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STANDING COMMITTEE ON ENVIRONMENT,
COMMUNICATIONS AND THE ARTS

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

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

Tuesday, 5 May 2009

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

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

Senators in attendance: Senators Lundy, McEwen, Pratt, Troeth and Wortley

Terms of reference for the inquiry:

To inquire into and report on:

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

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

WITNESSES

**BOWMAN, Mr Norman, Acting Principal Legal Officer, Copyright and Classification Branch,
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Committee met at 10.05 am

CHAIR (Senator McEwen)—I declare open this public hearing of the Senate Standing Committee on Environment, Communications and the Arts in relation to its inquiry into the reporting of sports news and the emergence of digital media. The committee's proceedings today will follow the program as circulated. These are public proceedings. The committee may also agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera.

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

I note also that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim.

[10.08 am]

CLEMENT, Mr Robert James Dixie, General Manager, Innovation and Best Practice, Australian Sports Commission

NANCE, Mr Gregory John, Director, Sports Performance and Development, Australian Sports Commission

CHAIR—I welcome witnesses from the Australian Sports Commission. Thank you for coming to talk to us today. The committee has received your submission. Do you wish to make any alterations or amendments to that submission?

Mr Nance—No, we do not wish to make any changes.

CHAIR—Thank you. Would either or both of you like to make a brief opening statement before we go to questions?

Mr Nance—Senator, I will make some brief opening remarks, and we will go from there. I would like to underline some key points from our submission to you by way of opening remarks. First off, the commission supports open and unfettered access by the public to sports news, regardless of the media platform—that is, platform neutral. In the evolving digital world, the principles of fair dealing and legitimate sports news reporting are still relevant and should be applied across all digital media platforms. We believe that the fair dealing provisions require modernisation to reflect the rapid emergence of new forms of media. To achieve this end, we are recommending action at three levels—clarifying regulation, creating a set of guidelines and a code of practice perhaps enforceable by regulation and having an agreed-upon dispute resolution mechanism such as mediation, where legal action is not required.

We would also like to emphasise that the reporting of legitimate sports news should not be restricted or limited by any new regulations or guidelines. However, the intellectual property of sports should be protected. In conclusion, the most likely desired outcome for all parties involved, we believe, could be the creation of these industry guidelines, supported by a dispute resolution process which is not legal in nature—that is, it does not cost much. I will conclude my introductory remarks there.

CHAIR—Thank you very much. Do you have anything to add, Mr Clement?

Mr Clement—No, that is fine.

CHAIR—You mentioned sports organisations holding intellectual property. The committee has had different views on that. Can you elaborate on why you believe national sporting organisations do have intellectual property rights in their sporting events?

Mr Nance—The sporting organisation itself is responsible for the development of the sport right through the whole pathway—all aspects of it. If they do not have some form of protection of their intellectual property, it is very difficult for them to be able to gain resources other than

from government—in other words, to gain resources from the private sector. With most of that ‘intellectual property’—and I know that has to be tested by the law and I am not a lawyer—the issue is that if they do not control it they normally do not control their events very well and they cannot get commercial revenue into their events or activities to support the development of their sport. Obviously, sports do require a measure of protection around what they call intellectual property.

CHAIR—But there is no legal basis that you are claiming exists there?

Mr Nance—Again, I do not wish to go into that area myself. We are not taking a position on that. I know intellectual property is tested by law constantly. I know from personal experience before I took up this job, when I was CEO of Surf Life Saving Australia, that I was in the marketplace every day protecting what we thought was our intellectual property. That is not in my current role at the Sports Commission, but my personal experience is very much coloured by that, and that battle goes on for sport every day.

CHAIR—Are you proposing, then, that there should be some sort of legal basis for vesting intellectual property in sporting organisations?

Mr Nance—It needs to be tested by the law. The current provisions of what is called fair dealing need to be modernised, and that is where we are proposing a set of guidelines be established to be able to determine what fair dealing should be in the new media. I do not really want to delve into the professional sports—they have already had a fairly good hearing with you here—but the Olympic sports, the ones that are principally funded by government, tend to be left out a lot in this area of their business. They do not have the resources or the capacity in the emerging media to be able to challenge too much under the law. So some form of regulation or guidelines that all of the stakeholders can accept to give some sort of a form and framework to how those commercially smaller sports may be able to gain revenue from their rights would be a good thing.

CHAIR—So what you are seeking, then, is a refinement in the Copyright Act. I grappled with your submission where you are saying you do not want legislation and regulation but you do want enforceable guidelines.

Mr Nance—Yes. If regulation and a set of industry guidelines that everyone signs up to cannot be achieved, a clear dispute resolution may be the best position that we could get to. But it would be better than what is there at the moment, which is essentially just that each case is individually tested by the law. I note that the media organisations want to keep that going that way. That is fine, but that is very difficult for sports, particularly for the Olympic sports, which are almost wholly funded by government—90-plus per cent of their funding comes from government in most cases. They have very little ability to compete in that arena and achieve what people see as potential forms of new revenue into the sports system. So a set of guidelines or regulation that creates some certainty for them to be able to act in that arena would be the way to go for smaller sports that now have difficulty playing in that arena because they simply cannot afford it. Most of them do not have the resources to take on and enforce their rights under the law as it stands at the moment.

CHAIR—Are you aware of any particular instances where sports such as those that you mentioned have been either reluctant or unable to pursue a legal matter because of a lack of funds? Effectively, I guess they would have to rely on government funding to pursue a matter.

Mr Nance—As a general observation, what is happening as the technology is emerging in these new media platforms is that the Olympic sports—the smaller ones—are being left behind. They cannot compete. They cannot even get to the start point. This is simply because they do not have the resources—and, with the lack of certainty for them, they cannot take the risk. It tends to be rolling on in front of them. The professional sports have a large stake in it, and they have already explained that to you, and they have the resources and the capacity. They are protecting a very large commercial investment.

The smaller sports, prior to this new technology coming on board, were pretty much left out of things anyway because they could not afford traditional broadcast media. Some can at different times, but mostly they cannot. As the new media platforms have been rolling out, they just have not been able to compete to get involved, but they do see it as a new form of revenue for them. If there were some form of guidelines that they could hang their hat on, if there were more certainty to the market for them, they would be able to play in that arena. At the moment, it is very difficult for them to do it. Their potential to raise that new income that is potentially seen there—they cannot even get to the start line to do that. That is basically their problem. That is across the board for all Olympic sports, from swimming—which is the largest and has got more non-government revenue than any other sport—right down to the smaller ones where they are up to around 95 per cent government funding.

As a business model for sports going forward, I think it is vital that we do have a look at creating some certainty for the sports industry, particularly at the smaller end of the scale, so there is the potential for them to get into this new media. Some of them are in it now. They have all got websites and some of them have arrangements with mobile phone companies and all that, but they have not really gone into the market in any way because, essentially, the uncertainty created by the way things work at the moment make it very difficult to do that. So they are sitting back and everything is happening around them. Our submission is essentially attempting to take a middle ground here. We do mention regulation but we are really falling on the side of a set of guidelines and decent dispute mechanism to give some certainty for those smaller sports that we think would be appropriate.

CHAIR—Are you aware of similar discussions going on with international organisations equivalent to the Australian Sports Commission and are you having any conversations on an international level with other similar bodies about these issues?

Mr Nance—We are not directly involved in any discussions ourselves, but I might defer to Mr Clement. We have had a look at what is going on internationally for some time.

Mr Clement—We have not been directly dealing with any other government agencies overseas or the like. I suppose that is because we are not directly involved in the intellectual property rights or the fair dealing provisions with sporting bodies. It would be more the sporting bodies that are operating commercially internationally and crossing those boundaries.

Mr Nance—We are aware that some of the major international sporting federations are really into protecting their rights with their large-scale events. That has come out in evidence to you through the other sports. That goes on all the time, not only in the professional sports protecting their leagues but also with FIFA and their World Cup, and Rugby Union with their World Cup. There is every indication that they are getting more detailed and stronger and trying to apply much greater certainty to their commercial negotiations around media rights as they bring the events into the country or where they are running a professional league already within a country.

Mr Clement—The impact of the internet is global and so there is no doubt that this issue is going to be more of a global issue in the future anyway. There is more and more competition domestically from international sporting codes, whether that is access to footage rights, content and/or events being played out in our region and/or Australia. So not only are our sporting bodies competing domestically with each other for access to availability on content and rights but now they are also competing more and more in a global market where international sporting competitions are more regularly based in our zone or region. Also, through pay TV and the internet, consumers have a lot more opportunity to access content from other nations and competitions, such as the IPL or the Premier League in England and those sorts of events. So, again, that only creates more competition for the sports to provide opportunity in that commercial space to generate some revenues from their intellectual property that can then go back into growing the game.

Senator LUNDY—In describing the situation that sports find themselves in and the challenges of the digital age in providing them with sources of new revenue, is the Sports Commission actively advising sports that they need to try and secure revenue from these sources?

Mr Nance—Yes, we are, across some of our programs where we deal directly with government and business development of the sports—the peak bodies, I mean. We have a very small program which we started last year to increase their ability to raise commercial revenue, and this comes up all the time. We have already dealt with athletics. We have given some financial assistance after having a good look at each sport. Athletics, cycling and triathlon are the three sports we have started off with. When you look at their commercial situation, the ability to harness the potential revenue from the new media comes up all the time.

Senator LUNDY—You say ‘comes up all the time’. What is the context in which that issue is being raised? Is it conversations between the management of those sports and the Sports Commission?

Mr Nance—Yes, at that level, definitely.

Senator LUNDY—Do the sports approach you and ask for your assistance about how to harness these revenues or is it more an active encouragement from the Sports Commission?

Mr Nance—It has come out in a dialogue when we have gone in to deliberately assist them generically with building non-government revenue for their business. We can always only be fairly limited in what we do in that regard, because they have basically got to do the work themselves, but we can certainly help in getting consultancies and experts in to assist them in building their base. When you look at the commercial solutions for the three we have dealt

with—we are advanced with athletics and fairly advanced with cycling and triathlon—in that dialogue, the ability to harness the new media has come up in each case. If you look at the traditional membership base of the sport and how they communicate with their members and the potential to exploit that across the new media, that is where most of them sit. Traditionally, they have talked to their members through pieces of paper and conventional things. As the web has come on and other forms of media have come in, there is the commercial potential for the private sector to get to that membership base.

