 86 per cent of that sport went to air live. The only instance that has come up on anti-hoarding happens to be the first session of the cricket. It is one instance

in a massive exercise of sporting telecasts. I think it has been taken out of proportion a little bit, even though it be a sensitive one.

Senator SCHACHT—All I know is that last year, when it occurred, members of parliament got roundly rung up and complained to by viewers. It was a public issue, you might say. From some of your own other media enemies, in other forms, this was used to beat free to air around the head. It was debated here in an estimates committee. At the estimates hearing, Channel 2 outlined that, even if they got the whole test at short notice, they were not going to show it. So, again, that fell into a black hole. The way I read it here is that the ABC and SBS are certainly not going to be, in this particular case, the baby sitter for one session, are you?

Ms Sharp—It depends on circumstances on a case by case basis. There might very well be circumstances where each or both of the national broadcasters would be interested in taking it under some other plan.

Senator SCHACHT—I presume you might say you want not only fair warning about it, but you would also want to continue with the next two sessions and use your own commentators, things like that.

Ms Walker—Fair warning is important—

Ms Sharp—Yes.

Ms Walker—because if we interrupt our programming we are severely criticised by our viewers.

Senator SCHACHT—Yes. For the same reason as Channel 9; you have got more non-cricketers watching and so on, so unless they can market, as I think Mr Lloyd-James said at the hearing—somewhat to the surprise of both myself and, I have to say, the minister at the table, because this was news to both of us—they are not that keen on turning upside down the program scheduling for cricket unless they get the lot for the whole test series, well planned beforehand and well promoted.

Ms Sharp—You have got to give time to let your viewers know that the schedule is going to change.

Senator SCHACHT—Has anyone suggested prohibiting someone bidding for program rights that clearly are going to clash with each other; that Channels 9, 10 and 7 cannot bid to have both the cricket and the tennis at the same time?

Ms Sharp—No.

Ms Marquard—The clash with Wimbledon occurred in respect of only one of the tests and that was the test that got sold to the ABC.

Senator SCHACHT—But it has happened several times. As a cricket/tennis devotee, I have noticed it has happened on three or four occasions that, in the summer when we are playing cricket, Wimbledon always clashes with one of the tests. It is not unknown that it is going to happen that, next time a new side plays in a test—a tour of England—one test will clash with Wimbledon. You knowingly bid for both rights knowing that one test, at least, will clash.

Ms Marquard—I think a satisfactory arrangement was reached in respect of that one test. It was available on the ABC.

Senator SCHACHT—But at other times, with the other tests, you were not broadcasting the first session.

Ms Marquard—But that was not to do with Wimbledon; that was for other programming.

Senator SCHACHT—Other programming. So the Wimbledon clash was one. But you are bidding for the rights free to air and then take one session off. A lot of punters say, ‘If you are bidding for the free to air rights, you should play it.’

Ms Marquard—But that gets back to my original point which is that I still believe the punters would prefer to have two sessions on free to air television than no sessions. Really, what the anti-siphoning list is there to do is not to say to broadcasters, ‘You have to put all the sport on television,’ but to say, ‘We will allow you to have the first go at getting the sport on television because we believe there is a public interest in it. We believe people in Australia want to see sport on television.’ So broadcasters have to make commercial decisions, and they will do so with their other programming and put as much of that major sport as they can on free to air television. But it is not always possible to do it to the degree that will satisfy everyone without dissatisfying some other viewer, and that is going to be a difficulty of it. However, we still believe that showing two sessions of the cricket is what viewers would like to see rather than not having it at all. Last time we offered the extra sessions to the ABC and SBS voluntarily.

Senator SCHACHT—Their complaint was that you did not offer it to them with enough time. Next time round I presume you will take that on board.

Ms Marquard—There were a few months, but we take that on board.

Senator SCHACHT—Can I ask anybody around the table, are there any other examples on the hoarding provision where, despite a right being bought by free to air, for various reasons the program did not go to air live?

Mr Mockridge—To our knowledge, there are numerous examples and we will supply those in detail. There are more than 5,000 hours of programming on the anti-siphoning list. Our estimates show that approximately 700 of those hours were, in the year we did the sample, actually broadcast on free to air television.

Senator SCHACHT—Do you consider then the anti-hoarding provision should cover where Channel 7—let us move away from using poor old Channel 9 as a bit of an example—buys the rights to the AFL for all the football matches but, even with replays over the weekend, you do not get all of the eight matches even replayed free to air? Is that a variation of hoarding that you object to?

Mr Mockridge—Certainly to the extent that it occurs. I am not that familiar with Channel 7’s AFL rights deal—

Senator SCHACHT—You come from Sydney. I suppose you are rugby league.

Mr Mockridge—But I have a great interest in AFL. A particular point there is that this issue of the timing that you raise is important here if we are talking about the specific anti-hoarding amendment which we see, at best, as a very clumsy amendment. We are unsure exactly what its intent is and how it is to work. But, certainly, timing is not a problem. This can all happen one day before an event is due to occur. At a minimum, if this is to be legislation, there should be a three-month period or something for these decisions to occur. Because if it is all left to the last minute, again, you have a great risk that no television operator, be it pay or terrestrial, is going to be relaying the event.

Senator SCHACHT—Is Channel 7 effectively hoarding, because they have exclusive free to air rights, if they do not show all the matches?

Mr Mockridge—Maybe I will invite Bruce Meagher to answer; he has a greater familiarity with the Channel 7-Optus relationships.

Mr Meagher—I actually have to take that on notice, Senator. I am aware that there are some issues there. There are arrangements between Channel 7 and Optus Vision in relation to the pay TV rights, although there have been a number of issues—

Senator SCHACHT—You do not show all the matches live, but all those matches are fully replayed in the subsequent five or six days from when the match actually occurs?

Mr Meagher—Again, I will take that on notice, but we either show all or most of them and there is a carve-up arrangement between ourselves and 7 as to which matches.

Mr McAlpine—In defence of 7 on that issue with AFL—and I know this is unusual coming from my end of the table—there are other issues attached to those rights, which is the sporting body itself. In Victoria there will be an issue of them playing it live in the town of origin or any other state. That has to be taken into consideration as well with this broadcasting position. They are often not allowed to telecast in the state of origin.

Senator SCHACHT—If you look at any weekend from Friday night through to Sunday night in any of the southern capital cities, not only do you not get all the eight matches live, because that is impossible, but you do not even get them replayed in total. If you happened to be a Hawthorn supporter last weekend, you would not have seen that match replayed free to air. That is 24 hours of television, which is the issue, as I understand.

It is difficult to put all of that on air because people want to watch something else as well. I wanted to ask the question: does pay TV see that as a restriction or a hoarding issue?

Mr Mockridge—Its outcome can be a hoarding issue. Again, we would see the solution as having two separate broadcast rights. We will provide the committee with details.

