



Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

INQUIRY INTO INTELLECTUAL PROPERTY ARRANGEMENTS

MR J COPPEL, Commissioner
MS K CHESTER, Deputy Chair & Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MERCURE, NORTH QUAY, BRISBANE
ON MONDAY, 20 JUNE 2016 AT 9.02 AM

INDEX

	<u>Page</u>
QUEENSLAND UNIVERSITY OF TECHNOLOGY DR NICOLAS SUZOR	2-13
HATCHETTE AUSTRALIA MS LOUISE SHERWIN MS INGA SIMPSON MS PAULA WESTON MR MORRIS GLEITZMAN	13-36
QUEENSLAND UNIVERSITY OF TECHNOLOGY DR MATTHEW RIMMER	36-50
MS SHERYL GWYTHYER MR MICHAEL BAUER MS ANGELA SUNDE	50-66
NATIONAL ASSOCIATION OF CINEMA OPERATORS AUSTRALASIA MR MICHAEL HAWKINS	66-75
QUEENSLAND LAW SOCIETY MS ANGELINE BEHAN	76-85
MS CANDICE LEMON-SCOTT MR BILL CONCANNON	86-97
MS CHRISTINE BONGERS MS JACQUI CARLING-RODGERS MS MELANIE HILL MS ANDREA SMITH	98-125
QUEENSLAND LAW SOCIETY MS ANGELINE BEHAN	126-127
AVID READER BOOKSHOP MS FIONA STAGER	127-128

MR COPPEL: Good morning. This is the first hearing of the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements. My name is Jonathan Coppel, I am one of the commissioners on this inquiry, and my colleague Karen Chester is the other commissioner on the inquiry. By way of background, the inquiry started with the Terms of Reference from the Australian Government in August 2015 which asked us to examine Australia's intellectual property arrangements, including their effect on investment, competition, trade, innovation, and consumer welfare.

We released an issues paper in early October 2015 and have talked to a range of organisations and individuals with an interest in the issues. A number of round tables have been held with groups of interested parties to inform the inquiry, including two last week, one on copyright fair use and the other on the pharmaceutical patents. We released a draft report in late April which included our draft recommendations, draft findings, and some information requests. We have received a large number of submissions in response, with the total number of submissions now well over 500. We are grateful to all the organisations and individuals that have taken the time to prepare submissions and to appear at these hearings.

The purpose of the hearings is to provide an opportunity for interested parties to provide comments and feedback on the draft report and following the hearing today there will be hearings held in Sydney, Canberra and Melbourne. We will then be working towards completing the final report, having considered all of the evidence presented at the hearings and in submissions as well as other discussions. The final report will be handed to the government later this year. Participants and those who have registered their interest in the inquiry will be advised of the final report released by government, which may be up to 25 parliamentary sitting days after completion, which is the requirement of the PC Act.

Regarding the conduct of the hearings today, we do like to conduct all hearings in a reasonably informal manner but I remind participants that a full transcript is being taken. For this reason comments from the floor cannot be taken but at the end of today's proceedings we will endeavour, time permitting, to provide an opportunity for anyone who wishes to do so to make a brief presentation. Participants are not required to take an oath but are required under the Productivity Commission Act to be truthful in their remarks. The transcripts will be made available to participants and will be available on the Commission's website following the hearings. Submissions are also available on the website.

I am not sure if we have any media present at this morning's hearing but if so if they could make themselves known to Anderson, our colleague at the back of the room and will explain the rules regarding media.

5 Finally, to comply with the requirements of the Commonwealth Occupational Health and Safety Legislation, we advise that in the unlikely event of an emergency requiring the evacuation of this building that the exits are located from the terrace room just outside and on your left. Your assembly point is the terraced area outside this room where you will then
10 be directed by the area warden to the exit point via Chelsea Lane Way to take you to the corner of Turbot Street and North Quay. If you require assistance please speak to one of our inquiry team members here today.

15 Participants are invited to make some opening remarks, no more than five minutes. Keeping the opening remarks brief will allow us the opportunity to discuss matters and participants' points raised in participants' submissions in greater detail. Participants are welcome to comment on the issues raised in other submissions however with ground rules relating to the opening remarks. I will stop there and I would now
20 like to ask Nicholas, who is at the table, our first participant. So if you could, for the purposes of the transcript, give your name and organisation and then, when you are ready, if you would like to give brief opening remarks, thank you.

25 **DR SUZOR:** Thank you. My name is Nicolas Suzor, I am a senior research fellow from Queensland University of Technology. I am here today in my academic capacity but I am also happy to speak about the submissions of the two NGOs that I am involved with, Creative Commons
30 Australia and Digital Rights Watch. So first, I would like to thank the Commission both for holding a hearing and inviting us here today, but also for a really comprehensive and quite careful thorough evidence based report.

35 This is an area that has typically not been marked by evidence-based policy. Copyright development is typically driven by essentially by a lack of good empirical economic analysis. And into that comes a mess of special interests lobbying and law making. I think it is heartening to see the Productivity Commission's move in this report to really try to inject some evidence based policy making into Australian policy, we see this
40 report particularly building on the fairly careful reports of other submissions, other bodies, over the last 15 years. Unfortunately one of the big challenges that we have had is translating the work, the careful work, of many different reporting teams into policy change, meaningful policy change.

45

5 So I would like to focus I think quite briefly on two main themes for this morning. So the first, in terms of short term reform to Australia's intellectual property law I will be focusing on copyright law predominantly, which is my main area. But short term reform, I think that there are two key reforms that Australia can enact and should enact quite quickly. And it is fair use, we have had a very comprehensive report from the ALRC, this most recent draft report confirms a lot of the work that the ALRC has done and I fully support the recommendations we produced for fair use, as soon as possible. I think that would be very useful not only for creators but also for intermediaries and innovators who are working to develop new ways to provide people with means to access industry with their works. It also provides great benefits for consumers of copyright material.

15 Second, the second short term fix, is the introduction of safe harbours. This is a legislative oversight in Australian law that when we introduced the legislation that implemented the Australia/US Free Trade Agreement we made a mistake in the way in which we introduced safe harbours so that they only applied to essentially ISDs and telecommunications providers. This is a really important issue that can be fixed very easily with the implementation of the draft bill that has currently either lapsed or not yet been introduced.

25 Safe harbours should fairly clearly be extended to other classes of online service providers. We have a real problem here where there is great uncertainty and legal risk for people who want to invest in providing online services in Australia. This means that a lot of cloud service operators simply cannot operate in Australia. And that is bad. That is bad for investments. It is bad for innovation in Australia.

30 The longer term issues that I want to talk about are that one of the things that the Productivity Commission's report starts to touch on is the extent to which Australia is actually free as a sovereign state to determine the extents and boundaries of our copyright and intellectual property arrangements. And it has been concerning over the last 20 years after a shift away from policy making at the World Intellectual Property Organisation towards a series of overlapping bilateral and multilateral trade agreements that effectively restrict the ability of Australia to determine the contours of its own laws.

40 So the Trans-Pacific Partnership Agreement, for example, is the most recent, or the most recently ratified not now the most recent, agreement that entrenches TRIPS plus standards but limits our ability to determine questions of national interest, like copyright scope and enforcement mechanisms, and duration of rights. So this is not something that we can
45

fix in the short term but it is something that it is important, I think, to make a clear signal. And I fully endorse the work of the Productivity Commission in the draft report so far, a clear signal that Australia needs to be careful when binding itself to international agreements that limit the ability for us to review the proper extents of our national laws and it is going to take a lot of effort internationally to start to disentangle ourselves from overlapping IP agreements if we want to have the latitude to ensure that our laws are fit as to the Australian context.

10 This is something that implies that over the longer term I think we need to work to make sure that IP agreements are removed from the purview of secretive trade agreements, that IP agreements are by their nature - they are not trade issues. They are issues that go to the hearts of much economic and cultural policy. They do not need to be negotiated in secret and they should, in fact, be negotiated clearly with the best national interest of Australia at heart.

20 This has not been the way that we have approached trade agreements in the past and I think that it is important that we try to do more to disentangle IP from trading order to start to examine questions of scope, enforcement, and duration. So I am happy take any questions on either of those submissions or any comments.

25 **MR COPPEL:** Thank you very much. Maybe I can begin with the last point. You mentioned the TPP as constraining Australia's sovereignty. Does that agreement, in your view, change the scope or the term of Australia's existing intellectual property arrangements, in your view?

30 **DR SUZOR:** Sir, I will confine my remarks to copyright particularly. I note that Prof Matt Rimmer is on the program for after morning tea and he will be much better placed than I am to answer the broader question of IP issues.

35 So the TPPA particularly - one of the issues here is that Australia has already signed away most of its rights to - sorry, let me rephrase that. Australia has already agreed to quite onerous copyright regimes and other IP regimes as part of the Australian-US free trade agreement 2004 - 2006. The TPPA further entrenches those US-driven copyright rules.

40 There are some minor issues that some of my colleagues are particularly concerned about in the changes required to domestic law, but overall the TPPA doesn't necessarily require a lot of change to copyright arrangements in particular. What it does do is further entrench (indistinct) standards that we are not convinced were in the national interest when we

implemented them in 2006 and I don't think they're in the national interest now in 2016.