Senator LUNDY—So you are talking about selling access to the sports clubs' memberships?

Mr Nance—Correct. That, in some form or another and through some platform or another, is essentially the space that the sports are in commercially at the moment. It is not everything they have got to do but it is one vital aspect of being able to create a product and take it to market. Normally, the product potential lies both around the number of members they have and in their events, their activities. The commercial potential lies in how the private sector can exploit that and how it can talk to them. The platforms and the ease with which you can get across that is the space they are in at the moment.

Mr Clement—Broadcast rights per se is one element of a commercial strategy for a national sporting organisation, whether it be in merchandising, licensing, broadcasting—the development of their intellectual property. We are looking at the sustainability and the cost of sport—for sports to generate the ability to sell themselves better and to generate commercial revenues from their inherent intellectual property to make themselves more sustainable. That is whether it is for high-performance purposes to compete on the international stage or whether it is to grow community sport and participation. All the sports we are talking about are effectively not-for-profit, as you would well know.

Senator LUNDY—So the motivation behind the Sports Commission's encouragement of sports to find new sources of revenue is based on what? What is the policy that you are putting in place by undertaking that activity?

Mr Nance—The bulk of our money goes in for high-performance sport, as you are aware. But increasingly, if you have not got a viable, sustainable and well financed and resourced national sporting organisation, that investment can often get shaky. We have had instances where some of the sporting organisations have gone to the wall—canoeing was one in recent times. Many of them sail fairly close to the wind in terms of their financial performance every year even with the money we put into them, so it is in our best interest to see them develop other forms of non-government income to build their business. It has to be treated as a business in the current context. Sport is a business, whether it is a not-for-profit business or for-profit at the top end. That is the incentive.

Senator LUNDY—Sure. For clarity's sake, you are not suggesting that the Sports Commission's contribution would reduce; rather it is that these additional revenue sources would help strengthen the business of sport?

Mr Nance—Correct.

Senator LUNDY—I thought that was an important point to clarify.

Mr Nance—That is right.

Mr Clement—I think the demand of sport for resources, like that of all people, is increasing, and we have limited resources. So there are pressures on all those resources, whether they are allocations of grants or whatever. This is the other avenue for them to develop. In an industry which is probably a little bit more immature in its business approaches and commercialisation of its assets, this is probably the next opportunity for them to enhance revenue streams.

Senator LUNDY—To go to the issue of intellectual property: as the chair said, we have had evidence that there is no intellectual property in a sports event per se. What we know is that under the copyright law intellectual property of moving and still images is derived from the fact that they are taken by someone. Their inherent value in that intellectual property right is then owned by the photographer and/or their organisation—the broadcaster et cetera. To refer you back to the chair's question, which I do not really want you to repeat, can you describe if the Sports Commission is of the view that there is an inherent intellectual property right in the sports event per se? We have had evidence to the contrary and we have certainly reviewed the Copyright Act, and there does not appear to be one under the law, so I am interested in the Sports Commission's view.

Mr Nance—I would have to take that on notice. I am not on the legal side of it. If you take a non-legal look at it, I would have to say yes—the event is inherently the intellectual property of the sport. The sports put in all of the time and effort, the money, the resources and the volunteers. The whole system is created to get that sporting event up. Somewhere along the development pathway are the athletes, the administrators and the volunteers—the whole system—so why should the sport not have the intellectual property of the events it puts on? It goes to all that expense and time. Leaving alone the history and legacy of sports being involved in the events of the nation, of course my view would be that they own that intellectual property.

Senator LUNDY—What about the public good and the public interest derived from that public event?

Mr Nance—I think they are intertwined. You cannot—

Senator LUNDY—I am putting to you that the comeback to your position is that these are public events and there is no inherent property right, because they are put on for the benefit of the public.

Mr Nance—That is the top end of the scale of the commercial activity within sports. You could take that view. But for the bulk of the sports that we deal with—the Olympic sports—yes, the public has a right to view them and sees them and all that, but there is less public involvement in a lot of those Olympic sports. There are not many paying spectators coming through the gates for most sports other than the larger professional sports that we see every day. So there is a public right—we are not saying there is not—but if it takes away the ability of the sports to own and control their potential income from the events they put on then we are only going to marginalise the ability of those sports to compete commercially in the marketplace. We are just narrowing their opportunities, particularly at the bottom end of the scale with the Olympic sports, as I keep emphasising.

Senator LUNDY—Given that you have mentioned a number of times already that the government does contribute significantly to the funding of these sports, particularly the elite development area, what government policy, if any, are you fulfilling in trying to enhance the capacity of these sports to, in your words, ‘exploit the opportunities that exist in the private sector to increase their revenues from alternative sources’?

Mr Nance—The simple take on that is that if they can increase their revenues through this new media they will be able to provide more funding toward the development of the total sport, not just the elite end—the participation end, the grassroots end. To build their income streams to support that end is the most difficult aspect for Olympic sports.

Senator LUNDY—But to go back to the point about events specifically, because it is a public investment—it is an event that is eventually open to the public—I am trying to ascertain if there is a policy in place that links your statement about the intellectual property right associated with a sporting event and the capacity to derive revenues from that inherent intellectual property right from an event. I am certainly not aware of any, so I am asking you the question in a way that seeks confirmation that that is not actually guided by government policy per se and is essentially an initiative of the sports commission.

Mr Nance—Correct. There is no policy position I can directly relate that to.

Senator LUNDY—That was my understanding. Thank you for that. I go back to your points about sports memberships and the possibility of revenue being derived from the sale of sports memberships. I am sure you appreciate that that raises a whole bucketload of very sensitive issues relating to privacy and permission based marketing. Do you have a document or any materials that you provide to sporting organisations when advising them in their efforts to derive revenues from the sale or use by others of their membership details?

Mr Nance—The privacy laws are embedded in all of our policies, and they are reminded of that constantly. I am well aware of that issue. My comment was not so much about selling; it was more about the potential by other means. If a sport has, say, 100,000 members it is not a matter of getting to 100,000 members individually, but for the private sector that offers an opportunity to get to that potential market through non-intrusive means: the channels of communication that the sport has.

Senator LUNDY—Like online or through mailing lists.

Mr Nance—Like online, through sponsorships and through marketing. But I am not aware, in my experience, of sports selling directly individual members’ contact details. That is an opt in, opt out under the privacy laws anyway. My personal experience is that you do not go down that route. It is more about the potential for the numbers that can be got to through the conventional means of communication that are non-intrusive and do not go across the privacy provisions.

Senator LUNDY—To clarify there: you are not suggesting any change to the law with respect to the online environment as far as marketing opportunities are concerned?

Mr Nance—No, not at all.

Senator LUNDY—Just going to the definition of ‘news’: this is obviously a key point and you do tackle it directly in your submission where you argue that there need to be much more stringent or clearer guidelines around what constitutes news per se. How did the Sports Commission come to that view? Did you consult with your members? And, if so, which ones?

Mr Nance—We did consult with a number of sports across the board in the preparation of this submission. With the professional sports, we were very mindful of how they have come to you and where they view themselves. In the case of our general dialogue with most of the larger Olympic sports, we have had an ongoing dialogue with them about this particular issue and in preparing this submission, but, in terms of widespread, detailed consultation, we did not have the time to do that.

Senator LUNDY—That is fine. I just wanted to get a sense of ownership of this submission by the sports that you fund, as opposed to it coming from the Sports Commission per se.

Mr Nance—If we had had more time there would have been deeper and more detailed consultation, but I am pretty confident that what we are presenting here is taking a general, generic view of the sports, particularly the Olympic sports, that we fund.

Senator LUNDY—By promoting more specificity with respect to what constitutes news, as opposed to other content, you imply that the Sports Commission has a view that revenues would be derived from other forms of content placed online. What evidence do you have, if any, that there are revenues to be derived if content were to be made available, presumably for sale or pay per view, to audiences?

Mr Nance—We do not have any direct evidence of that at all. There is a lot of anecdotal commentary. I will go back to my original remarks: I think the sports are being left behind as the technology develops and they have just got nothing they can really grab onto because they lack the resources to become involved. There is an opportunity for them which is being lost.

Senator LUNDY—Do you think that the resources required to explore the potential for revenue making from this kind of digital content is something that sports would invest in if the rules were changed?

Mr Nance—Yes, and it is a resources issue. I think that, if they had the financial resources to become involved, they could obviously become bigger players in it, and get a lot more certainty about how they might position themselves in the emerging marketplace. But it is chicken and egg—they do not have the resources and the technology moves on. There are definitely opportunities there, particularly the alternative forms of media that have come up. There is normally a lower cost threshold for them to get involved. They do not have the money to get to that most of the time. But, as I said, a lot of the Olympic sports have been left out, with some exceptions, of the traditional broadcast rights arrangements. They just cannot get there. They have got to pay for their broadcast themselves to get on TV. This emerging media is there, it is localised and they are dabbling in it. They can see it right in front of them and people are coming in through the front door to talk to them about it. They are trying to get hold of where they should position themselves. They do not have anything to hang their hats on, other than, ‘If you really want to go down this route, if you get into a dispute it has got to be settled under the

law’—that sort of thing—and there is no real arrangement for them to become involved. A set of guidelines might solve that problem.

Senator TROETH—I might be missing something here, but I would have thought that there was a natural tension between the sports themselves having a commodity that media organisations want and that a fair proportion of the population want to watch, and that the media organisations will want to have this to some degree so that they can play it in whatever medium that represents. So why can’t this be resolved by negotiation rather than guidelines?

Mr Nance—I think it could be resolved by negotiation—short of legislative change, do you mean?

Senator TROETH—Yes.

Mr Nance—I know we put regulation on the table in our submission, but we are really leaning more heavily to a set of industry guidelines worked out by all the stakeholders. I agree with you—it would be far better to have a non-intrusive non-regulatory approach but at least have some guidelines to give some certainty and create a process by which people could become engaged and negotiate it through, short of legal action. And, as I said, most of the sports will shy right away from that, because they cannot afford it.

Senator TROETH—No, but with the number of media organisations now engaged in showing sport on every variety of digital media, that presents unparalleled opportunities for them. I would have thought that that would represent an extraordinary opportunity for sporting organisations.

Mr Nance—That is correct.

Senator TROETH—Has there ever been a situation where an attempt has been made to get the stakeholders into a room together?