Senator SCHACHT—You would not object in that right for the free to airs showing the same event at the same time. But you want to show it at the same time on pay TV with the subscriber paying for it.

Mr Mockridge—That is correct.

Senator SCHACHT—And I presume FACTS is totally opposed to that?

Ms Marquard—Funny thing, that. It is integral to sporting rights around the world that what you purchase is exclusivity. That is what is attractive to sponsors. If there were going to be arrangements like that as suggested by ASTRA, free to air broadcasters would lose exclusivity and they would not be able to sell that package to sponsors. Therefore, it would provide a really huge disincentive to purchase sporting events, which in any event are fragile in the economic balance.

We are talking on this generally rather than looking at this amendment because ASTRA has made various suggestions about the anti-siphon list. We are saying that overall, if you have a look at the list, it is working very effectively in ensuring that major sport remains on free to air television at the levels basically that were there prior to the introduction of pay television.

The list also intended to achieve expanded and complementary—and I think those were the actual words used in the explanatory memorandum—coverage on pay television. In fact, that is what is happening. You are getting the extra matches as well as replays. For viewers there is a benefit in that they have free to air access and subscribers have extra replays. For example, with NRL we have two matches a week

Senator SCHACHT—That is rugby league, is it?

Ms Marquard—I know you do not know about that, Senator. Channel 9 has two matches per week. Another six live matches and another two which are replays are found on pay television out of the 10 matches per week. You are not only getting access on free to air television, but you are getting very extended access on pay television.

Mr Branigan—It is worth mentioning on the complementarity point that what happens at the moment with multigame matches, such as Wimbledon, is that you invariably get complementary coverage at the moment. If you had separate pay TV and free to air rights, you would find you would get identical coverage. In other words, the top match of the day would appear both on free to air and pay. So, in other words, you would get less overall coverage than you do with the present arrangements.

Mr Mockridge—FACTS seem to be asserting that there is so much sport around that they cannot run it all, which of itself is an argument to reduce the list. If we are going to have a list, there is simply too much stuff on it which, by their own admission, they do not have the opportunity to run.

Senator SCHACHT—From the sporting side why wouldn't the AFL or rugby league separately say, 'Let's have the two separate rights because we might actually in total end up with more revenue than with the restricted right under siphoning and we can pay sports people more, et cetera.'

In the end, will the siphoning list come under attack by the sports themselves once they see that, if Mr Mockridge's mob et cetera can pay more, there will be a bigger revenue and income stream? The siphoning list may come under attack from the sports themselves.

Mr McAlpine—Fundamentally, the issue there is that the services provided by free to air are free to air. If you get into a commercial scenario with cable as it grows and progresses in this country, it will all end up on pay. The Australian consumer I do not think will accept the fact that the only way he can access a live game of AFL or other sporting events is to go to cable. I would not think that is politically sound in its own right.

Senator SCHACHT—It is clear that, despite the best efforts of this legislation, if the ABC, SBS or some other broadcaster chooses not to pick up the right, the program will not be seen. This is an attempt at so-called anti-hoarding. If in most of the examples national broadcasters do not pick it up, it will not be seen free to air. Is that correct?

Ms Sharp—That is correct.

Senator SCHACHT—So we are still stuck with a complaint next year, or whenever it happens and wherever it may occur.

Ms Sharp—This does ensure that best endeavours are made.

Senator SCHACHT—I agree with that. Best endeavours is an improvement and at least you have some negotiation. One of the submissions—either from ABC or SBS—suggested a 30-day period and it is all reasonable. In the end, if you also chose to say, 'Our viewers do not want cricket from 7 o'clock on a weeknight from Great Britain for the first session,' it will not go to air. For the cricket viewer the problem will still be around.

Mr Mockridge—From our industry's point of view what it has done in that case is put another layer in the decision making process. At the moment, we cannot buy these events unless they have previously been bought by a free to air operator. In this case they might let the ABC and SBS have consideration. We are often talking about cricket events and overseas cricket tours which are prime time viewing here. They will knock them back as well. Sure,

ultimately, maybe one of our operators will get them, but through a more confused, late and difficult process which makes it more difficult for everybody, particularly the consumer.

CHAIR—Any other questions?

Dr Hart—The objective of the regime is to maximise opportunities for coverage of sporting events on free to air television. You are right in the sense that it does not mandate for the reasons that Chris Sharp alluded to before, but it does maximise the opportunities to the extent that it acts as a disincentive for broadcasters to buy rights that they cannot use. Hence, it is not targeting the acquisition of rights, but the use of rights.

Senator SCHACHT—Does the department have any view on the suggestion from the ABC about putting in the periods of notification of time, to give them time to deal with this sensibly if they are going to make an effort?

Dr Hart—In its submission, the ABC said they would hope there would be a reasonable time. That is certainly the intention. We have not specified a fixed time in the legislation, because it is recognised that all sports are different and there are different kinds of considerations in terms of scheduling commitments that are made by broadcasters for, say, a test match as against a one-day event. The minister would specify the appropriate time at the same time as designating the event.

Senator SCHACHT—Specify under regulation under the act?

Dr Hart—When he makes the designation.

Mr Buettel—By a legislative instrument.

Senator SCHACHT—That means that Channel 9—I keep harping on Channel 9, but that is the example we have before us with last year's cricket—would have to give a notification to the minister some reasonable time beforehand that they have got either a conflicting right with Wimbledon and the cricket or that they have got a right but they cannot show the first session for other programming reasons. Do they have to notify the minister some time beforehand?

Mr Buettel—No, not necessarily. The way the scheme would work is that the minister would do an instrument up-front in the same way as for the anti-siphoning rules. There is an anti-siphoning list. The minister, for example, could make an instrument which identified all Ashes Test cricket matches and he would then identify the period of notice that has to be given before each of those matches.

Senator SCHACHT—Does he do that based on past experience or as a guess if there is going to be a problem with Channel 9?

Mr Buettel—No, I think he would do it after consulting with the various parties as to what was going to be a reasonable period for that kind of event.

Dr Hart—Including taking advice from the ABA.

Senator SCHACHT—I was just going to say that I think the ABC last year said they could not handle any change in the arrangement because it was too short a time so they just gave it a miss. Is that right, Ms Walker?

Ms Walker—In the end, did we telecast the cricket or not? I cannot recall.

Ms Marquard—You televised one test, yes. In relation to the first sessions, I think you rejected those.

Ms Walker—Yes, we said it was too little time.

Senator SCHACHT—How do we overcome that? Channel 9 may not make the decision about the first session until very close to when the test is actually on and then it is too late for it to be handed over, even if the ABC wanted it.

Mr Buettel—We are going to have to come up with a period that is certain and that all the parties in the industry know of. In deciding what that period is going to be for the particular event concerned, we are going to need to consult with the various parties to determine what is a reasonable period.

Senator SCHACHT—Will that be a disallowable instrument then?