5 So my recommendation - my view on this is that while we have signed the agreement, Australia should not be keen to take any proactive steps to secure the agreements coming into force. We should and see particularly what the US will do and we shouldn't be too keen to enter into agreements that have very little trade benefits and continue to further entrench our IP roles.

10 **MR COPPEL:** The draft report goes to a lot of effort to focus on those areas which can be changed without being in conflict with Australia's obligations. There has been a bit of mis-reporting on what we recommend in terms of copyright scope, but we are not suggesting any change to - well, copyright term.

20 We are not suggesting any change to copyright term, but we do make the point that you have made that some of these issues are issues that would be addressed better in an international forum, and also the relation between how these agreements - these bilateral trade agreements, preferential trade agreements are negotiated and how to make them more transparent, without essentially revealing the hand of Australia's negotiators.

25 We have put forward the idea of a model agreement which would set out the goals, essentially, without revealing the actual measures that Australia favoured or those that it may wish to negotiate within the other objectives. Do you have any views on how to increase the transparency of these arrangements and do you have any views more specifically on the idea of a model agreement?

30 **DR SUZOR:** I don't have any prepared views on model agreements. My views increasing the - improving the process are that one of the recommendations that were made in the draft reports really goes to the heart of this issue, which is that responsibility for IP is not clearly delineated amongst the different departments at a federal level and to date, negotiation for IP rules has been handled by DFAT with assistance of the Attorney-General's Department. Now, they're starting to change as the Department of Communications plays a more active role in copyright and intellectual property policy making.

40 I think that this is really important, that the Department of Communications is probably best placed to be able to investigate copyright rules and to derive evidence-based policy. One of the challenges we have had, I believe, in entering into these agreements is that

while the departments obviously have a level of communication, the negotiating positions reflect, I think, a key or different interests.

5 I think that one of the best ways that we can ensure that copyright policy is reflected in international trade agreements is for centralisation of responsibility for copyright in the Department of Communications, with obviously the Department of Foreign Affairs and Trade, and the Attorney-General's Department working to implement that policy at both domestic and international levels.

10 **MR COPPEL:** Why do you say the Department of Communications is the best-placed department?

15 **DR SUZOR:** Because copyright policy is cultural and economic, and communications policy. The Attorney-General's Department is very well placed to deal particularly with questions of copyright enforcements. Unfortunately, at the heart of copyright - sorry, let me rephrase - restart that. It's not unfortunately at all.

20 At the heart of copyright is a balance between different competing interests and copyright policy needs to be really carefully calibrated to ensure that we develop a series of laws and a social and cultural infrastructure that can help achieve Australia's national interest goals, and that means that a lot of this is about arts and cultural policy; a lot of it is
25 about communications policy, that as Australia seeks to capitalise on our investments in the digital age and pivots towards an innovation economy. In order to do that, we really need to make sure that the balance of the copyright is fundamentally well-researched, well-examined and well-articulated.

30 In the digital age, this essentially has become the purview of the Department of Communications. We are moving into a digital economy and if we want to provide the scene for a flourishing art sector, a flourishing tech sector, a flourishing innovation, and start-up sector, then
35 copyright policy needs to fundamentally take into account those balances. That is best done, in my opinion, within the Department of Communications, as we've seen most recently.

40 **MS CHESTER:** So Nic, one of the other policy areas that we are looking with respect to copyright is the exceptions regime, fair dealing versus fair use, and what very much motivated our thinking there - and touched on your post-draft report submission, thank you - was making sure that those exceptions remained adaptable to technological developments over time. We know that there's been more than a material gap between the change in

technology and the fair dealing exceptions being updated to allow for the new access with that new technology.

5 We are also very mindful though that in making any changes, there's always going to be transitional issues. One of the major concerns of folk that we've heard from to date around moving from fair dealing to fair use is the level of uncertainty that they think is particular to the fair use system. It would be good to get your thoughts firstly on that issue of uncertainty and then also what transitional issues we may not have identified in our report that we should have identified if it all, in managing that policy move.

15 **DR SUZOR:** I have two mains on answer. The first is that, to an extent, uncertainty is the great strength of the fair use system. That uncertainty is not always seen in a negative light. Uncertainty - the facts that, for example, Google can operate - can develop a search engine, for example. A search index 15, 20 years ago that required them to make copies of every web page that they could come across. That was not clearly lawful nor was it clearly unlawful. The uncertainty of fair use is, I think, better categorised as the safety valve of their use, that a firm or a user who believes their use to be fair can rely on the fact that it has not, to date, been declared unlawful and can begin to undertake their operations. So, I think, uncertainty better recast is really flexibility.

25 The more worrying part is about legal risk and the uncertainty that can paralyse industries, and this is a level of uncertainty where the rules are not necessarily predictable, that they're subject to change. These are fundamental core uncertainties that are justifiably worrying.

30 I don't accept the submissions that have been made by others over the most recent law reform periods in Australia that their use is inherently uncertain to those extents. There have been some excellent empirical analyses of US jurisprudence that show that actually their use is quite predictable, that there are established patterns, that the judiciary apply, and that the decisions fall into that can be used as a really quite useful guide as to determining whether a use is likely to be fair or not.

40 The US decisions are actually relatively predictable. While any given decision may not be easy to predict at the outset, the categories over time are fairly certain and fairly easy to follow. We can, in Australia, benefit quite a lot from foreign jurisprudence. There is no suggestion that we would have to develop our own new jurisprudence here. Of course, we can deviate from US principles where that is necessary to do so. But I don't see that Australian law would be any more uncertain than US law

and US law is reportedly, by all accounts or almost all accounts, working well for producers, for individual creators and for distributors.

5 There are a couple of things we can do to enhance certainty. Some of them involve the illustrative principles, I think that certainly the ALRC and the Productivity Commission's draft report recommended introducing within the legislative that help to provide some certainty there.

10 The other things that have really helped in the US are industry guidelines. So particularly I'm thinking of things like the documentary filmmakers' standard guidelines about fair use. So, for a long time documentary filmmakers in the US, they were reluctant to capture existing creative material that they had not ostensibly licensed, even if it's incidental material in the background of their shoot.

15 This is quite difficult because it means that in order to clear the rights documentary filmmakers need to go to producers – I'm thinking of cases like the Outfoxed documentary is a classic example where someone conducted an interview and accidentally caught a couple of seconds of
20 The Simpsons in the background. They were unable to clear those rights in a way that enabled the documentary filmmaker, on a shoe string budget, to film a documentary or to produce a documentary that was critical of Fox the company that produced The Simpsons. So this is really quite dangerous. It's a disincentive to creativity. It's a disincentive to critical
25 speech.

The guidelines produced in consultation with the industry articulate a sense of principles that everyone's happy to work with. Importantly, it helps not only individual creators and licensors of the information, but it
30 helps insurance companies be sure, when they're underwriting a documentary film or other works, that they can rely on their use and the industry standards that accompany their use in order to know that they won't be exposed to fairly large copyright damages.

35 **MS CHESTER:** One other area of policy uncertainty that we try to address in our draft report is around the issue of the circumvention of geo-blocking. We've actually received conflicting evidence in submissions on this point as to whether or not the Australian law current is certain with regard to whether or not it is legal, under Australian
40 legislation, for folk here to circumvent geo-blocking. Is this something that you've had a chance to look at and have a view upon, whether there is uncertainty still in Australian legislation?

45 **MR SUZOR:** I do have a view on that. As a lawyer, I'm reluctant to provide a definitive answer to the question of whether geo-blocking is

5 lawful. My analysis suggests that geo-blocking is – sorry – that circumventing geo-blocks is generally lawful under Australian law with the current generation of geo-blocks that we see. Particularly, it's not likely to be an infringement of copyright and there's been a few analyses to support that for consumers to access content lawfully purchased or accessed in a third country.

10 The difficulty comes with the TPM legislation and the way in which the Stevens v Sony was eventually codified. So the Stevens v Sony case was, the High Court was really quite clear about this, that it is a fundamental part of consumers' rights to be able to lawfully play and access the material that was purchased lawfully from a third jurisdiction. That, in the way in which it was codified eventually in the 2006
15 amendments, became a limited carve out for only films and computer games. I think that was a mistake. The High Court jurisprudence is relatively clear that these are legitimate uses and that there's no justification for restricting the ability of consumers to access lawfully acquired content.

20 That creates a little bit of outstanding uncertainty. Is there uncertainty? Well you can see it from the conflicting submissions. So, yes, I think that there is uncertainty. Ultimately, I would take a bet that it is not currently unlawful, but I would like to see it clarified.

25 **MS CHESTER:** Which piece of legislation would be the best vehicle through which to clarify that?

30 **DR SUZOR:** I think clarifying the Copyright Act, section 10 of the Copyright Act, definition of "access to control technological protection" and "technological protection measures" would be a good start. There may be some guidance at a policy level, non-legislative, about whether or not it infringes the copyright owner's right of communication to the public and temporary reproduction in (indistinct) storage.

35 **MS CHESTER:** Thank you.