Mr Nance—Not by the Sports Commission, no. That is left up to the individual parties dealing in their own commercial space under the laws and imperatives of the time. No, we have never done that.

Senator TROETH—But, if all else failed, you would prefer to see some form of industry guidelines which everyone signs on to?

Mr Nance—Correct. Clearly, that is the preference. If that could be done, that would be a great first step. It is better than what is going on at the moment for those smaller sports.

Senator WORTLEY—I thank the Australian Sports Commission for their submission as well. I think it is a very thorough submission. I have a couple of questions in relation to the guidelines or regulations that you refer to. You say that there needs to be some sort of guidelines or regulations in place and that you believe that all of the organisations, including media, should be involved in establishing those. You are obviously not happy with the position as it currently stands. Is that correct?

Mr Nance—That is a fair call on the submission. In here, we are supporting the sports that are not able to play in this arena at the moment because of the lack of certainty or ability to do that. Either you work out an arrangement or you have got to go legal with it, and they cannot afford to do that. So, yes.

Senator WORTLEY—As it currently stands, there are not industry guidelines or regulations in place, with the exception, of course, of fair dealing. If it has not been achieved until now, how would you see it being achieved in the future? Who would orchestrate the coming together of various organisations to make these—what you have referred to as—effective regulations or guidelines, in particular for the sporting organisation?

Mr Nance—The commission could assist with that, but it is not within our area to pursue that. It is not within our brief. It is a by-product of our brief and our relationship with sports, I suppose. So it would have to be another area of government. But we would certainly be interested in assisting in developing the guidelines and assisting in bringing stakeholders together, or our portion of the stakeholders together. We would certainly see that as being something quite valuable.

Senator WORTLEY—In your submission, you say:

The preferred method for protecting sports' intellectual property and enforcing the intent of the fair dealing provision is a legally enforceable guideline or code of practice. However, in order to ensure these guidelines are legally binding, appropriate regulations need to be in place.

When you talk about 'legally binding' and 'appropriate regulations', are you talking about the government being involved or is it sporting organisations and media getting together on their own initiative?

Mr Nance—There are two levels to it. If it is regulation and it is legally enforceable, that would have to be government. But, if that is not achievable or not seen to be a part of the government's policy in this area, we would be strongly recommending that a voluntary set of guidelines not enforceable by regulation or law be put in place by the stakeholders. That would be a step in the right direction from where we are at the moment where there is nothing. So, if there is no regulation or law, our view is that a set of voluntary guidelines should be developed that all stakeholders sign up to—that is, the media organisations, the sports and whoever else is involved. Why could not that be tried?

Senator WORTLEY—In the submissions we have received from media organisations there has been specific concern regarding accreditation being required before they have access to sporting events. Would you like to comment on that in relation to your organisation?

Mr Nance—Yes. We do not have a specific view on it, but I am well aware that it is often the blunt instrument that sports have in their kitbag to protect their perceived rights—real or imagined—and they do it quite aggressively sometimes. We are well aware of many instances at major sporting events where this has occurred, and it is an ongoing battle. It is the most immediate battleground, physically and intellectually, that the sports become involved in with the media organisations, because I know the sports view it as a way that they can physically control access to achieve their commercial aims.

Senator WORTLEY—If sporting organisations and media organisations came together on their own initiative to develop an industry code, do you think that they would be able to achieve a balance that would be acceptable to all parties concerned?

Mr Nance—I do not know whether they would do that by themselves but, if someone brought them together and facilitated it, it would be a great first step in codifying practices that are not codified at the moment that are a free for all, particularly as the technology changes. Our interest in this is that we believe the smaller sports, the minor sports, the Olympic sports, are being marginalised by that activity.

Senator WORTLEY—You said about international sport in your submission:

The advent of world leagues, ever expanding international events and competitions has meant the domestic broadcast market is being eroded by increasing opportunity for international sporting content to be received by more and more Australians through different mediums ...

I am assuming that you are saying there that that is having an impact on Australian sport at all levels. I am wondering what you see as a solution to this.

Mr Clement—I am not sure we can stop the infiltration of the effects of the global nature of the internet or our media access. But if sports are not able to generate revenues from their product development, their staging of events, their competitions and their leagues then they will not have the capacity to compete with growing competition from international sources. Hence, the large organisations with more resources, more money will be able to stage more and more events in our zone or regions, consumers will get access to more and more products from overseas and, ultimately, the domestic product may suffer. We cannot stop evolution, but we can try and ensure that our sports have a capacity, if they have the skills and capabilities, to commercialise some aspects of their operations.

Senator WORTLEY—I expected that that would be your response. It is worth while noting that it is significant that we cannot do that in relation to the overseas and international events, but I can certainly see your point and where you are coming from in relation to our sporting organisations in Australia.

Senator PRATT—Is there anywhere in the world that the Sports Commission is aware of that is doing this well? Are there sports which have been able to reach out to their true, niche markets and the new interest developed through new media is assisting the sport's viability?

Mr Clement—I am not sure if this is along the lines that you are talking about, but the US is obviously a very advanced commercial market. The big Major League Baseball have developed their own television station. I believe—without quoting me on the numbers—that they actually telecast live over 260 games per year directly to their individual members or subscribers, as well as maintaining significant broadcast association with other media platforms and free-to-air and pay TV operators. They have had that capability and capacity to develop that skill and capability to in-house broadcast and are significantly reaping the rewards of that product themselves as well as partnering other organisations. That is the extreme end—they are obviously the top end commercial. There is evidence of private clubs and leagues developing websites and television channels, probably more to put content on as opposed to doing the actual broadcasting themselves.

Senator PRATT—Whilst recognising that we are a much smaller population base and market, what kind of proposed professional development do the different sporting codes need within their management to place them to see what kinds of opportunities are right for them?

Mr Nance—I will comment on the smaller Olympic sports. I am calling them the smaller ones as opposed to the professional sports, which are larger by commercial nature. It is a problem for a lot of the administrators who are in our Olympic sports to get the right people with the right skills under their employment. It is very costly to get consultants in there, so it is a continuing battle for the sports to play in this marketplace. The small intrusion that we have made to assist those three sports I named before—athletics, cycling and triathlon—with developing their commercial properties is an example of what needs to be done. We are actually bringing expertise to the table to enable them to better develop a commercial product, of which the digital environment or the changing technology and platforms that we are discussing here today becomes a critical component for them being able to develop themselves commercially. The short answer is that there is a continual battle for the sports to stay in front of this and they do not have the expertise on their payrolls to be able to compete—mostly.

CHAIR—In your submission you mention that the current fair dealing interpretation of the Copyright Act:

... does not provide adequate protection for sports media rights in relation to defining the boundary between the reporting of sports news and commercial sports content.

Throughout this inquiry we have had views about who is the best arbiter of what sports news is. Of course news organisations would say they are the ones who know what news is and sports organisations are sports organisations. Then later in your submission you mention some of the aspects of limitations that could be put on broadcasting to confine it, in your view, to sports rather than commercial interests. Can you just elaborate on what you think your position would be with regard to who would get the first call, I suppose, on what is news?

Mr Nance—I do not think that the Sports Commission is the appropriate body to determine what sports news is. I know that the sports, quite rightly, would think they can say that. We have not formed a conclusion about who would be best placed to determine that, other than we made some suggestions in there about getting people together to work that out. You would obviously need a media organisation and the sports there, but you really need people—maybe from government or from the private sector—who are professionally across all aspects of this to be able to do that. I do not see it as the commission's role to determine what is sports news and what is not.

Senator LUNDY—I want to clarify a point a few other people have asked about. When you say the sports are being marginalised by the encroachment of media organisations and what you claim is a broader definition of news, what specific evidence do you have of revenues being diminished as a result of that activity?

Mr Nance—I cannot draw on my own experience at the commission to give you any specific examples except that, across the board, if you add up the sum total of the experience of the Olympic sports, they just do not get to first base with it.

Senator LUNDY—I want to come to this point because I am very familiar with this vicious cycle where media choose not to cover certain sports, or all sports equitably or fairly. That means those sports then have a much diminished opportunity for sponsorship and find themselves without any external sources of revenue other than what their membership can provide and what governments can provide. With that vicious cycle—and we are particularly familiar with it with many women’s sports when compared to men’s sports in the same area—is the answer to try to limit definitions and use intellectual property law to resolve those inequities and imbalances, or is the answer in perhaps creating incentives to promote coverage of those sports to drive a commercial or market solution for sponsorship revenues to come in? What thinking has the Sports Commission done in this area of a public policy solution to what you quite rightly say is a pretty entrenched problem?

Mr Nance—It is. It is really the latter, where you provide specific incentives. The government’s recent initiative with the sport of netball, for instance, has injected that sport into a commercial space it was not in before. Simply through some very low-level cash injection, they have created a commercial product, which they did not have a chance of doing by themselves. That is an example of the second part of what you said being a more practical and immediate way of dealing with this. But if the sport does not have the ability to get its product into that marketplace, it is a chicken and egg problem—they cannot sell sponsorships. If they do not have that shop window through a broadcast medium to be able to sell themselves into the private sector and gain sponsorships, they do not have a chance. And that is where I think they have been marginalised.

Senator LUNDY—So do you think it is better to try to create a new market by creating new intellectual property rights, and value derived from those rights, rather than to create a raft of incentives to use the existing market to promote sponsorship?

Mr Nance—Yes, that could be the way to go, because if they can get some certainty into how they deal in these new technologies then that can become a more effective shop window for them to create the commercial revenue they are otherwise missing out on at the moment—because they do not get there.

Senator LUNDY—Can I put to you a bit of a hypothetical? I would understand if you did not want to answer it. If it could be demonstrated that the media were prepared to take a more active interest in covering sports, perhaps through the proliferation of digital channels, and that did start to open up more commercial opportunities via sponsorship for some of the underrepresented sports in our media, would that remove some of the imperative the Sports Commission see to try to tie up the intellectual property rights associated with sports events and sports content per se? Could that be the heart of a compromise perhaps?

Mr Nance—My personal view is that, yes, that would be a good way to go in increasing the ability of the sports to deal in that commercial space. That is another way of looking at it—an alternative way of looking at it. It would not solve all of the issues but it would create the commercial engine room for those sports to get into that as it did with the netball example.