Mr Buettel—It will be a disallowable instrument.

CHAIR—Are there any other questions for the SBS and the ABC?

Senator SCHACHT—We did not give them a chance—and maybe we should have—to speak on the general issues of copyright, retransmission, et cetera. I presume you do have some views about that according to your submission, but I do not think you have as many difficulties as the previous witnesses. You may have; I do not know. Do you want to speak to that as well?

CHAIR—I have read the submission. Do you need them to answer questions? Otherwise, we can let them go. If you do not have any questions on the submission, they can go. I do not have any questions to ask them.

Senator SCHACHT—I thought they may have heard something this morning when they were sitting at the back. Do you want to make any comments on what FACTS and ASTRA said that would impact upon you?

Ms Sharp—There is only one additional issue that SBS would like to address in addition to what we have already said in our submission and it concerns the retransmission of our services in declared remote areas. We do support the FACTS position that consent should be obtained in that case as well. Specifically, we believe that the bill as it stands leaves the way open in remote areas for commercial operators to possibly profit unfairly out of the retransmission of our radio and television services. With the passage of this bill, a person would be able to retransmit our signal in a declared remote area as part of a commercial operation without first obtaining our consent. This would mean that we would not have the ability to ensure that the same technical quality pertained to our signal as to others that were being carried by that carrier.

Senator SCHACHT—So you want an amendment to the bill?

Ms Sharp—We do.

Senator SCHACHT—It is in the submission, is it?

Ms Sharp—It is not in the submission. That is why I am saying it now.

Senator SCHACHT—Mr Buettel, what do you lot reckon about that?

Dr Hart—Perhaps I can answer that.

Senator SCHACHT—I am sorry, Dr Hart.

Dr Hart—There is an exception recognised in the bill for remote areas because it is recognised that they are a special case. There are special public interest considerations relating to remote areas which warrant the waiver of that general consent by the broadcaster, a principle that runs through the rest of the legislation, because it is the only way that regional viewers can get a complete suite of services.

Ms Sharp—If I could just make the point, Senator, that for SBS it is in our interest to get our signal to as many people—

Senator SCHACHT—Absolutely.

Ms Sharp—and in the national interest to get our signal to as many areas and as many individuals as possible—and we encourage self-help, as you know. Our concern is not that we would ever want to stop our signal. It is just that we believe we have the right to insist on certain standards of technical quality—

Senator SCHACHT—Are you going to ask for a proprietary right as well?

Ms Godwin—We would ask to be treated the same as all the other broadcasters.

Senator SCHACHT—So, if they are in for a quid, you are going to be in for it as well?

Ms Godwin—Well—

Senator SCHACHT—Why not?

Ms Godwin—We might take a different view, given that we are a national broadcasting service as opposed to a commercial broadcasting service.

Senator SCHACHT—Even though you are greatly advantaged by retransmission?

Ms Godwin—That would inform our view in those negotiations. The other thing I should say about declared remote areas is that the reason we are asking for this amendment is that we also have a concern for consumers, in the sense that if someone is able to just take the services and offer them in declared remote areas without any consultation with us, they may, for instance, be able to offer those services at extremely high prices and we may wish to have some interest in ensuring that that does not happen because that would, of course, disadvantage people in declared remote areas more than people in other areas who might get it very cheaply through a pay television operation, for instance. So we think we should have some ability to discuss that.

Mr Meagher—Again, this is an issue that could be cured if there were a ‘must carry’ with some benchmarks or rules or other things going to technical standards and other matters.

Mr Mason—I represent the commercial remote broadcasters in this issue. Accepting that there are public interest issues, there are also issues with the way in which the remote area commercial broadcasters have to purchase their capacity in order to provide their services. Unlike our regional and metro cousins, we inherently have a large expenditure in satellite capacity simply to deliver our signal. We are therefore highly dependent on the competitive nature of the various carriers to provide us with the best possible financial arrangements—and, I would also point out, to reduce our requirement for government subsidy in this particular area. So it is not only in the commercial broadcasters’ but also in the government’s interests that this competition aspect is promoted as heavily as possible.

If we get to a situation where, having completed negotiations with, say, one satellite operator, one satellite carrier, our arrangements can then be undermined or spoiled by the other satellite operator broadcasting our signal without our consent or our permission, maybe just broadcasting part of our signal and not carrying our additional radio services, maybe not carrying some of the other future digital services which the remote area broadcasters may be able to deliver, then we are going to find that the only competitive advantage we have from telecommunications deregulation is taken away from us, because where is the incentive for one satellite operator to deal with us and provide us with the best possible deal, knowing full well that there is a very easy spoiling tactic that can be used by its competitors.

Equally, as commercial broadcasters, exactly the same as the regional and metro operators, we have every interest possible in reaching every single pair of eyeballs within our coverage area. Any satellite operator who comes to us and says, 'Have we got a deal for you: we can carry your signals,' we will be falling over ourselves to work with. But when our intellectual commercial property is taken away from us and is delivered in a way which we cannot control, then the value of our service is reduced and our negotiating power is reduced. In our submission—which I have tabled today—I ask that the legislation be looked at very carefully so that we are not unduly disadvantaged by this lack of competition.

CHAIR—Dr Hart.

Dr Hart—All I am prepared to say, Senator, is that it is because of the intense rivalry that there has been in Western Australia that it has been felt necessary to retain what is an existing arrangement, where retransmission can occur without the consent of the broadcaster, in order to ensure that there is a full range of services available for viewers in regional areas.

Senator SCHACHT—So they are not switched off as they were earlier this year or last year?

Dr Hart—Yes, Senator.

Mr Mason—The other point we would make is that it is in our interests to see those services continue in a controlled and regulated environment. It is not in any of our interests to see people switched off. The situation in Western Australia was an unfortunate one, but it came about because of the particular regulatory regime which was promoted as a competitive environment.

Senator SCHACHT—That is a nice way of putting it.

Mr Mason—There are certainly ways in which that situation can be prevented from happening in the future other than by this blanket handing over to anybody who wants it of our very valuable product and service. All of the remote area commercial broadcasters are very keen to work with the department to investigate how that might be prevented from happening in future.

What we do not accept is that, because it has happened in the past and was solved in a particular way, this is the only way it can be solved and that it should be solved by handing over our product to organisations which have no requirement to continue to broadcast it, no requirement to broadcast it with any particular quality, no requirement to carry, for example, the additional radio channels which the remote area broadcasters also deliver to their viewers and, most importantly, bearing in mind that under the proposed regime there is no control which we can exhibit to prevent reception outside the licence area, we could very easily find ourselves in problems with the networks from whom we obtain our programs, with no recourse whatsoever, because we are not even aware of where these signals are being delivered and provided.

Senator SCHACHT—Ms Walker, referring to the things we heard in the debate earlier this morning, are there any of those particular issues that come up, not in your submission, that the ABC is concerned about?