40 **MR COPPEL:** Can I just come back to some of the points you made relating to the governance arrangements with copyright being a responsibility of the Department of Communications? All other forms, or most other forms of intellectual property policy rest with the Department of Industry and Intellectual Property Australia. There are models in other jurisdictions where there's a unified policy area. Do you have any views as to whether there would be benefit from having all intellectual property policy under the one roof, so to speak, or do you think the advantages that

you mentioned earlier, with respect to the Department of Communications, would outweigh those?

5 **DR SUZOR:** I think it depends on the roof. There are certainly advantages to having a strong body, independent body that is across all of the empirical evidence and is responsive to the different stakeholders in charge of intellectual property. But there are also particular differences. So the questions of, for example, gene patenting are not the questions of fair use in copyright infringement. They involve different stakeholders,
10 different groups.

We've seen, in international jurisdictions, some degree of regulatory capture of some of these organisations. The fact is, ultimately, that the interests of either users or individual creators are not well represented at a policy level. This means that, as I said in my opening remarks, copyright
15 law making, intellectual property law making, tends to develop as an industry compromise between publishers and distributors in copyright.

Whatever body is ultimately responsible for setting Australian policy
20 and legislative priorities in copyrights in IP I think the core issue is that the public interest needs to be better represented, and this is something that we haven't been able to do either in Australia or more broadly in other jurisdictions around the world, to ensure that the balance at the heart of copyright is not just a bargain between the loudest industry groups but
25 it is a balance that reflects the fundamental public interest of the Australian people.

I'm a bit agnostic, I guess, as to the answer to your question as to which body will ultimately be best for this. But it is a fundamental structural problem we need to embed civil society and public interest groups more corely at the centre of IP law making.
30

MR COPPEL: Do you have any specific ways in which that could be done in an effective way?
35

DR SUZOR: I'll have to take that on notice, if I could make a follow-up submission. But, as I said, there have been some experiments in other jurisdictions. The European Union has been able, in recent years, to better represent public interest in some circumstances. The US experience is a little bit more complicated, that certainly a lot of the – there is still a difficulty with developing public interest for legislation and IP law making in the US with their institutional arrangements. I think that we could learn a lot, but I don't have any specific models that I'd recommend
40 at this stage.
45

5 **MR COPPEL:** One of the points you make in your submission relates to publicly-funded research where you argue that the information that's generated from that, the use of that information and the re-use of that information should be open access. Are you aware of any jurisdictions which have implemented such an approach?

10 **DR SUZOR:** I'm just refreshing my memory here. Yes, so the Research Council UK and there was draft legislation in the US that would require open licensing. This, to us, is a fairly straightforward issue that we all agree the benefits of publicly-funded research and data should be made
15 accessible to the public and, in fact, publicly funded resources more generally. Our experience in Australia so far has shown, for example with Geo-Survey Data or ABS Data that this is a really well demonstrated mechanism to providing diverse benefits across a large number of users in the economy, both individuals and businesses, who would not otherwise
20 have access to license data, but you don't know the value of the material you want to access before you can and before it's made available. There's a lot of low hanging fruits that can be gained by openness.

20 So what that means is not just that the material must be publicly visible, but that it must be useable. So, for example, in research and data outputs you need to have clear licensing provisions that enable people to actually make copies, transform, reproduce and build upon the material that's released. So for us an open licensing mechanism is simply the
25 extension of existing policy that publicly funding material be openly available.

30 We, in Australia, were early adopters of these policies. We have fallen behind a little bit on this front internationally. As I said, the US and the UK have made moves on open licensing, but also the philanthropic organisations that fund a lot of research are probably leading the way here. The Bill and Melinda Gates Foundation, the Wellcome Trust, they all have open licensing requirements for their research.

35 **MR COPPEL:** Copyright is one of those areas where technological innovations have made it a lot easier to access illegally material, and this, in a way which is, essentially, as good a quality as the genuine product. Now, there are also technologies that can make it easier to enforce the property of copyright holders. In our report we discuss some of those
40 issues. But we also make the point that making more easily available, legally available materials works - is one strategy which can be used to reduce the incidence of piracy. I'd be interested in your view as to whether this is significant, whether it's sufficient?

DR SUZOR: How long do we have? I fully support the conclusions drawn in the reports. The history of the internet can be thought of as a history of rights holders to seek to control the flow of information. This has led to an escalating arms race over the last 20 years between people
5 who would clamp down on the flow of content, and people who would seek to evade the laws.

Our approach over the last 20 years globally, in terms of IP policy, has been to focus on enforcement. That has never actually worked. So
10 you've got all the way back to the Napster litigation, for example. Napster was shut down but it just led more bad actors to seek to develop new ways to access material. So the next generation of file sharing protocols were also shut down, Grokster, StreamCast, for example, Kazaa, and FastTrack Protocol.

15 At some point, this strategy has been ineffective, that the people who are now within the scope within the reach of the long arm of the law have essentially been regulated or sued. The other people who are – continued to providing networks of infringements are outside of the reach of
20 Australian law, or US law.

So the strategy in recent years has been to shift towards suing users. The RIAA tried this in the early 2000s. It was deeply unpopular. It's a very bad method of attempting to enforce copyright because,
25 fundamentally, copyright relies on people doing the right thing. Consumers are only going to do the right thing, by that we mean lawfully accessing copyright material, if they believe in the system.

The problem is that our copyright system is not demonstrably fair.
30 It's fair for consumers who – Australian consumers, in particular, pay much more for access to works, at least in the figures as at 2013 by the IT Pricing Inquiry, continue to pay much more, have much less choice in distribution arrangements and in format options, and have to wait much longer. Consumers don't like that. That means that consumers lose
35 respect for the law and seek to find ways around it.

But it's also not fair for creators. We're seeing a copyright regime that is structurally set up to concentrate the wealth of copyright in a very small number of highly successful artists and mainly major distributors
40 and platforms. Those are the people for whom copyright is working well. For everyone else, copyright has a fundamental problem at its core in the way in which it operates.

This lack of fairness, I think, is driving a lot of infringements. There
45 are times where we talk to consumers, for example, and Paula Dootson,

my co-author in this area, has done a lot of work here. Consumers do want to reward, they want to pay for, and they want to help support the creators whose work they enjoy. But they won't do that if it's difficult, if it's too difficult.

5

So, for example, there's been a lot of discussion about things like Game of Thrones and its availability. On the one hand this discussion is framed in terms that Australians are unrepentant infringers of copyright material. The other side of that story, the Productivity Commission's draft report quite rightly points out, is that Australians are hindered from accessing material.

At every point over the last 20 years the thing that has made a difference to copyright infringement is development in the marketplace. So this is iTunes in 2005 and 2006. iTunes making it simple for people to actually pay for things. All of a sudden a lot of the people who were using peer to peer networks, like Napster, like Kazaa, Grokster, StreamCast, migrated to iTunes because it's a convenient way to access material. Spotify, Netflix, these are all examples over the last five years, and maybe a little bit more for Spotify, where we have seen similar shifts.

The answer to this problem is not in continuing to clamp down on copyright infringements, because consumers are at the limits of what they can bear for enforcement costs. The answer is development of nice, efficient, well-functioning, digital marketplaces that promote consumer choice.

MR COPPEL: I think we've run out of time. So thank you very much for participating this morning.

30

DR SUZOR: Thank you very much for having me.

MS CHESTER: Thanks, Nic.

MR COPPEL: So our next participant is Hachette Australia, who will also be accompanied by a number of authors published by Hachette. We have Louise Sherwin-Stark, Inga Simpson, Paula Weston, Morris Gleitzman.

MS SHERWIN-STARK: I should point out these are not all published by Hachette. Inga is published by Hachette.

MR COPPEL: Okay, sorry. So maybe first Hachette would like to make some brief opening remarks and then there will be an opportunity from the authors to make some remarks, maybe reflecting their experience with the

45

copyright system and the issues that are in the draft report and how they relate to your view on intellectual property.

5 **MS SHERWIN-STARK:** Okay. My name is Louise Sherwin-Stark. I grew up in Brisbane and started my publishing career in London. I've been working the book industry for over 20 years. I am a joint managing director of Hachette Australia. Hachette Australia is an independently managed Australian subsidiary of Hachette UK, itself part of the global publishing house Hachette Livre. Hachette Australia publishes a wide
10 range of Australian and international fiction, nonfiction, illustrated and children's books. It's a trade publisher as opposed to an educational or professional publisher. Today, I would like to address one finding and one recommendation from the report, but I am happy to answer questions on fair use and piracy as well in session.

15
20 Firstly, Australian authors have been rightly concerned at the suggestion that the term of copyright be reduced from 15 to 25 years after creation to the current - from the current 70 years after the death of an author. If this finding was acted upon, Tim Winton would not receive payment for Cloudstreet and Thomas Keneally would not receive payment for Schindler's Ark. And why shouldn't Gabrielle Carey and Kathy Lette receive royalties from the sales spike of Puberty Blues, following the Network Ten series?

25 We instinctively, intuitively know that a reduced term of copyright is just plain wrong and is just not fair or right when it comes to books and authors. Senator Mitch Fifield has publicly responded to author concerns by ruling out such a change. What concerns me is that such a finding was included in the draft report at all, as it does suggest a bias against any
30 form of copyright and against the fair remuneration of creators.