Mr Clement—You will probably still need a commercial platform that allows the sport to commercialise in other areas. As we have said, broadcasting or the rights are only one aspect of a commercial strategy. To a certain extent that would be a solution for that particular medium. On

your other point, the opportunities through the digital media are emerging, and it is unknown at what speed and rate they will go down which platform. Sports like netball, for example, might find that by virtue of being able to self-broadcast or to directly deal with the consumer, they may be able to access a greater market. One of the areas of greyness in this issue is that, if they go down that path in the future, their content could be taken and proliferated by others and generate revenue capability. This is not proven yet, but that could limit their capacity to generate their own revenue. Again, it is a potential area as opposed to an area that has examples at the moment.

Senator LUNDY—Thank you for that.

CHAIR—As there are no further questions for the Australian Sports Commission, I thank you very much Mr Clement and Mr Nance for taking the time to appear before us today and for your submission. It has been very useful to the committee's deliberations.

Proceedings suspended from 11.01 am to 11.13 am

DANIELS, Ms Helen, Assistant Secretary, Copyright and Classification Branch, Attorney-General's Department

BOWMAN, Mr Norman, Acting Principal Legal Officer, Copyright and Classification Branch, Attorney-General's Department

CHAIR—I would now like to welcome Ms Helen Daniels and Mr Norman Bowman from the Attorney-General's Department. Thank you very much for coming along to speak to the committee today.

I note that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim.

The committee would like to acknowledge the Attorney-General's Department's assistance in this inquiry at very short notice, and we do hope you have had a chance to look at some of the submissions that have raised issues relating to copyright law and intellectual property. Did you wish to make an opening statement before we go to questions?

Ms Daniels—Thank you, Chair. The committee may already be well aware of how intellectual property is split up. The Attorney-General's Department has responsibility for copyright law, as it is a non-registered based form of intellectual property, as well as circuit layouts law. IP Australia, which sits in the innovation portfolio, has responsibility for designs, trademarks and patents, as well as plant breeders rights—and, I would imagine, from the point of view of your inquiry, the issue of trademarks is as relevant as copyright is in some areas. The only other general point I would make is about the term 'intellectual property'. We tend to refer to it by its statute base—that is the coverage of intellectual property. There is also confidential information and passing off that form part of the suite of intellectual property. But I think sometimes people use the term 'intellectual property' generically, without being clear about what it is they actually mean under the umbrella of 'intellectual property'. That is the one opening comment I wish to make.

In relation to copyright, obviously, the exceptions area, and fair dealing and the reporting of news as a subset of exceptions, is one area that the committee's work is very closely aligned with on this. We are happy to take whatever questions we can to assist.

CHAIR—With regard to the intellectual property stuff, I am not sure if you were here for the Sports Commission—

Ms Daniels—Yes.

CHAIR—Okay. I guess what we would like to hear from you, then, is whether you believe that intellectual property is vested in a sporting event at all?

Ms Daniels—No, not per se. There would be copyright in the broadcast of an event; that is a separate copyright. In the underlying film, if it is not live, and in any underlying works, yes, definitely—but in an event per se, no.

CHAIR—That is fine. So there is no copyright inherent in a sporting event?

Mr Bowman—No. Copyright only subsists in certain forms of protected expression. Those forms of protected expression are literary works, musical works, artistic works and also in film, sound recordings and broadcasts. So, if a footballer wanted to write their autobiography, there would be copyright in the book as a literary work, but there is no copyright in any event.

CHAIR—Has there ever been, as far as you know, any consideration given by any arm of government to investigating whether a sporting event should be—

Ms Daniels—A new form.

CHAIR—A new form?

Ms Daniels—Not as far as we are aware. In relation to the sporting bodies, our dealings with them over recent years have been fairly limited. When we did an examination of what are called the fair use provisions in 2005-06 we did hear from some of sporting bodies then, but the issue of a special protection in an event was not raised in that context. The only time governments have looked at it is where, for example, with the Olympic Games or the Commonwealth Games or a sporting event coming to Australia, there is a contractual arrangement between the government and the international sporting body and, as a result, there is sometimes legislation introduced. That legislation is of very limited duration, like two or four years either side of the games—I am not sure what it is—and then it is gone. So it is not a continuing piece of law. And that sort of legislation is normally to address the issue of ambush marketing rather than protection of the event per se.

CHAIR—Okay. Thank you.

Mr Bowman—I do not think that just because a sporting event costs a lot of money to put on has ever been regarded as a reason why it should have a form of intellectual property.

CHAIR—Okay. I might go to Senator Lundy.

Senator LUNDY—We are sort of trying to grapple with the raft of views that have been put to us by witnesses. Sporting organisations are quite firm in their view that there is some intellectual property right associated with the hosting of a sporting event. Hence, their one means by which to control access—that is, media accreditation—becomes the device they use to manage what they call their own intellectual property.

What I would like to get from you is your view on what this could conceivably be based on, because the closest I can come is comparing it with an arts performance. An arts performance

does have some intellectual property right ascribed to it and is managed through copyright et cetera. Can you perhaps give me a briefing on how that came about and why sporting events in public places would not be covered by such an arrangement?

Ms Daniels—You are right about the Copyright Act protecting performances. That is a fairly recent reform to our law. Performances are defined and they are defined as dances, circus acts—we can spell that out in more detail if you like, if you need some more written follow-up. It excludes sporting events.

Senator LUNDY—Specifically?

Ms Daniels—Specifically. For example, it protects expressions of folklore expressly. The protection of performers derives from the close connection to either a choreographic work or a literary work or an artistic work. That is the creative input that you are protecting. The performers rights extend to singers et cetera, but they do not extend to actors in the Hollywood sense of the term. So performance protection is quite limited. And as you probably appreciate from your knowledge, Senator, most of this derives from international treaty. Australia's approach to a lot of these issues derives from what our treaty obligations are. The World Intellectual Property Organisation's relevant treaty on performers does not extend into the sporting area.

Mr Bowman—Within the Copyright Act there is copyright per se, which is basically economic rights, and then there are certain other rights recognised which are not part of copyright. They include performers' rights as well as moral rights. The performers' rights extend, at their most basic, to being able to prevent an unauthorised recording of a performance. The reason for that right being recognised was essentially to prevent bootlegging—where somebody could go to a concert, make a sound recording or a film of the performance and then sell the sound recording afterwards. Prior to the 1989 amendments, performers did not have protection against that kind of recording and commercial sale of their performances. I do not think that it is seen that sportspeople have that kind of problem, in that they are generally being paid by their sporting body to turn up and play. If anybody is going to make a film of the sporting event and commercialise it, it is probably going to affect the rights of other people, like a licensed broadcaster, and not the sportsperson. But a bootlegged recording is going to compete directly with the authorised recording of the performing artists.

Senator LUNDY—That is, the holder of the copyright under the current arrangement?

Mr Bowman—Yes.

Senator LUNDY—Thank you for that. I think that explanation is extremely helpful. With respect to the point you make about sportspeople being paid, that is likely to be the case where in fact there is a rights holder per se, a broadcaster. We are a very much in the commercial sphere of large sporting organisations. There is a scenario that has been put to us by the Sports Commission where sports that do not pay their athletes and do not have a commercial rights holder in place. They are making the case that unless that intellectual property, or their right to copyright, is protected that will be exploited and deprive them of revenue—that is, the economic rights of copyright—in the future. They were not able to point to specific evidence of this. With sport being specifically excluded, is there any claim in that scenario, where there is not a rights

holder per se—that is, a broadcaster—that you would see the sports organisation, or indeed the athlete, having any rights with respect to copyright?

Ms Daniels—Looking at it through copyright eyes, to me it is the athlete you would be looking at as the equivalent to the performer. If you are looking at a new right, you would think: ‘Who’s the equivalent performer here? It’s the athlete.’ What we would appreciate knowing more about is why giving a new right to a whole set of players who are athletes as being the equivalent of performers, how that impacts on what the committee is looking at about digital media. To me it is another layer.

Senator LUNDY—Look, it is not something that anyone has put to us. No-one has come here and said, ‘Performers, per se, are seeking some kind of protection of their rights, of the other rights under the act.’ Rather it has been the sports organisations, or representatives thereof, that are seeking to become the holder of those rights just for clarity’s sake.

Ms Daniels—In the performers’ protection area that exists under the act, a performer cannot assign their right. So under the equivalent example—

Senator LUNDY—So it still does not work? That analogy, if you like, about performing and art events does not translate to sport?

Ms Daniels—It was what Mr Bowman was explaining earlier. They are at the edge of copyright performers’ rights and moral rights. A normal copyright you can assign to somebody else, performance rights you cannot.

Senator LUNDY—With respect to fair dealing and the current arrangements, are you familiar with the current traditional practice of 3x3x3 with respect to how news media use moving and still images of sporting events?

Ms Daniels—We are generally aware, yes.

Senator LUNDY—Are you able to give the committee any insight into whether or not you think the boundaries are being pushed or whether those arrangements are being stretched, as it has been alleged by sports—that is, they are using more and more moving images beyond what was considered reasonable under the 3x3x3 arrangement for news reporting?

Ms Daniels—I will make a couple of comments for the committee. The Copyright Act was amended years ago to deal with the online environment. The government’s overall intention was that we should try to replicate what happens in the hardcopy world to the online world to the extent that you can. Again, Australia was not unusual in that regard; it really was an approach by other countries to cope with the emerging technology and how what exists under the hard copy should, where possible, translate to the online environment. So when amendments were made to the act many years ago to introduce the communication right and all the online rights, there was a replication that the relevant exceptions would also apply in that area. So that would be our starting position—that is, the exceptions that have always existed in law should exist in the online environment because they had case law behind them. They also had a history of owners and users talking to one another about what were the limits, how should these exceptions operate in the real world and where things got to a point where that could not be resolved, there was

always litigation. To date, there was not a case that a new exception should be introduced just because it is the online environment because parties have been used to dealing with each other for decades on copyright and what is fair to take and what is not fair. Introducing legislation to say X or Y, I do not know if that would still take away the reality that those parties still have to deal with one another about what is fair and what is not fair.

Senator LUNDY—In the sale of the internet rights to a sporting event or a sports competition, how does that impact, in your view, on how those exceptions for news reporting have been replicated into the online environment?

Mr Bowman—It probably does not change them at all in that, fundamentally, the two tests you have to meet are, firstly, that the use has to be genuinely for reporting the news rather than a disguised other purpose, and, secondly, if the dealing is genuinely for the purpose of reporting the news, it needs to be fair in the circumstances.