Ms Walker—Just two. Before I get to that, I would like to take the opportunity to say that our submission is wrong in two paragraphs and draw your attention to those mistakes that we have made. The first occurs on page five in the recommendation at the very top of the page. We are quite wrong when we state:

The current arrangements for GWN and ABC signal re-transmission in remote areas of Western Australia are 'grandfathered'—

That is not what the legislation says. That same mistake is repeated on the previous page in paragraph 6. I apologise to the committee for that error.

Senator SCHACHT—Ms Walker, does the ABC believe that there ought to be a proprietary copyright payment as well as the underlying one?

Ms Walker—The ABC, I am advised, does not envisage seeking a fee for the carriage of its signal.

CHAIR—If we can just go back to page 4, where is that error, for the secretariat's assistance?

Ms Walker—The third paragraph under paragraph 2.2. It is the same error as is on the next page. The paragraph starts:

The ABC notes that the transitional provisions of the bill—

That is also the same mistake as is on the next page.

Senator SCHACHT—So you will not ask for a fee but you will accept that there may be an underlying copyright fee which will have to be paid, according to Mr Lake's organisation?

Ms Walker—Yes. I want to stress that it has always been our position that our primary support is for 'must carry'.

Senator SCHACHT—You support 'must carry'. Ms Sharp?

Ms Sharp—Originally our position was that we would prefer 'must carry' for, once again, the public interest reasons about being national broadcasters. For many of the reasons that have already been outlined by FACTS this morning, that turned out to be quite a difficult path to go down. We are very supportive of the way in which the legislation is going at the moment.

Senator SCHACHT—The present legislation?

Ms Sharp—Yes.

Senator SCHACHT—So you do not support 'must carry'?

Ms Sharp—In an ideal world we would like to have to be carried, but the legislation as it stands is a workable way of ensuring that each free to air broadcaster can—

Senator SCHACHT—So that means you will be seeking a proprietary right?

Ms Sharp—We agree that we have a right in our signal, yes. We agree. We should.

Senator SCHACHT—That is interesting. I just wanted to get clear what you are after and what the ABC is after.

CHAIR—Any other questions?

Ms Sharp—I would like to make two other points that we think are very important. One is that there should be a definition of retransmission in the legislation which is not there at the moment. The other is that we should not wait for the passage of copyright legislation for this legislation to be put into effect.

Senator SCHACHT—You agree with that, too, Ms Walker?

Ms Walker—Yes I do, Senator.

Mr Mockridge—May I raise something which was not raised in any of these discussions, very briefly?

CHAIR—I am reluctant to do that. We are here to ask you questions. Your submissions have been read and we will go back over them again. Is it something you have not got in the submission?

Mr Mockridge—No, it is in the submission.

CHAIR—Otherwise we will have to go through it all over again.

Mr Mockridge—It was a request.

CHAIR—We do have homes to go to, and we do have other lives to live—

Mr Mockridge—Okay.

CHAIR—We have read these and paid attention to all the detail. No. I am being firm now—we have gone across a wide area and we have asked you all questions. I would like to thank you all very much for accepting this form of questioning. Senator Schacht and I have done this a number of times and, while it is a bit messy in some ways, it does help us to clarify things, because sometimes you think to yourself about witnesses, ‘If only we had asked them this at the time.’ It is more difficult for Hansard, we know, but it does help us to understand things, so we appreciate your doing it this way. You might not feel it is satisfactory, but I think Senator Schacht would agree with me that we get a better look at the whole picture. Even though it might seem a bit chaotic at some points, and sometimes I have to be a bit stricter as a chairman, it is of value to us.

So thank you all for the time you have given today. After lunch, we will be asking questions of those people on the community broadcasting group and the captioning group and we may have a couple more questions for the department. If you want to stay, you are most welcome. If you feel absolutely compelled to, wave your hand and I may invite you to come forward from the floor, but I think we have probably dealt with as many people as we need to. Thank you.

Proceedings suspended from 12.42 p.m. to 1.44 p.m.

HAWKINS, Ms Catherine Marea, Senior Government Lawyer, Intellectual Property Branch, Attorney-General’s Department, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600

SCOTT, Mr Robert Douglas, Chief Executive, Australian Caption Centre, Level 4, 187 Thomas Street, Haymarket, New South Wales 2000

HODGMAN, Mr Richard, Station Manager, Vice President—Television, Community Broadcasting Association of Australia, Manager, MCTC Channel 31, Little Lonsdale Street, Melbourne, Victoria 3000

BUETTEL, Mr Rohan Nigel, Assistant Secretary, Legal, Parliamentary and Coordination, Department of Communications and the Arts, 38 Sydney Avenue, Forrest, Australian Capital Territory 2603

HART, Dr Beverly, Assistant Secretary, Licensed Broadcasting Branch, Department of Communications and the Arts, 38 Sydney Avenue, Forrest, Australian Capital Territory 2603

SPENCE, Mr Charles William, Director, Broadcasting Development Section, Licensed Broadcasting Branch, Department of Communications and the Arts, 38 Sydney Avenue, Forrest, Australian Capital Territory 2603

CHAIR—We are now considering the submission from the Community Broadcasting Association. I welcome Mr Hodgman and Mr Lynch, who will be giving evidence by teleconference.

Mr Hodgman—Unfortunately, Mr Lynch—he is our chairperson from MCTC Melbourne—is unable to attend as he is still tied up in a court matter. That is the reason we were unable to attend in Canberra in person. We were hoping that he would have been able to get free of his other commitments to be able to talk on the teleconference.

CHAIR—Thank you very much. We have before us submission No. 82, which the committee has authorised to be published. Are there any alterations or additions that you want to make to the submission?

Mr Hodgman—No, that covers everything that we wish to put forward.

CHAIR—We have had a problem because some of the submissions have been coming in late and we have not been sitting. Some of the stuff was sent down by post and the other was here late last night. I have a question to ask you. I just need to go back through this stuff. On page 4 of your submission, in the last paragraph, you talk about the Victorian harness racing programs and you have said:

Although the MCTC has the requisite free-to-air rights to telecast the Victorian harness racing programs it remains uncertain as to whether the existing agreement with the primary rights holder is breached if MCTC grants consent to the cable company to do nothing other than re-transmit Channel 31 within its designated coverage area.

Can you just expand on that a bit?

Mr Hodgman—Our original arrangement with harness racing allowed us to broadcast live trots on Saturday nights. In our endeavours to get a wider coverage, we approached Optus Vision to retransmit Channel 31. They asked us to sign an agreement to let them retransmit it, which was duly done back in July 1996. Harness racing was then approached. They received a letter from Sky Channel to say that it was in breach of our agreement with harness racing, that we were not allowed to give further rights of pay TV to another operator, that that was not part of our agreement, that we were in fact breaching our agreement of operating only on Channel 31, that the act and the High Court decision that was handed down in 1995 did not in fact allow Optus to retransmit our free to air signal even if we gave them permission.