35 Secondly, the recommendation that will have the biggest impact on trade, authors, publishers and booksellers and ultimately consumers is the weakening of what is already qualified territorial copyright. This recommendation is being supported by the Liberal Government. Territorial copyright is at the heart of the global publishing ecosystem. Publishers, agents and authors trade territorial rights around the globe, territory by territory. In this environment, publishers are able to invest on the basis they have some security for their investments in what is
40 inherently a risky business.

45 As publishers, our level of investment is determined by the number of copies we expect to sell of any one book. We estimate the volumes we sell through each retail sales channel, like Dymocks, the independents, Big W, et cetera as well as export, special, new book and foreign right

sales. We pay the author a royalty in abeyance which is calculated as a percentage of the RRP, multiplied by the estimated volume of sales. We then calculate the investment in publicity time and cost, in marketing and cooperative retailer advertising to achieve those sales.

5

Now, let's imagine that Dymocks and Kmart bring in copies from the US or UK wholesalers. We would have to reduce our estimated initial sales and reduce our investment across the board. We note that the Commission has acknowledged the concerns of Australian writers with its suggestion that Australian writing should be supported by government subsidies in an open market in the absence of investment by local publishers.

10

Overall, more 300 million dollars has been taken from the Arts budget in the three years of the Abbott/Turnbull government and these cuts suggest that it's highly unlikely that the government will be able to match the current level of publisher investment in Australia through works of 120 million dollars a year. In any case, Hachette rejects it is appropriate for the government to pick and subsidise winners in the literary space.

15

20

Without government subsidies, we believe the removal of territorial copyright and a reduction in local investment in Australian and international titles will result in an interlinked series of bad outcomes for the industry. Firstly, as risks to publishers increase, investment will be decreased. There will be a tipping point when it is no longer viable to invest enough in Australian writing to meet consumer demand.

25

Australian authors will struggle to secure deals and the deals they do secure will be for lower advances and royalties. Australian publishers and agents will hesitate to sell UK and US rights due to fears of books coming back into the market. The sale of US or UK editions of Australian books back into the market, authors only receive a lower export royalty or if the books are remaindered or dumped, will receive no payment at all.

30

35

Author incomes will fall further and ultimately the potential best-selling writers of the future will not emerge. The average Australian author income is just under \$13,000 per year and it is not sustainable for authors to continue writing if incomes drop further. All of this means there will be fewer Australian books. Bookshops will close due to a less compelling consumer offering unless access to a wide range of books. In an industry that employs over 20,000 people, jobs will be lost.

40

So this is all bad news, but actually the ultimate loser will be the Australian consumer. This is not in the interest of consumer welfare.

45

5 Australians will have fewer opportunities to see their lives and experiences reflected back to them in the books that they read. With fewer bookshops, it will be harder to find books and Australian readers will be increasingly reliant on UK or US retailers who have little understanding or care for Australian consumer interests. There will be fewer conversations in the media around reading, with fewer people seeking out books. All of this will have a potentially negative impact on literacy levels.

10 The Productivity Commission and the Turnbull Government believe that the removal of territorial copyright will lead to lower book prices. In fact, this is the only consumer benefit discussed in the report. This belief is based on data gathered for the 2009 Productivity Commission Report and we don't think the data is actually current enough or robust enough to support this recommendation, because there has been significant change in the industry since 2009. (1) Prices have fallen in real terms, by over 15 25 per cent; (2) the range of books available to booksellers has grown by 15 per cent; (3) this increased diversity has been achieved by significant improvement in speed to market beyond the legislated 30 days from 20 publication and 90 day for backlist.

The industry has agreed to 14/14 days and most publishers have moved to simultaneous publication. This has been delivered in part by improved print technology and more competitive onshore print prices. In fact, Hachette will move the bulk of our black-and-white into Opus Group 25 by the end of this year, with ambition to move all of black-and-white print into Australia by the end of 2017. This move to more production onshore and more investment in local print capability and in local jobs is happening across the publishing industry.

30 (4) When Angus and Robertson and Borders disappeared in 2011 we lost nearly 25 per cent of the print market. This has never been returned and there are many suburban and regional centres without a community bookshop hub, and publishers have had to become much leaner and more 35 nimble.

(5) The Australian dollar hit parity with the US dollar around 40 2010/2011 and the Australian online consumer behaviour was firmly established. Amazon and The Book Depository have quite legally offered books to Australian retailers, but they have had an unfair advantage over Australian retailers. They currently don't pay GST on sales into Australia, but will do so after 1 July, which is great news and The Book Depository pays no freight on the sale of books into Australia. Despite these unfair 45 advantages, Australian publishers and booksellers are striving to compete on price.

5 So where is the evidence that supports the supposition that books are more expensive in Australia and what evidence is there to suggest that an open market will achieve cheaper books? The Australian Publishers Association has done international price comparisons and found that in general prices for trade books are comparable, and the Australian Booksellers Association conducted a similar price comparison exercise and reached the same conclusions.

10 In fact, legendary Australian bookseller David Gaunt of Gleebooks have said that the repeal of PIRs will likely lead to an increase in the price of books and limit the local access to a wide range of international titles. This is backed up by our analysis which reveals that prices in smaller open markets, for example New Zealand and Hong Kong, are actually higher than they are in Australia. We should look at the outcomes of the open market in New Zealand in particular. Since 2009, (1) prices have fallen by 14 per cent in New Zealand, compared to 25 per cent in Australia; (2) the range of books available in the market has decreased by 35 per cent and (3) the sales have fallen by nearly 16 per cent.

20 I'd just like to use Hachette as an example. We closed our distribution business and the New Zealand market is serviced by just a small sales and marketing office of eight staff. This is down from over 40 people at its peak, which included a whole publishing department. We no longer significantly invest in new writers from New Zealand or books from New Zealand, as much as we would love to. We are not alone in this move.

30 In conclusion, we believe that the current laws around copyright are socially optimal. Australian consumers have local access to a diversity of great competitively-priced books that reflect their lives and experiences. Australian writers are rewarded for their creative efforts with home royalties and local industry support and expertise. Australian publishers operate competitively and invest not only in Australian writing and books, but the promotion of reading and literacy.

40 The Australian book trade industry is aligned on territorial copyright for the first time. Australian authors, illustrators, agents, publishers, printers, distributors and booksellers want to work together without government interference or subsidies to continually improve our ecosystem to ensure that authors, publishers and booksellers can thrive and compete on the global stage. It is in our best interest to continue to refine our offer to Australian consumers, but it would be better to work under a legal copyright framework that does not put so much at risk.

45

MR COPPEL: Thank you, would Inga, Paula or Morris wish to make a few remarks? If so, if you could give your name and obviously you are free to represent for the record. Thank you.

5 **MS SIMPSON:** Okay, thanks. My name is Inga Simpson. I am a writer, a writing teacher and I've had three novels published over the last four years with Hachette Australia and have a work of nonfiction and fiction contract with Hachette Australia again for 2017 and 2018. As a developing literary author who focuses on rural Australia, I'm concerned
10 that it's voices like mine that will disappear if the Commission's draft report recommendations relating to the removal of copyright protections from my creative works were implemented.

The report concludes that the proposed changes would have little or no
15 effect on the incentives for authors to produce works. I am not sure how the Commission reached that conclusion. Each of the recommendations, if implemented, would reduce my capacity to earn a financial return from my writing. The reduction of the copyright period would obviously reduce my royalties. The shift of fair use would potentially expose me to
20 the use of my works without recompense, and the removal of territorial copyright again reduced my local and overseas royalties.

These recommendations, if implemented, would also reduce the margins for Australian publishers. This would cause a contraction in the industry
25 which would make it more difficult for writers like me to get new works published and, if I was lucky enough to have a new work contracted, it would likely be with a lower advance and lower royalties. Any contraction in the publishing industry would also have negative flow-on effects for printers, booksellers, creative writing departments in
30 universities, writers centres and book reviewers. These industries are all interconnected and make a significant contribution to Australia's economy.

These industries are also the means by which many writers
35 supplement their income and any contract of those industries would further reduce our capacity to earn a living in our field. I would be paid less for my works, have fewer copyright protections, fewer earning opportunities, greater difficulty getting work published and all within a shrinking local industry, and with government policy that doesn't value
40 what I do for Australian literature. What would be the incentives for me to produce new works exactly?

Some Australian publishers would likely shut down or reduce their Australian operations and independent bookstores, those great supporters
45 of Australian literature will close. There will be fewer Australian books

on shelves and fewer shelves. Most vulnerable, if these recommendations were implemented, would be new and emerging writers; alternate voices; our indigenous writers and writers from diverse backgrounds. The next generation of Tim Wintons, Alexis Wrights, Bruce Pascoes, Nam Les, Richard Flanagans and Charlotte Woods.

Australian literature has always been a key part of our culture and national identity, and today it is a vital part of our economic and cultural economy. For the sake of a possibility of cheaper, mass-produced titles, the Commission's draft report recommendations would risk Australia's literature and a vibrant book industry and we would be so much the poorer. Thank you.