Senator LUNDY—And is it your view that fair includes the—again, I am responding to some of the things the sports have said—perpetual hosting of a series of video clips that were collected for the purposes of news reporting to be hosted in perpetuity on a website?

Mr Bowman—It might be difficult to establish that retaining material in a website past the point when it is genuinely reporting the news would fall within the exception.

Senator LUNDY—Is that yet to be tested in court?

Mr Bowman—Yes, as far as I am aware.

Senator LUNDY—Because the news organisations have certainly put it to the committee that that kind of news ought to be searchable and that the moving images ought to be part of that searchable body of content for the purposes of news. It gets complicated. And the same can be said for stills. One of the particular areas of complaint from sports organisations has been media companies' hosting of photo galleries for commercial sale where those photographs were collected as part of an effort to collect news—that is, many more photos are collected other than what is published in the news item, either online or in the newspaper. Has that ever been tested in court or do you have a view on whether or not that conforms to the exception under the act?

Ms Daniels—I do not know whether it has ever been tested in court. From our point of view, it would be very useful if it had. I do not think that most of the court decisions that have been on these fair dealing provisions have looked at this photograph area in particular. The starting point would be to ask yourself: have those news organisations forever held on to archival material? I imagine the answer would be yes. So it is the accessibility of that material that the committee is raising and whether that changes what the present arrangement is.

Senator LUNDY—Absolutely. I do not know about how newspapers have managed it, but my understanding is that before they had websites, you could go to the newspaper office and ask to look at their photographs and purchase their photographs by looking through them all, or through microfiche or slides or whatever. But it seems to be, in the context of someone else being able to derive revenues from a photo gallery—that is, the sport itself—that this has come under specific contention.

Mr Bowman—Again, if we could clarify, in relation to a photograph, who is the copyright owner: the first copyright owner is the photographer, and the copyright might be transferred to the employer or to a subsequent assignee.

Senator LUNDY—This is absolutely the issue. No-one is contesting that the copyright for those photographs is held by that news organisation or the photographer; what the sports are contending is their right to take those photographs, under an exception, for the purposes of news, but then use them for a different purpose—that is, for subsequent commercial gain clearly not for the purposes of news. So it is about the purpose for which they were originally collected, not a contention about the ownership of the copyright per se.

Mr Bowman—If I could just clarify: the exception comes into play when you are using somebody else's photograph, where somebody else is the copyright owner. If you have gone to a sporting event and taken a photograph, you own the copyright of the photograph and you can use it for any purpose that you want. It is only if you—

Senator LUNDY—Yes. Sorry, I am thinking more of the exception relating to the capacity to use those images for an otherwise copyright protected event for the purpose of news.

Mr Bowman—But again, the event is not copyright protected.

Senator LUNDY—It is if the broadcast rights have been purchased by somebody else.

Mr Bowman—The broadcast would be protected and the underlying film that is broadcast would be protected, but the event is not protected.

Senator LUNDY—But if the moving images are from that—

Mr Bowman—Again, it is not the event that is protected. It is the recording of the event in a film or the transmission of a live broadcast, as a broadcast, that is protected.

Senator LUNDY—Yes, hence the sports' efforts to try to restrict access for that right.

Mr Bowman—Again, there is nothing particularly unusual about that. It is fairly normal for art galleries to protect the ability of a photographer to exploit images of old masters, say, Rembrandts, by controlling access into the gallery by a photographer to take the photograph. They might claim there is an IP but, obviously, there is no IP in a 400-year-old painting; it is just you are able to control the commercial exploitation of photographs of that old painting because you can control who gets access with a camera to take the photograph. It is the same thing.

Senator LUNDY—The argument that the sports are putting forward—that is, restricting access to limit, in this case, the media organisations' claim that they are news reporting—do you think this is a legitimate activity on behalf of the sports?

Mr Bowman—We would only talk about what copyright—

Senator LUNDY—I know. This point about access is really at the heart of the complaint by the media organisations. They feel that they are being deprived of their right to report on news of a public event, which we all agree is not protected by intellectual property.

Mr Bowman—We would clarify that the access issue would have two distinct parts to it, of which, I guess, you would be very aware. There is the ability to access the event to make a film of it, which is not copyright. Under copyright, you do not have a right of access to make a film. Copyright comes in if you have made the film; it is your right to prevent people free riding off the film that you have made.

Another very general point is that copyright gives certain exclusive economic rights, but they have never been watertight. It is a part of copyright that the rights that are given to a copyright owner are limited in several ways. They are limited in the nature of rights themselves and the duration of the rights but also in the exceptions to the rights. So the fact that other people can make a free use is not a weakness per se. It is a fundamental part of a copyright system. It is just whether the use is—

Ms Daniels—The balance is right and where the public interest lies.

Senator LUNDY—That has been the subject of much discussion.

Mr Bowman—It is also not unusual for copyright owners to say that exceptions to copyright are far too broad and are being abused and for users of copyright material to say that they are not wide enough and are too narrow. That is just a part of the normal copyright debate.

Senator LUNDY—Observing this dispute, if you like, between news organisations and sports, does the department have a view, in the spirit of what you just said, about how this could be resolved between the parties?

Ms Daniels—The department does not have a formulated view. Our starting position would be that these are two interests who need each other and they need each other in the copyright system and the contractual system to work together properly. Our starting position would be that it is in their interest to resolve what should be the new rules in the online environment and maybe try them for a few years to see if they can come up with something that is going to work. Sometimes law is seen as the solution but, even if you amend the law, these bodies still have to deal with each other and work with what that law ends up being. So it does not take away the necessity to work with another party.

Senator LUNDY—In terms of resolving these kinds of disputes, is it usual for guides to be used or created that could assist in codifying what is intended by the copyright laws? Is that usual practice? Because it has been put to us that we formulate some kind of guide for the parties on how they should approach this issue to help with dispute resolution and so forth.

Ms Daniels—I can only think of two areas in copyright law that we could offer up as possibilities for the committee to think about. One—and you may be familiar with this in the internet area—is the relationship between internet service providers and the music and film industries in relation to infringements that occur online, where nobody is really saying that changing the law is going to solve the problem of how to deal with online infringements by

consumers but where a code of conduct on what it is reasonable for one party to do for the other and vice versa has been suggested as a way forward; the government thinks that is very sensible. We would prefer to stand back and have the parties do that, but if they cannot do that then the government would try and facilitate something. So that is one area in copyright, in the infringement area, where that occurs.

The only other example we have thought of is the Copyright Tribunal of Australia. Its role is to arbitrate disputes between owners and users on terms for using copyright material. However, my one hesitation in that is that it does not determine questions of law, and I think that in this area what is not settled yet is what is fair. It would really be for a court to ultimately decide whether a particular dealing is fair, but the tribunal, as a mechanism set up by the act and used frequently by owners and users to resolve their differences, has been a successful medium in the licensing area.

Senator LUNDY—Thank you for that. I think those two examples are quite instructive for us. The Copyright Law Review Committee made some proposals for reform back in 2002, and one of them was that it should not be possible to make an agreement that would modify or exclude the fair dealing rights provided under section 42 of the act, concerning the reporting of news. It has been put to this committee that a way of protecting the rights of news reporting with respect to sporting events would be to make that reform to the law. Can you confirm that that is the case and that that recommendation has not been implemented and also whether or not the government has a view or is in the processing of implementing that particular recommendation with respect to section 42?

Mr Bowman—That report was provided to government at the time and the previous government did not respond to that report. As far as I am aware, the report is still lying on the table but is not under active consideration—

Senator LUNDY—By the current government?

Mr Bowman—at present. However, I have two quick comments on it. First of all, it would not apply where somebody is taking snippets of a TV broadcast, for example, and making them available on a website because they would not have any contractual relationships. I guess this is targeted at the accreditation agreements.

Senator LUNDY—It is designed to prevent accreditation agreements being used to exclude news organisations.

Mr Bowman—Okay. I guess the trouble would be that, if a media organisation breached the accreditation agreement and relied on that exception to avoid being sued for infringement, it would not do much for them in terms of keeping an accreditation agreement if the sporting body just refused to reaccredit them. So I am not sure whether that kind of provision is of any real practical use in these circumstances.

Senator LUNDY—Are you aware of any litigation with respect to section 42 of the act?

Mr Bowman—At the moment?

Senator LUNDY—Or in the past.

Mr Bowman—There has been litigation on that provision, yes.

Senator LUNDY—Can you describe the general nature of that litigation?

Mr Bowman—One of the best known cases would be the *Panel* case, between Channel 9 and Channel 10 over the re-use of clips from the Nine Network, I think, on the program *The Panel*. There were questions there as to whether some of the clips that were provided in an entertainment, humorous sort of setting were actually for the purpose of reporting the news or for criticism and review. The courts looked at that issue and decided that some clips legitimately fell within the exception and others did not, looking at the circumstances. I guess that example is a good one for showing the problems of legislating what is reporting the news rather than having to look at the facts and all the circumstances.

Senator LUNDY—And no doubt contributed to why everyone is still arguing about it.

Ms Daniels—I would like to add one other comment about copyright and contracts. You may find it of interest—and the report itself notes this—that none of our comparable common law countries in the world have resolved the issue of the relationship between copyright and contract. So it is quite a tough issue to address. But the copyright law view the committee was most interested in was the relationship between a big corporation and a consumer where the consumer had no hope other than accepting the terms of the licence. It did not have in its sights two equal parties.

CHAIR—Do you have questions, Senator Troeth or Senator Wortley?

Senator TROETH—No, all of my questions have been answered, thank you; it is very comprehensive.

Senator WORTLEY—No, the questions have been answered. It is good to hear from the copyright branch and to get some of that information specifically regarding fair use and where the Copyright Act stands for them.

CHAIR—I would like your comment on a couple of things that have been put to the committee. Some witnesses have said they do not believe that the fair dealing provisions of the Copyright Act adequately deal with all new forms of media, particularly digital media. Does the Attorney-General's Department have a view on whether or not the fair dealing provisions are adequate to deal with all of the new platforms that we are seeing?

Ms Daniels—We would welcome whatever the committee says on this issue. From our point of view, we thought that, at the time, the parliament translated fairly well the hardline environment to the online environment. We have not heard, other than through what your committee has been looking at, that there are suggested gaps. So if there were, we would obviously have a look at those because that would not be the intention at all. Our intention is to replicate what has existed before.