Subsequently, we had to withdraw our approval for Optus Vision to retransmit it. We asked them to do that on 31 October, which they did on 4 November. They have kindly continued to retransmit Channel 31 on the basis of the decision that was handed down in 1995 for retransmission.

On checking with both the harness racing and Victorian racing industries today and previously, they all have a problem that, if we have to give written permission to Optus Vision or to Foxtel and if they choose to retransmit Channel 31, which we hope they will one day, that is in fact in breach of any arrangements that the racing industry has with Sky Channel which retains in most cases first and last rights for pay TV. So we believe that, under the proposed regulations, we would then not be able to pass on the rights to any other operator or pay TV operator to retransmit a free to air signal. That came from the opinion of our legal representative, Mr Clifton Pannam, a QC from Melbourne, who in fact drafted the advice for both the harness racing board and Victoria racing.

CHAIR—We have sitting at the table with us officers from the department. We will ask them, because I was a little bit lost when I read that bit of your submission. Mr Buettel, could you make a comment on that?

Mr Buettel—As far as the department is concerned, this is entirely a contractual matter between Harness Racing Victoria and the MCTC as to whether the MCTC should be allowed to consent to retransmission of harness racing.

CHAIR—Are you saying that Sky Channel has not got a say?

Mr Buettel—No, what I am saying is that parliament should not be putting in place special rules which would override the rights of the program provider in favour of the broadcaster.

CHAIR—Does that make sense to you, Mr Hodgman?

Mr Hodgman—I believe the same circumstances would occur to any television operator or station that wanted to broadcast races but did not have the rights to do so that included pay TV rights.

Mr Buettel—That is really a matter for the horse racing body concerned, to decide who they want televising their events. It is entirely a contractual matter between the parties.

Mr Hodgman—We maintain that we are not passing on pay TV rights. We maintain that we are simply allowing a signal that is freely available to everybody in the community to be retransmitted on the platform of pay TV.

Senator SCHACHT—If they want it.

Mr Hodgman—If they want it, yes. Obviously, not all pay TV operators want to run Channel 31, or community TV, at this point in time.

Senator SCHACHT—Because you are a community broadcaster, because of the nature of the contract you have with the harness racing industry to provide that service, would you have any objection if a pay TV network or station chose to rebroadcast the harness racing service that you provide?

Mr Hodgman—We do not have any objection to that whatsoever. We are quite happy for them to retransmit our signal as it goes to air as a free to air signal.

Senator SCHACHT—Yes.

Mr Hodgman—But by giving them permission to do that we are in breach of the Sky Channel contracts. Sky Channel has the first and last rights of pay TV rights. They maintain that, by letting a pay TV operator retransmit free to air signals, we are fundamentally giving away pay TV rights.

Senator SCHACHT—No, because, if Channel 9 pays for the rights for rugby league, it can be retransmitted by pay TV. That happens, and under retransmission you would be exactly the same.

Mr Hodgman—We believe so, but on checking with them today they say that, unless the original owner of the rights gives permission, their advice is they would be contravening the licence agreement as well.

Senator SCHACHT—I have to say that is your problem. I do not want to sound flippant about that, but that is your commercial problem. We are not arguing that issue here.

Mr Hodgman—But that is not just a problem for community TV. It would be a problem for all television stations that were broadcasting sporting events that they did not hold pay TV rights to.

Senator SCHACHT—I do not think the brains trust sitting on my right here from the department agree with your view about that. I have to say it is not the issue we have been debating, that this is an issue for retransmission. Not even the free to air television stations

have argued that case. They have looked at every possible issue they can raise to put a spanner in the works of pay TV, but not even they have tried that one. So I think you are safe.

Mr Hodgman—If that is clearly defined, we would be very safe and we would be very happy.

Senator SCHACHT—Good.

CHAIR—We are not offering you legal advice.

Mr Hodgman—I understand that, yes.

CHAIR—Let me just say that Senator Schacht might want to, as a bush lawyer, but—

Senator SCHACHT—I am not giving legal advice. I am just saying that, if free to air television this morning in three hours tried every argument they could think of to make it difficult for pay TV, you might say, and they did not try that argument, then I do not think the argument has got much weight at all. If you are putting out a free to air signal with harness racing and pay TV wants to retransmit it, under the rules of this legislation, so be it.

Mr Hodgman—That is what we were hoping for. That is certainly our understanding of it.

CHAIR—Mr Hodgman, let Mr Buettel continue.

Mr Buettel—The point I am making is that Harness Racing Victoria has agreed a contract with you that you will televise their event on the basis that you will not then allow further retransmission. As far as the department is concerned, it is entirely a matter for you to comply with your contractual obligations with Harness Racing Victoria. They are the people staging the event; they have the right to decide who they want to allow to televise it and on what terms and conditions.

CHAIR—So, if it is to their advantage for it to go on Sky Channel and be retransmitted from 31, then they will renegotiate the agreement with you if it does not fit now. But, if it does not, it is not really for legislation to deal with that. Do you see what we are saying?

Mr Buettel—Yes.

Mr Hodgman—I understand what you are saying. Again it comes back to the fundamental right to retransmit a free to air signal. That is an area that we have to negotiate ourselves, but we—

CHAIR—No. They have given you the right to transmit their event.

Mr Hodgman—Yes.

CHAIR—It is free to air. It is not about the right to then retransmit the free to air. It is the right to transmit their property which you have negotiated to transmit for them. So they have an ownership on that. Am I correct, Mr Buettel? Have they a proprietary right on their product and there is an agreement that you will not retransmit it? I presume that is what is in your agreement.

Mr Hodgman—It does not say that we will not retransmit it; it says that we do not have the rights to offer it to pay TV.

Senator SCHACHT—If the legislation allows retransmission as a right under the Broadcasting Services Act—

Mr Hodgman—They fundamentally disagree with that. That is the problem.

Senator SCHACHT—As far as I am concerned that is just their view.

Mr Hodgman—Certainly that is the way we see it as well, so long as there is a fundamental right for retransmission—

Senator SCHACHT—Someone might test it in the High Court and say that parliament has got the legislation wrong. You cannot stop lawyers doing that, but no-one tried that on us this morning.

Mr Buettel—Perhaps we can make the offer that the organisation concerned come and talk to us and we will deal with them and discuss the situation with them.

Senator SCHACHT—Accept it with alacrity.

CHAIR—There we are, Mr Hodgman; you have an offer from the department.

Senator SCHACHT—Go and see them. I will be waiting with bated breath.

CHAIR—Either the department will come and see you or they will arrange to have some sort of a teleconference or visit.

Senator SCHACHT—Take them to the trots at Harold Park and they will be right.

CHAIR—We will try to sort out whether it is an issue that affects you under the legislation or whether it is an issue about your agreement. That is the thing we need to sort out, isn't it?