MR COPPEL: Thank you. Go ahead, please.

MR GLEITZMAN: Thank you for having us here this morning. My name is Morris Gleitzman. I have been writing for young people for about 30 years. Last night here in Brisbane we had a free market in rain. I got home last night from a literary conference interstate to discover that a large amount of a usually useful and, in fact, quite precious substance had been dumped in my workplace, rendering my ability to function as a productive member of our society somewhat difficult over the coming days.

I want to make a couple of remarks which are largely in support of the publisher's submission this morning, but from perhaps a slightly more personal perspective; from the coalface, as it were, of our literary industry. Over the last 30 years, I've visited about 1500 schools as a speaker to young readers and it's for this - and it's on behalf of this particular group of Australian consumers that I want to speak this morning, the young people of Australia.

During my many, many visits to schools, I've listened very carefully to what a very large number of young Australians have had to say about the stories they read; the importance of those stories in their lives. Our young people very articulate about the importance of those stories to them, both literally and in the subtext of what they say, and I've come to understand over many years that as Australian consumers, our young people have an interest that goes far beyond the dollars and cents cost that they or their parents might pay for books.

I don't think it's an exaggeration to say that for our young people, their relationship with the stories they read are absolutely vital and integral to their development, not only as people, but as future economic contributors to our society. If I can very quickly summarise how stories work for

5 young people, it's as follows - and this is a paradigm that has been developed through some thousands of years of human culture. It's not unique to Australia, but every Australian story for young people works as follows: A young character discovers in their life they have a problem that is far larger than they ever thought they'd have to face or indeed could do anything to solve or survive, but they have no choice.

10 So they are forced to go on a journey in which they develop the capacity to understand themselves and the world better. They learn research skills, because you need to find out about a problem, before you can begin to solve it. Often you need help, so you need to develop interpersonal skills, so that you can enlist allies and friends and also, importantly, come to understand your enemies.

15 You develop the capacity to empathise and all of these things contribute to the development of problem solving skills. You need to be agile. You need to be creative in your thinking. You need to be determined and have resilience and if all of these things can gradually become a synthesis of your own personal development and growth, you may possibly be able to solve or at the very least survive your problem.

20 Now, I've spoken to thousands and thousands of teachers over the years and they agree that this journey, this process, exactly mirrors some of the key developmental and educational stages that they hope to achieve, particularly with middle and upper primary school kids.

25 What I've just described, that central journey - character's journey - is not unique to Australian stories, it exists in stories from every culture and every part of the world, but something else I've observed over the years is that there is an absolutely crucial connection between young Australian readers and Australian stories. It is the same as the connection for English, for British readers - young readers and their stories et cetera.

30 Young people, particularly at the time that I am writing for them, which is from the age of eight or nine up to about 12 or 13, every young person needs to go on a very difficult and challenging personal journey where they move from somebody else's world, the world owned, defined and created by adults to their own personal world, the world that will become their personality, their character and their modus operandi.

35 It's a difficult and often challenging journey and I have had reflected back to me countless times the crucial role that stories play in helping them make that journey, and nothing is more important about those stories, but that they reflect what is happening in the culture and the environment of those young people. If we ask young people to make that

5 journey while at the same time they are looking around and seeing that the only inspirational stories available to them are other people's stories, American stories, British stories, I think we are presenting them with a cognitive dissonance with a contradiction that is going to be hugely hindering to them.

10 Now, implicit in what I am saying, of course, is my concern that the changes to copyright arrangements proposed in the current Commission report are in fact going to damage the stories, the Australian stories, available to Australian young people. You have heard and will hear again over coming days from different publishers why they believe that their business model will be damaged by these proposed changes. I just want to add a couple more quick comments from the point of view of somebody whose career and work would not be possible were it not for the traditional, let us say, publishing model that has enabled me to develop my skills and abilities as an author.

20 I would not have got started, it took considerable capital investment, it took the investment of time and expertise by an Australian publishing company to give me my start to allow me to write my first book, and more importantly, to bring that book to a level of, I hope, excellence that made young people want to read past page 1 and then tell their friends that it was worth reading. My publishing colleagues are of course in business and of course they have capital invested that deserves a return. But for me they are a professional team. They are as important to me as the theatre team for a surgeon or the engineering team for a pilot. And just as those professions would not be possible without those teams, mine is not either.

30 I am therefore very concerned about the future survival of those sorts of teams for people like my colleague here and the crucial cohort of new writers. As you can see, I am getting on and I have noticed over the last 30 years that there is an increasingly - that there is a diminishing number of Morris Gleitzmans in their 30s around. I am not sure exactly where people like me are going to come from over the next 20 or 30 years to continue providing stories for our young people because for publishers it already has become a more challenging business model, but they do still invest.

40 Penguin Random House, who publish me, put huge amounts of resources into developing new writers but with increasing difficulty. I am in a specific situation where I am fortunate enough to not only be able to earn my living from doing the work in the place that I want to do, which is my country, but I am also an exporter. I have sold several million books in Australia but I have also sold several million books overseas. Up till now

I am proud to say that my enterprise has only contributed in a positive way to our balance of trade.

5 I also have the option if the professional support that I rely on from the publishing industry in Australia is undermined and weakened I have the option to publish in the UK because I have a European passport, I have a considerable market in the UK and I have a publisher there who would be happy to publish me. They would even allow me to continue to write Australian stories but I know that every time I sat down with my UK
10 editor there would be all sorts of compromising forces at play, "How will it play in Grimsby", she would say, and I would have to say, "I am an Australian writer, so that has to be my secondary consideration."

15 But there is also an economic jeopardy that may well - that is of great concern to me. It was briefly mentioned that one of the threats if territorial copyright no longer exists is that remaindered copies of Australian works overseas can come back into the country and totally undermine the business model and therefore the capacity to support new creative endeavour by Australian publishers. I thought it might be useful
20 if I give a specific example of that. Several of my books have been distributed by American book clubs, and that is a large market. I think with each of my books the print run has been something a little over 300,000 copies.

25 Now, when you are an American book club and you are buying 300,000 copies of a book you only have to make a small misjudgement, let us say 10 per cent, to find yourself with 30,000 surplus copies left. And those copies were very cheap because when you print 300,000 copies the per unit cost is low. So they just dump them on the international
30 remainder market. I sign thousands of books each year in Australia and I can tell each a child hands me a book to sign where that book came from. I can tell if I am signing the English, the Australian, the American edition. I can also tell if it is a remainder because of the small black mark that remainder distributors have to put on the bottom.

35 So I know already that the territorial copyright arrangements are being circumvented sometimes. But I also know that from time to time with my books there is a lot of remaindered copies out there internationally. And, yes, if they are allowed to come in to Australia at a unit cost of, let us say,
40 after transport, a dollar, so they could be sold here, as I have occasionally seen, for three or four dollars, there is a short term and obvious dollar and cents benefit to the consumers who buy those books.

45 But I think what I am trying to say and what I think you will hear repeatedly over coming days, is that there is a longer term economic

disadvantage, even in a dollar and cents terms, even before we get to the fact that the longer term economic disadvantage to Australia, if we have future generations of Australians who do not develop the capacity to behave in a confident and entrepreneurial way, and that is what I believe
5 Australian stories do for Australian young people, we are not going to be a clever and economically successful country in the future.

And I will not move my operations to the UK because I am Australian writer and I want to look into the eyes of Australian readers as often as possible and hear their thoughts and feelings about what they are reading.
10 However if I did behave in a purely economically rationalist way and move my operations to the UK instead of being an Australian producer who is contributing to our export market, all of my future book sales in Australia would become imports. I would become a net drag on our
15 balance of trade.

I do have the option of staying here and of forbidding my publishers to licence any of my books anywhere around the world. So, yes, I have got the option to cease to be an exporter and to simply stay in the place that I
20 want to work. And I am one of the lucky ones, I have a sufficiently large readership and sufficiently large sales that even if a change to territorial copyright greatly reduces the turnover value of those sales, I will get by. But I will do it with a very sad heart because I will see fewer and fewer young people prepared to make a considerable personal risk investment of
25 time and effort to pursue their desire to contribute to this story and therefore the individual developmental wealth of Australia.

I think it would be a very, very sad thing if the Productivity Commission in their very important and well intentioned desire to advise our government on ways to improve productivity and consumer benefit in
30 Australia contributed to a future in which Australian children no longer have Australian stories. That I think would be a great tragedy, beyond words. And it also would not be productive. Thank you.

MS WESTON: Thank you. I am Paula Weston. I am published with Text Publishing here in Australia. I am a writer of young adult speculative fiction. I have had four books published in the last four years. I would like to talk today particularly about the parallel importation
40 restrictions and probably echo a lot of what my colleagues here have already said today.

Text publishing, as I said, published my work here in Australia. They took on the world rights and then on-sold to Orion who has since become Hachette Children's Books in the UK, Tundra Books which has since
45 become Penguin Random House Canada in the US, and I also have a

Turkish translation that has been published by Yabanci. My books, although they are speculative fiction, I pride myself on my Australian settings and my innovative Australian voice. And so for me that Australianness is very important in my work. With the potential to lift the restrictions on parallel importation what that means that booksellers may choose to import the international versions of my books and sell them locally rather than the locally published ones.