CHAIR—Yes, and ultimately whether or not the fair dealing provisions are adequate would have to be determined by a legal interpretation through a court case.

Ms Daniels—That would be our starting position, and there have been some useful court decisions already.

CHAIR—Another proposal the committee has received from witnesses is that disputes about the fair dealing provisions could be addressed through some kind of low-cost mediation process that, in particular, would give sporting organisations that do not have the resources of the large sporting organisations an avenue to progress their claims. Do you have any views on that?

Ms Daniels—My initial reaction is that that sounds very sensible. You do not need to put that in law, though. For bodies on two sides to agree to some form of mediation would seem a sensible approach, I think.

CHAIR—Can you think of any other mechanism like that that we could look at as analogous to this situation?

Ms Daniels—The only one we could help with a little bit is that I was mentioning earlier about the Copyright Tribunal. A few years ago, the government introduced alternative dispute resolution as an optional step before going to the Copyright Tribunal. That has now been the law since 2007, and the relevant copyright interests have not taken up that option.

CHAIR—Ever?

Ms Daniels—Not as far as we know. Most of them like the certainty of the tribunal—having a judge there. So to date it has not been taken up. That is something we are monitoring because we are very curious as to why it has not been. We would have thought it quite a less expensive option in dealing with some of these licensing disputes.

CHAIR—And that comes under the purview of the Attorney-General's Department?

Ms Daniels—Yes, under the tribunal the option for alternative dispute resolution is in our law.

Mr Bowman—But, again, the Copyright Tribunal is dealing with copyright licensing by collective management bodies. It is not dealing with access agreements.

CHAIR—I understand that.

Senator LUNDY—I just wanted to clarify something relating to my earlier questions about accreditation and limit to access through rejecting accreditation if news organisations refuse to accept the terms and conditions they are presented with. It has been put to us that if the provision to prevent exceptions—I think it was two, fair dealing for the purposes of collecting news—were put into the act then that would specifically prevent accreditation being used to exclude news organisations; that is, additional conditions that impacted news gathering and relaying could not be placed on the news organisation. Mr Bowman, you said something a little later which implied accreditation was still all-powerful in the scheme of things. I want to clarify: if that amendment

were made to the act to prevent a contract from removing the fair dealing provisions then surely that would prevent sports organisation using accreditation to exclude news organisations.

Mr Bowman—I did look at the AFL accreditation agreement for photographers. My understanding of that is that under that agreement, first of all, the photographer agreed not to exploit their copyright in the sense where, if you took a photograph, you could sell it commercially because you owned the copyright in it. Under the AFL accreditation agreement, the photographer agrees not to do that and also gives a licence to the AFL so the AFL can use their photographs. In that situation, there is no copyright exception that comes into play. It is an agreement by the person not to exercise their copyright; it is not an agreement not to use an exception to the Copyright Act. I am wondering about a different sort of situation where, say, one TV network is licensed to broadcast a sporting event and another network uses the fair dealing provision to take parts of the broadcast to put in their news and current affairs programs. Again, exceptions are not going to come into play normally because there will be no contractual arrangement between the second network and the rights holder of the broadcast and the film.

Senator LUNDY—I put to you that the condition that makes those copyright protected images available to the AFL does have a direct impact and therefore does invoke that particular aspect of the law that could be protected if this provision were put in place.

Mr Bowman—Of course, where the provisions would apply is if the copyright owner in the photographs said, 'I will sell you copies of this photograph but you must promise not to use the photographs in any way, including ways that would otherwise be permitted under the act.' That would be a case where the purchaser of the photographs would have a contractual agreement with the original supplier.

Senator LUNDY—So, coming back to the original question, would enacting those review recommendations to prevent the contractual override of the fair dealing exceptions resolve the issue of sports specifically excluding news organisations, for whatever condition, from the sporting event?

Mr Bowman—I guess my question was: if you did have that no opt-out of the exception sort of provision, could the sporting body—

Senator LUNDY—Put any conditions?

Mr Bowman—retaliate by refusing to give an accreditation agreement to the party that has not kept to the agreement?

Senator LUNDY—I am asking you a question.

Mr Bowman—I am sorry. I am just trying to understand.

Senator LUNDY—I do understand what you are saying, but I still want an answer to my question.

Mr Bowman—Obviously, I have missed it.

Senator LUNDY—If this review recommendation were put in place—that is, the act prevented a contractual override of the fair-dealing exception, would that have the effect of preventing sports from using accreditation to exclude photographers on the basis of providing additional conditions that started to impose conditions on what constituted fair dealing? The condition may be: ‘You must give us all your photographs,’ or ‘You cannot put photographs on your internet site.’

Mr Bowman—The no-opt-out provision would protect the user of the photographs from a copyright infringement action, but the accreditation agreement is really directed at something else, which is the providing of the access, as long as you stick to the agreement.

Senator LUNDY—But if the agreement seeks to modify the fair-dealing arrangement—the news media say they are trying to modify what we believe are our fair-dealing exception rights for the purposes of collecting news—

Mr Bowman—You are right, but a second question is: how long is an accreditation agreement going to last then?

Senator LUNDY—I am just trying to get to the point of law here. What we have heard is that such a change to the act that would prevent a contractual override of fair dealing would give news organisations the protection they are looking for, because it would prevent the sports excluding them because they refuse to sign an accreditation agreement that impinged upon what they believe their fair-dealing right to be.

Ms Daniels—The other thing I would add in looking at that issue, if that change were put forward, is that there would be no justification for the galleries, museums and everybody else having a similar no-opt-out provision. Therefore, galleries and museums could no longer prevent anybody from coming in and taking whatever photograph they wished to. Why limit it to sport? How I am reading your question is that you are not being allowed to exercise all your copyright exceptions because you are not allowed access to a venue.

Senator LUNDY—That is right.

Ms Daniels—Then I would query: why limit it to only sport?

Senator LUNDY—That is one of the issues that has been put to us. So you tell me: why would that or why could that only apply to sport? Or are you saying to me that that would have the effects of also changing the parameters or arrangements by which photographers or news reporters could also access other places other than sporting venues? Is that what you are saying?

Ms Daniels—That is right. I guess the point I am making is it would be unusual for the Copyright Act, for example, to, all of a sudden, start talking about sport or sporting bodies. It is an act of much more general application, including in the exceptions area, which ultimately is about the public interest. So you would have to be talking about entities or anybody who is holding an event.

Senator LUNDY—My understanding is that the recommendation from the law reform group is to include a right that says, effectively, that you cannot contract out or override, by a contract,

that fair-dealing exception right. If that were implemented, would it or would it not impact upon the sport's ability to use press accreditation to limit news media access to those events?

Ms Daniels—I think it is at two levels. First of all, I thought the answer to your question was yes, but now I am not sure, because I think it is at two levels. Access is one thing; use of copyright material is another. So it is only when someone—

Senator LUNDY—But the news organisations are saying that they of course would abide by the law and the fair-dealing exception. You are right: there is a second layer about the definitions of that. But I am not talking about that. For the sake of this conversation, let us assume that the news media organisation absolutely complies with the customer practice for fair dealing for content collected for the purposes of news. You are quite right: there is a second layer of argument about those definitions, but they would collect it only for the purposes of news. If those accreditation passes contain other conditions, such as: 'You must provide us with our photographs' or, 'You must not place those photographs in a photograph gallery or provide images in perpetuity; you have to pull down your images after 12 hours'—all those kinds of conditions; I am trying to make it easy—I put to you that that impinges on the current interpretation of fair dealing and therefore that accreditation does in fact contractually override existing and established fair-dealing rights for news media. Is that correct?

Ms Daniels—Instinctively, I think you are right but we would have to think about that a little more.

Senator LUNDY—I am very happy for you to take it on notice. It actually goes to the heart of what I think you described as the 'first layer' of this problem and that is sports' rights to user accreditation to modify what is established customs and practice for those fair dealing rights for the purposes of news reporting. There is a whole second layer about what the definition of those established customs and practices in the three by three by three constitutes. We have had lots of conversations about that.

Ms Daniels—And, as far as I am aware, no court has tested the present position.

Senator LUNDY—Yes. That is good. I think we are there. So if you could take that on notice that would be helpful.

Ms Daniels—We will, Senator.

CHAIR—As there are no further questions, we thank you for that exercise in intellectual rigour. That was very good. I would again like to thank the Attorney-General's Department for responding to the committee's request to appear before us at such short notice. Thank you very much for appearing before us today.

[12.02 pm]

CHISHOLM, Mr James, Manager, Consumer Policy Framework Unit, Competition and Consumer Policy Division, Department of the Treasury

CHAIR—Welcome and thank you for coming along to talk to us, Mr Chisholm. I note that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy, and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. The committee appreciates your assistance for this inquiry at such short notice and we do hope you have had a chance to have a look at some of the submissions that have raised issues in particular to do with the Trade Practices Act. Would you like to make a brief opening statement, Mr Chisholm, before we go to questions?

Mr Chisholm—I do not have a formal opening statement as such but I do understand that the committee is interested in learning something about the process for codes of conduct under the Trade Practices Act and I am also able to answer any questions generally about the consumer protection or competition laws under the Trade Practices Act. So we could have a general discussion about that, but I am in your hands.

CHAIR—Why don't we start off with that general discussion about codes of conduct in particular and you could give us some examples and say whether you think the act is applicable in this situation?

Mr Chisholm—Yes. Part IVB of the Trade Practices Act contains a regime for the making of what are two types of codes of conduct. There are prescribed mandatory codes of conduct and prescribed voluntary codes of conduct. The criteria for making codes of conduct, which are effectively regulations made under the act, are quite broad. They really relate to the conduct of participants in an industry towards each other or of participants in an industry towards consumers. Whether a code of conduct is mandated has a number of implications. If it is a mandatory code of conduct, all participants in the industry are required to comply with the code of conduct. If it is a prescribed voluntary code of conduct, it is only those participants in the industry that choose to be bound by the code of conduct that are required to comply with it. The process for being bound by a voluntary code of conduct is usually set out in the regulations themselves, or that would be the idea. However, there are no voluntary codes of conduct. There are only prescribed mandatory ones at this time.