Mr Hodgman—Yes, we appreciate that.

Senator SCHACHT—In your recommendation on page 3, on the hoarding issue, you say that, if the commercial stations cannot show it but they have the rights and pass it off to the national broadcasters and they do not want to take it, then you want the community broadcasters to have the right to take it.

Mr Hodgman—That is correct.

Senator SCHACHT—The issue here is: would that be for one individual station or for all community broadcasters as a job lot?

Mr Hodgman—It could be either. Originally, when we first raised the issue with the Ashes series last year, we were looking at all stations that were on air, including Perth and Hobart, which were doing Test transmissions. It could be either. There may be circumstances such as recently when the ABC had the finals of the women's basketball. Game two, for instance, was between Adelaide and Melbourne and would have specifically had special interest in those states. They did not broadcast the final of game two live and they subsequently had a delayed telecast later that evening. We would have been able to run it free to air in both Adelaide and/or Melbourne for the greater community to see. That is an example of where that could have been isolated into one single market as opposed to a mass market.

Senator SCHACHT—Could the department officials tell us if there is any ideological, philosophical or practical reason for this amendment being opposed?

Dr Hart—I am certainly not aware of any ideological one. I think the national broadcasters were chosen because they have a greater reach.

Senator SCHACHT—They have a greater reach, but if they knock it back—

Dr Hart—That is right. If they do knock it back we could have a look at whether it is possible for the offer to then be passed on to the community broadcasters. There may be some practical issues associated with that in terms of the offer time that is needed. It would complicate the regime, but it is something that, subject to the minister's agreement, we could have a look at.

Senator SCHACHT—I am sure the pay TV people will not like it because it will be another barrier they have to jump over.

Mr Hodgman—A good example is next year for the World Series Cricket out of England where a lot of the matches will be coming in in prime time. There may be interesting games that do not include Australia and they may interfere with prime time schedules on both the national broadcasters and the Channel 9 network.

CHAIR—When nobody takes it up, is there a provision for a community television station to then have it?

Dr Hart—There is not at the moment.

CHAIR—So you are saying that, if nobody wants it, you should be able to have access to it.

Mr Hodgman—We believe that there is a need. Certainly last year we had a lot of support to play the first two hours of the game and then transfer it and advise everyone to tune in to the major network broadcaster. We have no objection to that. What we are trying to do is to give the public what they are looking for. In the case of cricket, for instance, certainly a lot of people would have liked to have seen the first two hours. We believe that there may well be matches next year that do not necessarily include Australia—it might be South Africa and West Indies—but there may be interest within communities here to see that, especially with some of our ethnic communities such as the Pakistanis, the Indians, the Sri Lankans and people from those countries who are now emerging supporters of community television.

CHAIR—What is your coverage area?

Mr Hodgman—It is 78 per cent of Melbourne, and we are looking to increase our coverage area to be 95 per cent in 1999.

Senator SCHACHT—If you had the right passed on to you, would you be the third level as the rights came cascading down from free to air, to national, to community? You would then sell a limited range of advertising sponsorship, as the number of minutes per hour and the type of sponsorship are restricted. Is that correct?

Mr Hodgman—That is correct. When we were originally talking to FACTS about it, we were also looking at a way of meeting some of their obligations with some of the major advertisers that they may have wanted to include as well.

Senator SCHACHT—By doing this, which is a major commercial sponsored sport, does this in any way make it difficult for the definition in your own standing of what community broadcasting is vis-a-vis what community broadcasting is? You are doing something here that is basically accepted as being covered by the commercial networks and/or the national broadcasters and suddenly you are now doing something that they should be doing?

Mr Hodgman—No, we believe that we are meeting that need of providing access to a community that is otherwise denied it. They are being denied the coverage during those hours and we are providing the air time for that to occur, so we believe that it very much fits in. We are not competing against any of the networks head to head, nor are we looking to seek mass audiences. All we are trying to do is to provide a service to a special interest community. It depends on how you define community, but certainly there is a cricket fraternity which we would define as being a special interest group.

CHAIR—How do you get your television station? I am in Melbourne.

Mr Hodgman—If you are in Melbourne there are several ways. If you are on Optus you can pick it up automatically through Channel 31.

CHAIR—No, free to air.

Mr Hodgman—Either through the main transmitter on Channel 31 or through—

CHAIR—How do I get 31?

Mr Hodgman—After you have gone past SBS, we are the next channel. The easiest way is to loop it through a VCR and that will help enhance our signal. It is the next one after SBS, which is on Channel 28.

CHAIR—I will ring you up and get a tutorial, because you must be that fuzzy thing I keep seeing at about number 15 or something.

Senator SCHACHT—You are saying that, for a normal viewer with a standard television set that already receives the five free to air channels, if they press the button or turn the dial to 31 on the UHF band, if your station is transmitting they will see your picture.

Mr Hodgman—That is correct—unless you have tuned into Foxtel, where it has probably been tuned out.

Senator SCHACHT—Have Foxtel done it again?

Mr Hodgman—We have an issue with Foxtel, yes.

Senator SCHACHT—They have not taken down your aerial as well, have they?

Mr Hodgman—No, not the aerial, but they have certainly detuned us out of the little black box.

Senator SCHACHT—I see.

Mr Hodgman—So anyone who channel surfs will get every channel except 31. When they leave the documents after completing the installation, they do not tell you how to regain your Channel 31 signal.

Senator SCHACHT—Ms Richards, perhaps you could take up with ASTRA the code of practice—that you do not tune Channel 31 out of the box when you are connecting up Foxtel or Optus. Would that be a reasonable statement?

Ms Richards—They are allegedly taking off the aerial.

Senator SCHACHT—Yes, of course.

CHAIR—Mr Hodgman, I think you are having a good day today.

Mr Hodgman—Yes, we are.

Senator SCHACHT—Just send us 10 per cent. We will have a cup of tea and we will be right.

CHAIR—The department will have a chat to you about the taking of your transmission on to the channel. That is the word we should be using. It is not the offering; it is the taking, isn't it?

Mr Hodgman—That is correct.

CHAIR—Is that a distinction that should be made?

Dr Hart—Being in the offer queue.

Senator SCHACHT—Yes, they are No. 3 in the queue.

CHAIR—No, the other thing is the issue of the Victorian harness racing being taken. At the moment it can be taken, but should it be offered? Is there a distinction between offering it to one of the channels or it being taken by one of the channels from free to air signal?

Mr Jarzynski—It is being taken at the present time.

Mr Hodgman—It is being taken at the present time. If we have to offer it, they believe that we are in breach.

CHAIR—Yes. So ‘offer’ and ‘take’ are the operative words?

Mr Hodgman—That is correct.

CHAIR—You discussed that with the department, but they seem to think it is an issue that should be sorted out commercially.

Dr Hart—Contractually.

CHAIR—Contractually, rather than through the legislation. Who will I leave to get in touch with them? Mr Buettel, will you get in touch with them?