What that means, and this may not seem majorly significant in the short term but if you consider this may happen with a lot of Australian writers, it may mean that teens are reading books that are less Australian because often what happens when you are published internationally, as we have touched on before, is the slight word changes that happen. It might be as simple as in the North American version that jumper becomes sweater and car bonnet becomes car hood. And these are all, they are small language things but when you talk about young people needing to see themselves in Australian stories - sorry, see themselves in the stories they are reading, they need to hear themselves as well.

An example I can give is in the UK version of my first novel Shadows I have a couple of characters who are slightly rough around the edges, they live in dirty pants and blue singlets, well in the UK version of Shadows they are wearing trousers and blue vests. Now that sounds like they are wearing formal wear which to an Australian reader would be slightly jarring. So again I think that to make sure that we keep the Australianness in books the only way we can do that is to make sure that it is local editions that are sold on local shelves.

Now, we talk about the upside being cheaper books for book buyers here in Australia but I think as we have seen with what has happened with the dairy industry, Australian consumers are smart, they understand that sometimes if they pay a little bit more for a local product that that will support a sector or particular industry, they are happy to do that. And I think that if there is an awareness around why books may cost slightly more in Australia than they do elsewhere and the flow-on benefits that my colleagues have been talking about today with an entire sector and industry and strengthening that national identity and culture and capacity to nurture new and emerging writers, most book buyers if they understand that are prepared to pay that little bit more. They would not sacrifice that for cheap books. I do not believe the majority of book buyers would do that.

We talk about also capacity to earn as authors. I have a full-time job. I cannot afford to support myself on the income that I earn as an author. I am fortunate in that I earn slightly above the average for an Australian

5 writer. I think last financial year I earned around \$20,000. And the vast proportion of that was advances from the publishing deals that Text Publishing secured for me overseas. And as Text has said in Michael Heyward's submission, two thirds of royalties that it pays as writers is through those international advances and royalties.

10 I am certainly reflective of that. My books do okay here in Australia, I am what is classed as a mid-list writer, certainly no best seller, certainly not got Morris' figures behind me, but I am doing enough to be economically viable to my publishers, and that is because my books earn out. And by earning out it means that the advance that they pay me my books do well enough for them to recoup that and to make a profit. They only do that because they can on-sell them to other markets. Without that I may not get another contract with Text or any other publisher. Because of that I have been contracted for a new work that is due out next year. I think, I mean I cannot say for certain, but I would assume that without those international on-sales that may not have necessarily been the case based on my Australian sales alone because the Australian market is very small to be the only market in which to be published.

20 It has been well documented through some of the larger sectors' submissions that I have read that the Australian publishing industry is worth \$2 billion and 20,000 jobs. Now, you have to ask that if this sort of industry or this sort of threat to an industry of the same size anywhere else in Australia was to be mooted that we even would be having this conversation. It seems quite astounding that we could introduce some changes, particularly through parallel importation that could have that level of impact culturally and economically.

30 I understand that we are talking about the government providing arts funding and grants as subsidies to kind of balance that. Well, again, as we have seen, there has been massive cuts to the art sector in recent years. The idea that an entire sector can rise and fall on the whims of the government of the day is a little bit frightening as well. And I think if our economy continues to decline, which let us face it, it may, the first thing that will go will be this type of funding, I would suspect.

40 So I guess to come back to my original point, which is that - and I have sort of jumped all over the place. My original point is that we do need to have a strong local publishing industry to support obviously our local writers but to also to ensure that our readers, and in my case particularly teen readers, can see and hear themselves in books. And that is more likely to happen if Australian publishers have first rights to get Australian editions on Australian shelves. Thank you.

45

MR COPPEL: Thank you. We have about 20 minutes. So you have all made the point about the role of a publisher supporting Australian literature in Australia, so just to get a bit more context from the publisher, if you could give us an idea or - because you publish also foreign writers or - if you could give us an idea of the importance of the Australian writers in Hachette's current works on the market, that would be helpful and also if you can - you also made the point that the profits that come from foreign workers can be recycled in a way to promote Australian workers. So is it the rationale behind that is linked to a sense of a greater risk associated with promoting Australian writers or is it a broader general interest that motivates you in that area.

MS SHERWIN-STARK: Sir, it's a couple of things. History, Australian publishers were just distributors of UK publishers. 50 years ago, Thomas Keneally got published out of London, because there was no local expertise here. Over the years, led by Penguin in many ways, and then newcomers like Text, there has been more investment and in developing local expertise to support a local writing industry.

So for Hachette, we publish Australian works with pride. We love it. It's a little bit more fun, because we've got authors on the ground. We can get involved in publicity. It's really rewarding, professionally, to publish great Australian work and to know that it has huge resonance for our readers as well. Interestingly, I worked for Google Play for a while and Google Play is, as you know, an online part of Google. They sell eBooks. I set up their Australian store. Their sales are dominated by romance and by sci-fi fantasy and things like that, but what I found really, really interesting is that Australian readers were really determinedly seeking out Australian stories.

So we would sell a Miles Franklin winner, but we couldn't sell a Booker winner, but it was because Australian readers wanted that. Now Google Play sort of de-invested in their local Australian store; they are not so interested in catering to Australian tastes anymore, but I found that really interesting. So I think there is a huge demand for Australian writing and, in fact, over 50 per cent of the titles sold in Australia are Australian stories and that's a big change from 10, 20 or 30 years ago. It's an increasing Australian output to meet an increasing demand.

There are different kinds of risks for international and local publishing. I think in local publishing we do have a risk of unearned, when we talk about unearned advances. One in three of our books does not earn out. We lose money on the local list and that's a similar statistic for the international list as well, because the cost of importing books is actually

higher in some ways than the cost of producing local books. We have to freight them.

5 We have to air freight them sometimes, which I really detest because it's environmentally unfriendly and very expensive, but to meet publication dates, we do do that, but as in investment in publicity and marketing and author too it's hugely expensive to bring someone like Stephen King here but we do pay for that to happen, because we believe it's important for Australian readers to access the writers they like to read.

10 So if Stephen King wants to come, we will invest in that and enable that to happen. So there's different risks for different parts, but they're both significantly risky and with a diminishing industry, we lost 25 per cent from Angus and Robertson and Borders closing, and actually we say our profits contract when that happened and that increased the risks of publishing all the books that we have on our list, but particularly actually the mid-list you were talking about, Angus and Robertson were hugely supportive of Australian mid-list and when they stopped - when they closed down in regional centres we really didn't find that harder, and I think the real worry for us is that tipping point; the tipping point which at the moment for us we can kind of make 4000 copies or 5000 copies work.

25 If we lose Dymocks and Kmart we will be down to 2000 or 3000 copies and all of a sudden that book will not be viable, because yes, foreign rights sales are important, but we don't achieve them for every single book. William McInnes is a fantastic Australian author. He writes brilliant Australian stories which have absolutely no resonance for British people. We are not going to salvage rights for that. So we are purely dependent on Australian sales for him and in some ways that easier, but actually if we lose channels, if Kmart stops stocking books altogether, we will find it harder to publish him at all.

35 **MS CHESTER:** Louise, we might approach it - I've got a couple of questions I'd like to put to you and then a couple that would be terrific to put to our author panel, but before I do, maybe just three points of clarification.

MS SHERWIN-STARK: Sure.

40 **MS CHESTER:** So firstly, in our draft report, there was a little bit of fictional reporting in the media, so there was no recommendation to change the copyright term.

45 **MS SHERWIN-STARK:** But it was a finding.

MS CHESTER: We had a finding, but if you purely look at in an economic sense, an optimal term for copyright would be 15 to 25 years. There's no recommendation in our report to change the term of copyright. Indeed, we can't, under our current treaties and obligations, so I just
5 wanted to correct the record on that one.

Secondly, and I think it was a point maybe that you raised, Inga, about fair use. If your works are commercially available then fair use does give you a fair deal. That's how the fair use factors work. Thirdly,
10 just on our terms of reference, and I think this is a point that some folk have missed. Our terms of reference when it comes to parallel import restrictions asked us to advise the government on transitional issues for its implementation. So I think that was quite important to clarify and that's what we've been focusing on in our draft report, which brings me to the
15 transitional issues.

You touched on the issues of bookstores and distribution and we've heard from a lot of our submissions and a lot of folk representing bookstores that the parallel imports is kind of like a bit of a double-edged
20 sword. So the impact that not having access to being able to purchase lower prices books offshore, so an individual in Australia can do it, but a bookstore cannot, and that's been one of the key factors that they've identified in the restructure of that sector.

So it would be good to get your perspective on the role of bookstores for local authors and your distribution chain, given that we are sort of trying to balance those competing.
25

MS SHERWIN-STARK: Sure. Actually, the booksellers and publishers have not been aligned on this for many years and, in fact, they have just become aligned now, and I think partly that is because of the increased investment by publishers in Australian writing and the booksellers really value that investment in local writing, but also book prices have come
30 down.