The other implication of having a code of conduct is that not only are participants who are required to be bound or choose to be bound by the code required to comply with the code itself, but if anyone breaches the code of conduct this has implications under the Trade Practices Act more broadly. If someone breaches that code then they breach the Trade Practices Act. This means that they could be subject to legal proceedings either from a private party or from, in this

case, the relevant regulator, which is the Australian Competition and Consumer Commission. The types of enforcement proceedings could be applications for damages by a private party or the seeking of an order by the regulator that someone has breached the code—and thereby the act—such as a declaration, or an injunction could be sought. Various types of remedies are available. However, there are no criminal penalties or civil penalties. It is much more in the nature of civil remedies.

There are at the moment three codes in very different industries. There is a franchising code of conduct, there is a horticulture code of conduct and there is the Oilcode. There is also a proposed code of conduct that is currently being developed by the Treasury called the unit pricing code of conduct. That is the first code of conduct that would relate to the conduct of participants in an industry towards consumers. It is a consumer code of conduct. The other three codes are much more about relationships between industry participants. The other unique feature about the codes is that Treasury and the Treasurer are responsible for the regime in part IVB. But usually the proposal for a code of conduct is brought forward by a minister with responsibility for the portfolio that would deal with that industry. So, in the cases that we are talking about here, the minister for small business has responsibility for the franchising code, the Minister for Agriculture, Fisheries and Forestry has responsibility for the horticulture code and I think the Minister for Resources and Energy has responsibility for the Oilcode. The individual policy responsibility for how a code is managed lies with those ministers. For example, for the horticulture code there is a horticulture code committee and the actual issues that would come up relating to that code are dealt with by the departments that understand those industries in detail. The unit pricing code is a different example because that is the first code brought forward by the Treasury itself, so we have responsibility for that.

You have asked the question of whether a code of conduct would be appropriate in the circumstances raised in this inquiry. It is very difficult for me to give a view on that because it is not an industry with which I am familiar. I would say that, if a proposal were to be brought forward for a code of conduct in this area, it would likely come from the Department of Broadband, Communications and the Digital Economy. The way that would happen is that the minister would give consideration to types of regulation that might be appropriate—or to not regulating, as the case may be—and discuss them with the Treasury, as the Treasury plays in effect a gatekeeper role with respect to the regime, and other ministers that would have a responsibility for areas touched on by this regime. Because it is a code of conduct, it is often referred to as a coregulatory regime. It is not self-regulation nor is it the traditional direct regulation by government. It is meant to be coregulatory. What that means is that the proposal for developing a code may come from the minister or it might be proposed from the industry itself and the development of the code takes place on a coregulatory basis. There are a couple of government policy documents that deal with the process of making a code. They are now around 10 years old. The idea is that the government would work very closely with the industry, through developing draft proposals, roundtables discussing draft codes and setting up processes for the further management of the code into the future. The idea is that issues that arise under the code, including disputes, are resolved through the code process rather than by having to rely on enforcement by government.

To give you an example, the Franchising Code of Conduct contains a number of obligations on participants in that industry, including disclosure of information prior to entering into a franchise agreement and other rights and obligations relating to that. It also defines what a

franchise agreement is and, if there is a dispute, it sets down a dispute resolution process. Other codes, for example the horticulture code, suggest that parties can come up with a dispute resolution process. That is the emphasis in a code on resolving disputes in that informal way. But the government's approach to codes of conduct is that if people are unable to resolve disputes, and if an issue is one that cannot be resolved in that informal way, there is the option for direct enforcement of the code by the regulator. Occasionally the ACCC has taken direct action to get enforcement of codes, particularly the franchising code. I can think of examples there, but beyond that I would have to look more into it.

The other thing to keep in mind is that, although it is a co-regulatory approach, it is regulation so it would potentially involve costs to industry. Any proposal for a code of conduct would have to comply with the best practice regulation requirements, including consideration for alternative means of dealing with the problem—whether that involves self-regulatory or non-regulatory measures or other forms of intervention that might be better able to address the problem. That is all part of the framework for government decision-making generally.

That is the broad outline of the peculiar creature we are dealing with here—codes of conduct. I have given a bit of an understanding of what the existing codes are. I am happy to answer any specific questions about that regime with respect to the issue you are dealing with here.

CHAIR—Are you aware of any other codes of conduct in this area of the media and news reporting anywhere else in the world?

Mr Chisholm—I am not directly aware of any such codes, no. One comment I will make about existing codes is that they commonly appear to put in place a process for resolving issues, particularly where there are bargaining imbalances between parties, or perceived bargaining imbalances—it may not be the case. Franchising is an example where it could be argued that in many cases the franchisor has a large amount of bargaining power—in particular, franchisors know things about the franchise arrangement that a potential franchisee does not know and therefore there are disclosure obligations to ensure a better informed decision is made by the franchisee. The horticulture code deals with relations between growers and other participants in the market, particularly other suppliers or wholesalers—I would have to check on that. You commonly have that kind of potential bargaining imbalance or power imbalance between parties. It is, of course, not always the case. There are some franchisees who are quite big, or who have a number of franchises, and therefore might have a different level of bargaining power compared to other franchisees. But that appears to be something you see in existing codes at least when they are dealing with behaviour between industry participants. I am not sure whether that can be said to be the case here, where you have media organisations and sporting codes.

CHAIR—Do you have a view as to why there are not any voluntary codes of conduct yet?

Mr Chisholm—It is a good question! We would certainly encourage the development of voluntary codes of conduct. Speculating about it, it may be that—certainly in the areas that have been mandated as codes—the decision made at the time was that those issues were important in that broad industry compliance and binding all of the industry was absolutely necessary given the potential for market failure or community concern about the problems in those areas. An assessment would have been made that potential non-entry into the arrangement, or people choosing not to enter into it, was quite likely. When applying that kind of conventional

regulatory impact analysis it really is a decision as to whether you think that this is something where the problem is so severe it requires mandatory compliance by everyone in the industry or would you want to encourage people to sign up on a voluntary basis.

There are other regimes for codes of conduct. For example, I understand in financial services there are various types of codes of conduct. You have to be a member of a dispute resolution or code regime but there are different ways available. Here the decision was made that for this particular code everyone has to comply. There should be no tolerance for choosing not to comply. Why there have not been any voluntary ones beyond that, I am not certain.

CHAIR—Perhaps you could give us your view as to whether any aspects of the Trade Practices Act can be brought to bear on the issues at the heart of this inquiry.

Mr Chisholm—I am aware that some submissions have raised the competition provisions of the Trade Practices Act as an issue here. Very broadly, in part IV of the Trade Practices Act there are a number of prohibitions on anticompetitive conduct. The type of conduct referred to in those submissions seems directed at what we would call vertical restraints—that is, arrangements between people who are not directly competitors in a particular market, which is often contrasted with horizontal restraints or agreements, where you are dealing with agreements between competitors.

I understand the provisions reviewed in some of the submissions include section 46, which deals with misuse of market power, and section 47, which deals with exclusive dealing. There are other provisions that could apply here too. Section 45 deals more with horizontal restraints, but any arrangements between competitors about whom they should or should not deal with do raise issues under the Trade Practices Act as well.

Proving that there has been a contravention of the Trade Practices Act is totally dependent, as you would understand, on very particular fact circumstances. Section 46 requires there to be a corporation with a substantial degree of market power and who is using that market power in certain ways, which are called prescribed purposes. That would include, for example, seeking to damage a potential entrant, restricting the possibility for a potential entrant into that market or trying to force a competitor or other person out of that market.

Section 47 is different in that it deals with situations where a corporation, for example, will only supply goods or services to another trader or person on certain conditions. Those conditions might be that they are not sold to someone else, that they are not sold or supplied in particular geographic areas, or that that second person or other party has not refused not to do those things. The key issue there though is that you do need to prove that there has been a substantial lessening of competition in the relevant markets that are being looked at.

Enforcement of those provisions is something that private parties can bring, and they do seek to enforce the competition provisions. Of course, the ACCC is also the regulator that enforces the competition laws and only the ACCC can seek certain types of remedies, for example, civil remedies and things like that. I am not aware though that any of the submissions have gone into particular depth about whether the conduct has actually breached part IV. I would anticipate that, if they did consider there was evidence of such a contravention, they would take further steps.

CHAIR—And you are not aware of any cases dealing with the issues that have been raised in the inquiry being taken under the Trade Practices Act—

Mr Chisholm—There have been cases involving part IV and what could be called intellectual property arrangements in certain ways. For example, there have been cases involving attempts by copyright owners—and I am thinking here of what is often called the Universal Music case—to prevent retailers from selling parallel import CDs. There was also the Rural Press case about arrangements or attempts by certain media proprietors or outlets to prevent other types of conduct from taking place. I would have to refresh my memory about the details of those cases, but none of those cases, as far as I am aware, are on point in terms of what we are dealing with here.

CHAIR—Do you have a view whether the big national sporting organisations—for example, the AFL or Cricket Australia—would be considered corporations for the purposes of the Trade Practices Act?

Mr Chisholm—It is a very good question. This sort of issue has come up in the Trade Practices Act, not only corporations but whether business activity is being undertaken when you are dealing with a sporting code. That has pretty much been settled beyond doubt, that it does involve commerce—large amounts of money are obviously associated with sporting events and activities. As to whether they are corporations or not—

Senator LUNDY—They say they are not-for-profits.

Mr Chisholm—They say they are not-for-profits, yes. It is a question of fact: I would have to have a look at the way they are structured and have set themselves up. But the requirement is that they are corporations. One point I will make is that, under the competition law, the corporation requirement only applies with respect to the Commonwealth's capacity to directly regulate people in these markets. Under the application law regime that applies, state and territory governments have agreed to apply the Commonwealth law to state and territory laws such that the ACCC can take action against natural persons, who are not corporations obviously, and they have done so, to deal with the important issue that in many cases anticompetitive conduct might be engaged in by people who are not corporations. So whether they are corporations or not might be an interesting discussion but it may ultimately be arid in the context of the real effectiveness of the regime.

Senator LUNDY—One of the intriguing facets of this inquiry is that it is the sports themselves who are, albeit very large and commercially orientated, not-for-profit organisations. The money they make does not go into private hands per se or into shareholders' hands. At one extreme of that we have sports like the AFL and Cricket Australia who are very commercial in their function and operation but are still, by definition, not for profit. On the other hand we have media organisations which are very large, in some cases, public corporations with an interest in maintaining shareholder value. Yet it is the sports that are being the protagonists in this debate in trying to reach out into new areas of rights under copyright law to, they say, protect revenue sources. With that background, what scope is there under the provisions of the Trade Practices Act for claims of restriction of trade by a sports organisation, a not-for-profit body, on a large media corporation pursuing profits in the interests of their shareholders?