Mr Buettel—Yes, we will.

Senator SCHACHT—Ms Richards will check with Mr Mockridge and get back to you, Mr Hodgman, to have any clarification needed about tuning up black boxes.

CHAIR—If I cannot find you, I will ring you as well.

Mr Hodgman—I will organise that. Certainly we have instructions on how to tune in to 31.

CHAIR—If you would send that to my office in 270 Clayton Road, then we will all be happy.

Mr Hodgman—I certainly will.

CHAIR—Thank you, Mr Hodgman.

Mr Hodgman—Thank you very much.

CHAIR—I now welcome Mr Scott to the table. The committee has before it submission No. 50, which it has authorised to be published. Do you have any alterations or additions you would care to make at this stage?

Mr Scott—I do have some additions, which are based mainly on some additional research that we have done over the past few days. Our submission hinges on the assertion that closed captions are an integral part of a television broadcasting service, just as is the audio. The captions are actually the sound for people who are deaf or who have a hearing impairment that precludes them from hearing the audio properly. They refer to the program on a moment by moment basis, so they are different from any other sort of ancillary data service that might be broadcast with the television signal.

There are 1.7 million people in Australia, according to the Bureau of Statistics, who have a significant hearing loss. Our research indicates that over 30 per cent of those people use captioning to access television.

CHAIR—Mr Scott, given that we had all this in the digital hearing, Senator Schacht and I are very aware and very positive about captioning. I do not think we need to go over that again. What we need to know is: what is happening in this instance with captioning? The issue of captioning, I think you would agree—

Senator SCHACHT—On retransmission.

CHAIR—Yes, we want to know about captioning on retransmission. We understand many people use captioning. We are very sympathetic to the cause but we want to know about this particular issue.

Mr Scott—On the history of retransmission since 1995, when the Federal Court made the decision, initially only Optus Vision was showing captions on the retransmission signals. It took about another year and a half before Foxtel had reached a situation where they were able to pass the teletext signal through their services and, according to Austar, they still do not have the technical capability to pass the caption signals through the retransmissions.

Senator SCHACHT—Today?

Mr Scott—Yes.

Senator SCHACHT—What about East Coast?

Mr Scott—East Coast is in the process of being taken over by Austar.

Senator SCHACHT—But does East Coast do it anyway?

Mr Scott—No. According to what Austar said, they are in the process of upgrading their services. They claim that within three months they will have the ability to pass any signals that are on the VBI—

CHAIR—Earlier today I said that approximately 15 per cent of free to air transmission had captioning. I was told with no qualifications that all that captioning was being transmitted on pay TV. Is that right? Is that what I heard today? On cable—that is what I mean.

Senator SCHACHT—It was on cable. The problem is that with the dishes the satellite one is not doing it. Is that right?

Mr Scott—That is correct. I think most of Austar's transmissions are through satellite. They also have a cable service, I believe, in Darwin.

Ms Richards—Austar are mainly involved in satellite and MDS wireless connection but in Darwin they have a cable operation.

CHAIR—I did not understand the subtlety this morning. I assumed it was all retransmission-carried captioning. So that is not right? Is it only cable retransmission?

Ms Richards—My understanding of what Tom referred to earlier was that the cable retransmission was showing all the data including the captioning. It was an issue with Foxtel and Optus Vision.

Senator SCHACHT—I think he was talking about Foxtel. The issue here is that, when it is done by Austar, which is a satellite on microwave distribution, and they are taking retransmission of the free to airs, that captioning is also provided. We are not sure whether Austar are able to do that. Are you telling us they cannot?

Ms Richards—They are upgrading to do that. That is my understanding.

Senator SCHACHT—I think the quickest thing we ought to say here is that the legislation ought to be explicit that, if any pay TV operator is retransmitting a signal and that signal is captioned, it must be captioned on the retransmission by pay TV. Game, set and match!

Mr Scott—We would certainly appreciate that.

Ms Richards—The only qualification I have—

Senator SCHACHT—It is a big complication.

CHAIR—Hang on, Senator Schacht.

Ms Richards—I am not against the principle at all. The only qualification I would have is in the situation where Austar are actually technically upgrading, so there is a technical issue in terms of what they can transmit. But once that technical issue is fixed, that is fine.

CHAIR—Is Austar the only one? If we find anybody else new in the field, once they fix that up it would not be an issue any more. So all the carriers can do it?

Ms Richards—Yes. My understanding is that on cable transmission at the moment, which is Optus Vision and Foxtel, there is no problem. Initially there was one with Foxtel but that has been fixed.

CHAIR—What if we say yes and we put that requirement in? What about the problem with any smaller companies? Do you have any smaller ones?

Ms Richards—Not any more.

CHAIR—Are we going to catch anybody up? That is what I mean. Is anybody small who cannot do it going to get caught in the system?

Ms Richards—I do not think there would be a problem if the legislation said that it must be the whole signal. The only qualification I have is if there is a technical issue in terms of capacity.

CHAIR—But they are saying they are doing that, aren't they? Somebody said to me they would have it done in three months.

Ms Richards—Yes, Austar. That is what Robert just reported.

Senator SCHACHT—If we have any form of 'must carry', anyone who wants to be a pay TV operator has to understand that they need the technical equipment that they have to pay for to ensure that the captioning that goes free to air is exactly the same as on any pay TV signal—full stop.

CHAIR—Can I ask you to do something for us? Before we actually make that rash promise, Senator Schacht—

Senator SCHACHT—No, I will be voting for it in the legislation.

CHAIR—I think we would both agree that, wherever captioning is, we would like to see it in retransmission. Perhaps you can come back to us on notice—because we have only Mr Scott's word about it being three months—as to whether any of your members have a problem with that. If they have a problem, do they object to it in principle? I would be very surprised if they say they do not. If they do not object to it in principle, what is the reasonable date by which they could achieve that? If captioning increases for certain things, which it could do, will that change things? I do not understand technically whether you need more space or not. If captioning increases, can they still deal with that capacity? I want to know the answers to those questions. If the free to air stations were to do more captioning, could you cope with that? If you cannot, why not? We have some very good reasons as to why you could not. My inclination is to agree with Senator Schacht, but I think you should have the chance to respond as to whether that is reasonable and what time is reasonable.

Ms Richards—Okay.

CHAIR—I know that you are looking at me askance, Mr Scott.

Mr Scott—Oh, no.

CHAIR—But it is difficult to ask someone to do something that is totally—and you might end up with nothing at all; they will not retransmit. What I would do is pull off the retransmission, if it is going to be an impossible ask.

Mr Scott—Madam Chair, I think it should be noted that other countries in the world have quite strict legislation about levels of captioning that have to be done. A lot of the equipment that is being purchased by pay providers comes from those countries. So there are technical solutions to any of those problems.