A decade or 20 years ago there was a big discrepancy in price, but as print technology has improved, as distribution has improved - actually it's still quite expensive. We are a vast country with little quantities going around, so it's much more expensive than the US, but as those prices have
40 come down, booksellers have found it more economically viable to source locally than perhaps off shore. They constantly tell me that they would prefer to source locally than offshore.

The reason being is that have to put books on planes to get them from
45 the US. We provide books to booksellers free of charge. There's no

shipping cost to them. From the US wholesalers, for example, they have to pay significant air freights. So they can access cheaper books, but it is expensive. What could happen in an open market is that the US wholesalers could set up bases here. That would be okay, and then there would be little shipping charges, I think - but I don't know - for booksellers.

What US wholesalers are not interested in is investing in Australian work. They are not interested in investing in marketing and publicity. They are just interested in selling books. So if they can - if Hachette Australia, for example, could run a really expensive sales and marketing publicity campaign to promote Stephen King, a US wholesaler can happily supply Stephen King's books with no investment in that publicity and marketing.

So they benefit from our investment. That's not something that we think is sustainable for the local industry. We would just stop marketing Stephen King, so booksellers wouldn't know - so readers wouldn't know when a Stephen King novel was coming, because booksellers would have to do all of that work on their own. So booksellers really do feel that that's not in their interest. They need marketing and publicity to drive readers to stores and they need Australian publishers. In an open market we would lose a lot of that.

MS CHESTER: Thank you. So in your initial submission and your post-draft submission, you did point to the movement in prices over time.

MS SHERWIN-STARK: Yes.

MS CHESTER: Of the books that Hachette is currently publishing in Australia the local books - so the exact same book being published offshore, is there any price differential once you adjust for currency now?

MS SHERWIN-STARK: We try to do it as - so at parity. Wherever we can, we make it as inline as possible, because we lose - we do lose sales offshore and we are competing with Amazon and The Book Depository who have hugely different business models to us and can afford to sell under cost. So we are competing with the already. So yes, we are competing more and more every day on price. There are time when we just can't. If we have to air freight a really fast expensive illustrated book, because the UK publisher has not printed it in time for us to meet territorial copyright, we will put that on the plane and that has costs involved.

5 So in general, we are moving towards price parity wherever we can. There are instances when we can. In an open market, there is a suggestion that actually prices would go up rather than come down and I think that's really true. If we're looking at print runs of 1500 instead of 10,000, the economies of scale will be reduced and we just will have to put prices to get books into the market. So at 1500 copies, do we even bother?

10 **MS CHESTER:** I just wanted to stray to one area that we haven't touched on in the discussion this morning, but it was in your initial submission around the repeal of section 51(3) which we gave some support to in our draft report.

MS SHERWIN-STARK: You will have to remind me which that one is.

15 **MS CHESTER:** That's whether or not the affording of IP rights and licensing arrangements are subject to the competition laws of Australia. They are currently under section 51(3) they are partially exempt so therefore not subject to competition laws.

20 **MS SHERWIN-STARK:** Right. Okay.

MS CHESTER: And we're not the first to recommend this. I think there's been four or five other well-considered reviews on this issue, more recently the Harper Report or Competition Policy in Australia.

25 So we tried to address the issue of uncertainty by ACCC guidance, but I'm just wondering, you still have an issue around a reduction in certainty, and I'm just trying to understand - - -

30 **MS SHERWIN-STARK:** Is this around fair use or around parallel importation restrictions.

MS CHESTER: No, it's to do with neither of those.

35 **MS SHERWIN-STARK:** Okay.

MS CHESTER: It is about whether or not licensing arrangements between copyright holders would be subject to Australia's competition laws.

40 **MS SHERWIN-STARK:** I think - I'm sorry - - -

MS CHESTER: If you are not able to comment, that's fine.

MS SHERWIN-STARK: I'm not able to comment. I can refer back to that and come back to you with (indistinct) because I can't quite remember exactly how. I'm concentrating today on fair use, piracy and parallel importation.

5

MR COPPEL: Does Hachette remainder books?

MS SHERWIN-STARK: We do, yes. All publishers remainder books. We would love to think that we print exactly the right amount of books, but we rarely do. So there are places where we are struggling to meet demand, which is great, because we can move everything quickly and get books out there, but there are cases where we remainder books. But we do have control over those remainders and we remainder everything in this country.

15

MR COPPEL: So typically every publisher would try to minimise the amount of - the number of books that they need to remainder?

MS SHERWIN-STARK: Absolutely, but they're always a proportion of the print run, so US print runs are so much larger than ours and like Morris said, 10 per cent of 300, 000 copies is 30,000 copies. We might only be looking to sell 5000 copies of a book in Australia. If you've got 30,000 copies coming in cheap, you literally destroyed the entire mark of that book.

25

MR COPPEL: So in terms of the royalties on a remaindered book, is it calculated as a per cent of the remaindered price?

MS SHERWIN-STARK: No. There is no royalty on - - -

30

MR COPPEL: There is no royalty on a remaindered book?

MS SHERWIN-STARK: Because effectively we're selling well under cost. We lose money on every remaindered sale. So do US publishers when they are remaindering 30,000 copies of a book. We lose money.

35

MR COPPEL: A lot of the submissions - yours is an example - have made reference to the removal of parallel import restrictions in New Zealand and then subsequently what happened in New Zealand. You have also talked a lot about the structural changes in publishing, the decline in the number of particularly suburban bookstores. How do you disentangle the effect that you attribute to the removal of parallel import restrictions in New Zealand to the other factors that are not just impacting on the New Zealand market but are impacting on the Australian market and other markets?

45

MS SHERWIN-STARK: That's a really good question actually. We talked to some colleagues in the music industry and they found that they couldn't detach parallel importation changes with the digital disruption.
5 Actually, we've handled digital disruption in this - in the book industry. About 20 per cent of turnover is through eBook sales, predominantly in commercial fiction, so romance, sci-fi, that kind of market; that's really strong. That hasn't decimated the print market.

10 There are lots of people who thought that it would. The rise of onshore - offshore online retailers also haven't decimated the market. They've certainly made it harder, but the market has - the market contracted after Angus and Robertson and Borders closed, but actually what's been really exciting in the last two years - three years is we have
15 seen growth from the market.

So those other factors did cause disruption here in Australia, but we've survived that disruption. New Zealand has been through similar
20 disruption - offshore online retailers, eBooks and so forth, but what has been different is that the market was so much reduced before those disruptive factors took place that they were not as well able to survive them.

So it was a generational thing. The New Zealand market opened. It
25 eroded the market gradually, gradually, gradually. There were those two big disruptors that happened in New Zealand as well, and then it shrunk further from that disruption. So it just wasn't able to survive the disruption in the way that Australia has been able to survive it. I think what's really interesting about New Zealand booksellers is actually they
30 regret the move to the open market. They really miss the investment in New Zealand writing. They are desperately hungry for New Zealand stories, because actually New Zealand booksellers could only compete against Amazon with New Zealand stories. Really, that's where they are now and prices are significantly higher in New Zealand than they are here.
35

MR COPPEL: Can I ask about - because you all have books that have been published in markets outside of Australia. When a book - one of your books has been published in a market outside of Australia, are they adapted for the market that they're destined to? Like, you have made
40 reference to some examples where books may be adapted for the Australian market. Is that a prevalent practice?

MR GLEITZMAN: It is to a greater or lesser extent, and to a certain extent it is a trade-off between the desire of an overseas publisher -
45 primarily we are talking English language here - but a desire of an

overseas publisher to publisher to publish a particular book and the desire of the author to be published in that territory. I have had many debates over the years about specific words or specific concepts. Words are less troublesome.

5

I have had always a blanket rule that I don't ever want any of my Australian characters thinking or speaking in American or British idiom and I will decline to have a book published if that was being imposed. But it's the conceptual changes; one of my early books, *Belly Flop*, is about a boy who believes he has a guardian angel in his imagination and the whole book is a series of conversations by the boy to the guardian angel and my then American publisher said, "Morris, great story. Funny, moving. We love it. The one thing we'd like you to remove is the guardian angel," because in middle America there's a lot of feeling that spiritual matters really shouldn't be dealt with in a humorous or - so I've been lucky.

20

For most of my career, I've had the economic ability to say no, if I felt that the integrity of my work is threatened. And this is a very important point, because when in a review of copyright that is being approached primarily from economic standpoints, I think it's really important to say that, well, writers are professionals who need to earn an income. We have an even stronger need and desire to protect the integrity of our work, and copyright at a very basic level allows us to do that.

25

I would not for a moment equate myself with Jane Austen, but I sometime shudder to think that the fate that has befallen poor Jane might befall me, because *Pride and Prejudice* with zombies, fun though it is, does absolutely nothing to repay Jane Austen for the very fine work she did in her career and the contribution she's made to our culture for many, many years.

30

Can I just take on to that response a very quick response, Jonathon, to your earlier question, because I think this is important. You asked about contributions that the overseas workers - overseas publishers make to local workers, Australian authors and publishing employees in a territorial copyright environment. When I started out Pan MacMillan was my publisher and I know they lost money on me for the first two years, because they put a lot of editing and other support time and effort into helping me to develop my first couple of books to their highest potential and also to taking them to the market place so the publicity and marketing costs were huge, and they simply lost money. Now, I know that they were able to do that, because in effect I was being subsidised by their authors who were earning money for them; some of them Australian authors, but some of them overseas authors. Wilbur Smith was one of their big

45

authors at the time. I've never met Wilbur, but if I ever do, I would like to say, "Wilbur, thank you. You got me through that crucial first two years and maybe, without you, I wouldn't be sitting here today."