Mr Chisholm—As I said before, there have been cases involving sporting codes and the competition provisions. I would have to check it but I recall litigation in relation to the Super League and the National Rugby League. There was also a case called Hughes and the Western Australian Cricket Association. It always comes down to the facts of each case, obviously, and each code or sport has its own fact circumstances. And of course it is the conduct itself and whether that conduct or that arrangement is in trade or commerce that has to be considered. But the courts have been generally willing to take a fairly broad view of what is commercial activity under the Trade Practices Act. It does not need to be profit-making activity. Any activity that involves the continuous or repetitious commercial or income-generating type of behaviour that you sometimes see in, for example, a sporting code is capable of being considered trade or commerce or a business activity. So it does not need to be profit-making activity for it to be caught.

Given the large amounts of money that are being dealt with here and sponsorships and things like that, I think it would certainly be highly likely that the court would look very closely at that issue and would be willing to consider that it was in trade or commerce. But, again, a case-by-case analysis would have to be applied.

Senator LUNDY—Thank you for that. With respect to some of the claims, it was certainly implied and may have been specifically articulated that the accreditation conditions demanded by sports prevented the news organisations from conducting what they claim is their normal business; hence, there was the prospect of a restriction of trade case to be built around that. Do you know of any examples, or any case law, where conditions of entry or access for the purposes of news reporting have resulted in a successful action relating to restriction of trade?

Mr Chisholm—There are older cases dealing with restraint of trade that may not be exactly on point, but the issue has come up in the context of who has the right to enter, for example, a sporting ground and whether that ground is a privately owned site or whether it has some other public component to it. That is not strictly a Trade Practices Act issue but a broader common law issue which has sometimes come up. The key issue here is that no-one is required to supply anything to anyone under the law. Certainly, under trade practices law, a corporation can quite justifiably refuse to deal with someone else. The key issue, though, is why they are doing that, and, if they are doing that for one of the reasons that the Trade Practices Act prohibits, then that would contravene the act. An example that is relevant is if a person—say, a corporation or other entity—refused to supply a service to another person because that other person was not prepared to comply with certain conditions about who that information could be supplied to, and if that lessened competition substantially, then that could raise issues under the act. But it is very complicated because you would have lots of discussion about what service is being supplied and whether it is, in fact, a service or not.

Senator LUNDY—Is news a service?

Mr Chisholm—Provision of news is arguably a service, yes. Then there would be an argument about whether the free provision of news is provision of a service or not. I am sure that would be an issue that might come up. Certainly, provision of information pursuant to a contractual arrangement is obviously going to jump that threshold. Those are issues that are then debated in detail in these sorts of cases. But, as I said, the key issue is why a person is refusing to supply services to another person, and if that is because they are trying to stop that person from

using that information in a way that the act regards as pro-competitive then that certainly raises issues.

Senator LUNDY—Both of those aspects are under contention, of course. Can I ask you whether an attempt to use an argument that the sports organisation is in fear that the images or content collected will bring the sport into disrepute as the basis for a condition of entry—that is, for the purposes of accreditation one of the news media organisations said that that, at some point, had been an accreditation criterion—impinges upon the provisions of the Trade Practices Act in any way?

Mr Chisholm—There is always going to be a question of the difference between stated and real reasons for doing things, and that often comes up. Obviously, a response to an allegation is that there is a different reason for doing it—and it might be the one you are referring to here—but the court looks beyond those things to the real reason and evidence that there might be some other motivation for it.

The other thing I should add here is that, although we have been focusing on what are often called ‘vertical restraints’, any evidence of an arrangement between people—for example, a newsagency here—also raises issues if it can be shown that there was a decision between what you might call competitors not to deal with someone else. That can raise issues. Again, you have all sorts of complications there, too, because each of the codes has its own market. The AFL does not compete with the NRL—at least, perhaps they do for audience members but not with respect to that code specifically. So those sorts of allegations do raise broader competition issues, but I do have to emphasise that they are just allegations. Were there to be any evidence to support them then the normal course of things would be either to complain to the competition regulator or to seek private redress, which firms frequently do.

Senator LUNDY—What about exclusivity with respect to photographic images? I guess we have to deal a bit hypothetically here because it is also in contention whether or not photographs subsequently hosted on websites are breaching the fair dealing provisions. On the basis that photographs were taken and an agreement signed that they would not breach the fair dealing exceptions and provisions of the Copyright Act, is there anything in the Trade Practices Act that prevents exclusivity arrangements?

Mr Chisholm—No, not unless those arrangements give rise to the sorts of concerns we have talked about here. A private contractual arrangement about how the information is to be used between those parties would not generally give rise to issues, no. It is where you start to get into questions about evidence that the reason for restricting how information will be provided is of the nature of preventing other people from competing in that market, for example, that issues come up.

Senator LUNDY—From the perspective of claims by sports that they are entitled to earn revenues from content generated by their sport, other than what is covered by the news reporting fair dealing provisions, is there anything in the Trade Practices Act that assists sports in preserving that right to earn revenues from content generated by the activity that they create?

Mr Chisholm—The way I would put it is that the Trade Practices Act does not seek to prevent, in this case, sporting codes from exploiting their private intellectual property rights.

Senator LUNDY—But they do not necessarily have a private intellectual property right per se. That is part of the problem. They are asserting that to create one would assist them in protecting their rights to earn revenue from this content. The property right is created once they effectively contract out the capacity to record the event.

Mr Chisholm—The Trade Practices Act, the competition laws, are fundamentally about relationships between participants in markets and ensuring that competition is maintained in those markets by preventing anticompetitive practices. Usually those anticompetitive practices concern whether it is an agreement between competitors to divide markets up, to fix prices or not to deal with other participants in those markets or whether it is action unilaterally by one firm to try to control the activities of another firm in a way that lessens competition—to restrict their dealing with others. That is really what the Trade Practices Act is all about. What you are putting to me here does not immediately strike me as something that raises issues but, again, it would depend on the circumstances. They are very broad fact scenarios.

Senator LUNDY—I feel that unless I start putting to you very specific scenarios it is difficult for you to respond. With the sporting organisations' view is that they want to be the only content aggregator, and that has been their contention and that is their right, would that constitute anticompetitive behaviour given that there are already established other content aggregators out there hosted by news media companies?

Mr Chisholm—Could you perhaps explain 'content aggregator'?

Senator LUNDY—In the online environment the sports are saying that they want to be the ones to hold the photo gallery, they want to be the ones to hold the moving images beyond those which everyone can agree are collected for the purposes of news. But even beyond a 12- or 48-hour period they are saying that they should all come back to their site. At the moment those moving and still images are on a proliferation of other news sites and interest sites, not just necessarily news bulletins but footy sites hosted by news media organisations.

Mr Chisholm—Certainly the act would not prevent a sporting organisation from entering into arrangements with, say, media outlets about who owns or who gets the ultimate right in that content. It could be agreed between them that after a certain period the content comes back to the sporting organisation, and that sort of thing probably goes on in other markets, I suspect. Issues come up where you have, for example in this case, content which, it is alleged by the sporting organisation, would belong to the sporting organisation, and attempts then to prevent other people from using that information, who would claim that they have a legitimate right to that information, and whether that attempt falls foul of provisions in the act.

To give you an example, section 46 prevents actions by a firm with a substantial degree of market power from using that market power in a way to damage a competitor of that sporting organisation or prevent another person from entering the market in which that sporting organisation operates, or deterring or preventing someone else from engaging in legitimate competitive conduct in that market. So without making a call on whether what is being discussed here does breach those sorts of provisions, that is the key issue: what is it that they are doing and how are they doing it and what is the position of that person in the potential market that you are dealing with here?

I have to emphasise that cases involving these sorts of issues are extraordinarily complex. They come down to issues of market definition with large amounts of expert economic evidence about what the market is, and it is often not easy to determine that. Then the actual decision as to whether the use of that market power is one for a prescribed purpose is another question of evidence that can really take some time to untangle. But, hopefully, by highlighting those things, it helps you to understand the way the act would work in these scenarios. It is not so much that two parties might agree here—and I appreciate that you are probably not saying that there is an agreement about this; there is just an assertion of a right—

Senator LUNDY—That is right, it is an assertion. But one of the issues is that because there is no agreement these accreditation passes are being used effectively to insist on conditions. So could that coercion—that is, you do not get in unless you sign up to our conditions—fall foul of the Trade Practices Act in that way that you describe?

Mr Chisholm—Use of an accreditation pass or the capacity to approve who may or who may not cover any event, for example, is conduct that can be considered with respect to whether there is anticompetitive behaviour going on. The act is very broad about what would constitute using, for example, market power, or what would constitute an arrangement between competitors about who they will deal with and who they won't deal with. That is certainly covered and it is not constrained in terms of what an arrangement is.

Senator LUNDY—So the use of differential agreements for accreditation passes could also be part of the consideration?

Mr Chisholm—The Trade Practices Act looks very suspiciously at agreements between people who compete. It is the old adage that when people who are in the same industry are meeting together or discussing common issues then there is usually something that you need to be looking at. It is something that goes all the way back to Adam Smith and his concern about why people in the same market who are competitors would want to meet and discuss certain issues. It is then also complex because you would need to prove that they are doing so in a way that has the purpose or effect of lessening competition or for fixing prices or dividing up markets or things like that. It is very complicated but—

Senator LUNDY—So if the sporting organisation used that accreditation to differentiate between different news organisations for the purposes of access would that be considered anticompetitive?

Mr Chisholm—Again, whether it is or not I do not know, but a sporting organisation or any other organisation can make its own decisions about who it will or will not deal with, and they might have good and legitimate reasons for that including commercial reasons. The question then becomes: irrespective of the stated reasons, what are the real reasons and are those reasons anticompetitive as the act defines it?

CHAIR—As there are no further questions, thank you very much, Mr Chisholm, for taking the time to appear before the committee today and for your very useful evidence. Again, thank you for appearing at such short notice. We do appreciate that. That concludes today's proceedings. I would like to thank on behalf of the committee all of the witnesses for their informative presentations, and Hansard and Broadcasting and the secretariat for their assistance.

Committee adjourned at 12.42 pm