CHAIR—Well, we will get their view and make an assessment when we get the written response back from Ms Richards with their arguments. If they have told you three months, we will see whether they will support publicly that it is going to be three months or six months or whatever else. Is that okay?

Senator SCHACHT—Absolutely, but from the Labor Party's point of view—taking into account all of that information—we would be very supportive of amending the legislation to make it absolute. The signal has captioning on it, and retransmission is not changing the content of the signal; it is just completely retransmitting as is, including the captioning. If you take captioning off, you are amending the signal. Once you start amending the signal, you get into a really different argument with the free to air networks that their signal is being amended. Pay TV's main argument on retransmission is that it is exactly the same signal going out and that the consumer is just choosing which infrastructure they want to have it delivered. If you take captioning off, you are amending their signal.

Ms Richards—I certainly agree with you, Senator. We think retransmission is simultaneous and unaltered retransmission. The issue for Austar—

Senator SCHACHT—I think we all agree. Well done, Mr Scott. You are ahead on points.

Ms Richards—The issue for Austar is their cable retransmission in Darwin. They do not actually retransmit any other services, except in the particular circumstance of Prime in Tamworth and SBS in Port Lincoln.

CHAIR—I do not understand what you mean by that. So what?

Senator SCHACHT—So what?

CHAIR—What do you mean? I do not understand the point that you are making. I am not being silly or stupid or difficult. What are they doing in Darwin? Does that mean they cannot retransmit captioning as well?

Ms Richards—No, they have got cable in Darwin so there should not be a problem there.

CHAIR—Right.

Senator SCHACHT—Yes, we agree. But there is not going to be a problem anywhere because, if you do not do it, you will get knocked over.

CHAIR—There is not going to be a problem in Darwin. There is not going to be a problem in Port Lincoln.

Ms Richards—I just made the point that the only other places they retransmit is Prime in Tamworth and SBS in Port Lincoln. For Austar the issue is that they are servicing—

Senator SCHACHT—But you have to understand—

CHAIR—Hang on, just let me finish. The problem for Austar is where?

Senator SCHACHT—Everywhere, because they are not retransmitting, are they?

CHAIR—Senator Schacht, just let Ms Richards answer the question I have just asked. Just explain to me: Austar retransmit where?

Ms Richards—Austar retransmit in Darwin, and they retransmit ABC, SBS, Channel 7 and Channel 8 NTD8 in Darwin by cable.

CHAIR—All by cable?

Ms Richards—By cable.

CHAIR—So it is not going to be an issue there. Where are you telling me it may be an issue?

Ms Richards—It may not be an issue—

Senator SCHACHT—Everywhere else.

CHAIR—Shush, Senator Schacht. Please tell me where it may be an issue other than those places mentioned. I do not know where they broadcast. You might; I do not. Do they broadcast everywhere else?

Ms Richards—They broadcast everywhere else, but I am talking about retransmission of the signal.

CHAIR—Everywhere else where there is retransmission, other than those areas you have mentioned, there may be a problem. Is that what you are telling me?

Ms Richards—Because they do not transmit by cable—

CHAIR—That is right.

Ms Richards—And those two areas are Tamworth, where they retransmit the Prime signal only, and in Port Lincoln, where they retransmit SBS.

CHAIR—That is what I wanted to know. So we might have problems in those two areas unless we know how long it is going to be before they get their apparatus up to date to be able to do that.

Ms Richards—They are the examples that we have at the moment because that is where they retransmit, but I take on board the issue that you have raised. We should look at it overall and see whether there is an issue in terms of retransmission and technical capacity, whether we agree with it in principle, the reasonable timing that we would need, et cetera, and we will come back to you on that.

CHAIR—And understand that the reasonable timing is on the short end rather than the long end. Do you see what I am saying?

Ms Richards—Yes, I understand that.

CHAIR—The very short end.

Ms Richards—Could I table where we do retransmit?

CHAIR—That would help me.

Senator SCHACHT—I am sympathetic to the issue of making this legislation in a form of ‘must carry’. Given the example raised this morning, Austar said that they do not retransmit in the Spencer Gulf region of South Australia because there is no need to and the signal is good enough. But, if you make a ‘must carry’ arrangement, unless you give exemptions, they would have to carry the free to air in that area. As it is a satellite signal, they would have capacity problems with putting another five signals on. If we overcome that problem, they will then have to understand that when they put it on air they have to run the captioning. Irrespective of that, my view is that captioning is mandatory. You cannot take captioning off if you are doing any retransmission under any form of delivery system by pay TV. The captioning must stay.

CHAIR—Do you do any other captioning? Do you caption anything else that you get directly?

Ms Richards—I do not know offhand, but I can respond to that.

CHAIR—I would be interested to know that too. Do you have any community obligation or community commitment to captioning, or do you take it off when you buy a product that has captioning? Do you always send that captioning? I would like a little paper on what you do with captioning. That has nothing to do with this bill, but it is of interest to the committee.

CHAIR—Do you have any questions of the department?

Senator SCHACHT—I think they have got most of the gist of what we were about during the last five to six hours. Whatever the recommendations of the committee, from the perspective of the opposition in terms of amendments we may be looking at a form of ‘must carry’. There is also the nightmare with the definition of underlying rights. I think we are all in the same quagmire, so I will see you at another hearing.

CHAIR—Does the department have anything it wishes to add?

Mr Buettel—No.

Senator SCHACHT—So nothing has come up today on any suggestions from the committee or from around the table that it is something out of left field that is absolutely unattainable even if the parliament amended the legislation a bit?

CHAIR—I think that is an unfair question. That is a policy question.

Senator SCHACHT—No, I am not asking them to comment about the policy implication. I am just asking whether there is anything I have raised that you think technically is contrary to WTO, the constitution or anything in those areas.

CHAIR—Senator Schacht, I think that is a bit difficult for them to answer.

Senator SCHACHT—Well we had a double discussion earlier about constitutional matters.

Mr Buettel—Senator Schacht, in relation to the issue you raised earlier with the ‘must carry’ rules and whether a separate tax legislation would need to be enacted, the department did look at the issue at an earlier stage. One of the models for a ‘must carry’ regime that was put to the department was looked at, and we did get advice to the effect that implementing it would involve a serious risk of a tax being imposed and that we would have to do it with separate tax legislation. But subsequently other models were also looked at, and those other models did not have those difficulties.

Senator SCHACHT—You have answered the question. You will not be going out of here pulling your hair out that this committee has gone off the deep end with some suggestion that means the end of parliamentary democracy or the end of all broadcasting as we know it. That is fine.

CHAIR—I thank the departmental officers for their attendance. Also, Mr Scott and Ms Richards, thank you for your attendance today. I also thank Hansard officers for their patience with the earlier debacle this morning. It is done in a slightly different way with Senator Schacht and me, but it seems to work most of the time. I would also thank the committee staff for all the organisation they have put into the hearing.

Committee adjourned at 2.26 p.m.