5 **MS SHERWIN-STARK:** That is true. Stephen King funds Maxine Beneba Clarke and Inga Simpson.

10 **MS CHESTER:** So Inga, Paula and Morris, you've all published offshore as well. It would be good if we can just get a sense of does it make any difference to the royalty arrangements that you enter into or is it is a different sort of metrics that you will get from an offshore publisher versus a local publisher.

15 **MS WESTON:** Yes, I can give you an example. My UK publisher - my royalty is - I think the books retail for £6.99 and I see seven and a half per cent of that for the first 50,000 copies. So the chances of me ever seeing (indistinct) and, of course, of my seven and a half per cent, my agent takes 15 per cent of that as well. So you can understand why it's so tough for writers to earn a living. But yes, that's significantly less. In 20 Australia, my retail price is \$19.95 and I see 10 per cent of that. In fact, Shadows has gone into reprint now, so I think it's gone up to 12 and a half per cent. So it's a much better arrangement from my local publisher.

25 **MS CHESTER:** Morris, do you experience a similar disparity or are you our outlier for the day?

30 **MR GLEITZMAN:** I think I am a little bit, because I have the good fortune to have a bit more negotiating power, perhaps, and so although I'm published in Britain by Penguin Random House as well as Australia, I've been able to do a deal where I'm treated in that market as a British author, I guess, in that I sign one contract with Penguin Australian and Penguin UK, and the same royalty structure applies to the books from both ends.

35 **MS CHESTER:** Thank you.

40 **MS SIMPSON:** I'm only published in the UK as well as Australia at the moment and that's with the imprint at Hachette UK. Yes, lower retail price in the UK and a slightly lower return. Yes.

MS SHERWIN-STARK: They go to straight to second format, your books. Inga doesn't have an outing in the first format of that.

45 **MS CHESTER:** Yes.

5 **MR GLEITZMAN:** Could I just add to that that once one goes into foreign language territories, the royalty arrangement is quite different for a couple of reasons. Usually there are agents who can work on behalf of Australian publishers to place those deals and they take a cut, in a sense, but also there are translation costs and those are usually priced into the money that would usually come to an author.

10 **MS CHESTER:** Morris, you described it quite eloquently earlier about the team behind the author and a publishers role in that. It would be good to just get from all three of you a sense of also the local booksellers role as part of that team, in terms of the importance of you reaching audiences and readers in Australia.

15 **MS SIMPSON:** That's been really important for me, and Hachette have supported that and taken me around bookstores. A publicist will go with me and introduce me; meet all those independent booksellers as well as owners of Dymocks and so on. It's really that hand-selling of new Australian author with the support of Hachette and publicity, and so on.

20 They've just got my name into the marketplace and I suspect it helps with short listings and so on for various prizes that - meeting people face-to-face and hearing - having the opportunity to tell the story behind your book and so on. And once those independent bookstores are behind you in a united kind of way that can really make a career. I wouldn't be where I am and wouldn't still be in print without them.

25 **MS WESTON:** Yes, I would agree with that 100 per cent. Particularly in emerging authors that don't have large marketing budgets behind them. The hand-selling of the booksellers is invaluable, because that's the main connection with readers. That's what you don't get with online stores either, is that. Yes, they make recommendations, but it's based on data and metadata. It's not based on a relationship between a bookseller and a buyer. So, yes, I found that incredibly valuable to have that relationship.

35 **MS CHESTER:** Thank you.

40 **MR GLEITZMAN:** With the best will in the world, teachers and parents and librarians are busy; particularly teachers and parents, and rely on informed and very capable booksellers to hand sell, exactly. And I know I wouldn't have got, really, a start without a number of particularly passionate but also very astute in a business sense independent booksellers who formed - and this continues around Australia - formed relationships with schools and are able to help burdened teachers to keep across the large numbers of new books that are available and help connect them to

the ones that will be of particular use with their areas of curriculum interest and responsibility.

5 I agree that it's a system that has worked very well over decades now.
The Renaissance in Australian children's literature that started about 30,
35 years ago has been in part a result of this mechanism with these
booksellers. As yet its equivalent I don't think does exactly exist with the
online market. Neither - and I think it's wonderful for young creative
10 people that they can self-publish on line and potentially find a readership,
but I think if any of us visit the new web sites with thousands of
potentially exciting but unmediated novels, you don't have to read too
many pages of too many of those books to be reminded of the crucial
contribution that a professional creative team provides to the quality, to
the cultural value of those stories.

15 **MR COPPEL:** We've run overtime. We could continue, but we have
many other participants today. So I would like to thank you all for
attending the hearing this morning. We are going to have a shorter coffee
break, 10 minutes, and we will be back reconvening at 5 to 11.00, and
20 there are coffee facilities just outside. Thank you.

ADJOURNED

[10.45 am]

25

RESUMED

[11.00 am]

30 **MS CHESTER:** Okay, folks. We might resume our hearings here in
Brisbane and we are now going to hear from Dr Matthew Rimmer. So,
Matthew, if you could just state your name and the organisation that
you're representing today and then we'll get underway.

35 **DR RIMMER:** Yes, Matthew Rimmer. I'm the Director of QUT's
Intellectual Property and Innovation Law Research Program and I'm
appearing in my own capacity in my role as (indistinct).

40 **MS CHESTER:** Thank you, and thanks very much for your submissions
to date and for your endeavours surrounding our inquiry. We might just
kick off with some questions around pharmaceutical – sorry? Sorry. I
was getting straight into it. I've read so many of your submissions. So,
Matthew, sorry, is there anything else that you'd like to make in terms of
any opening remarks, assuming that we've read your submissions in full?

DR RIMMER: Sure. Just to say in terms of my opening remarks, as I said before, I complete a group that work on Intellectual Property and Innovation Law at QUT and we're particularly interested in international trade, intellectual property, innovation law, and communications law.

5

In my own work, I've done work on digital copyright law, gene patents, access to essential medicines, some of the battles over plain packaging tobacco products, as well as some of the issues in relation to intellectual property and climate change and intellectual property and indigenous communities. Of late, I've been doing a lot of work around intellectual property and trade.

10

So I put forward a number of submissions really touching upon different elements of intellectual property and trade. I'll probably have a few more submissions in some of the other disciplines like copyright law and trademark and trade secrets law as well.

15

I mean, looking at the report of the Productivity Commission, I am reminded that the Productivity Commission has had a long engagement in some of the battles on intellectual property and trade. So after the TRIPS Agreement, the Productivity Commission was deeply concerned about some of the costs associated with the measures that were in the TRIPS Agreement and there was a great deal of concern about the lack of critical analysis of the obligations under the TRIPS Agreement before Australia entered into those negotiations.

20

25

Around the same time, the Howard Government tried to set in place a new system for treaty making which involved the (indistinct) JSCOT and had a number of processes put in place to try to better inform the parliament and community about treaty making generally. So particularly about dealing with some of the issues in relation to intellectual property and trade.

30

As one of its former chairs has lamented on its anniversary, Kelvin Thomson, I have noted that our treaty making process in some ways has been quite broken. That's often been because it hasn't worked in terms of consultation processes, but also in terms of there being some sort of open and transparent process to evaluate the processes. Kelvin Thomson has, kind of, lamented that agreements are presented to Parliament as a fait accompli and there's very little flexibility to change or view the agreements that are put before them.

35

40

Thinking over the last 20 or so years that we've looked at property law in Australia, a lot of the developments have been driven by some of the big trade agreements. After the TRIPS Agreement we had the

45

5 TRIPS-Plus Regime put in place by the Australia-United States Fair Trade Agreement. There was a great deal of debate at that particular time about the inclusion of the Mickey Mouse copyright term extension as part of that deal, as well as measures associated with Digital Millennium Copyright Act. There were huge debates over pharmaceutical drug patents and the ever-greening of drug patents. The Shadow Health Minister, Julia Gillard at the time, was very concerned about some of the costs that could be associated with those.

10 Since that time we've then, kind of, pushed on to, kind of, entering into an array of different bilateral agreements, most recently in Korea and China and Japan. But Australia has also, kind of, flirted with TRIPS Double-Plus Agreements.

15 The Anti-Counterfeiting Trade Agreements several years ago, was highly controversial. It was very notable that the Joint Senate Committee on Treaties was very concerned about the content of that agreement and concerned about the process behind that agreement and resisted Australia joining the Anti-Counterfeiting Trade Agreement. It's very striking, several years later on, all those measures that were in the Anti-Counterfeiting Trade Agreement being bundled up into the Trans-Pacific Partnership.

20 We're at a, kind of, interesting moment of time at which the future and fate of the Trans-Pacific Partnership hangs in the balance with Obama trying to push the agreement through the United States Congress, perhaps in the lame duck session, while Hilary Clinton and Bernie Sanders and Donald Trump all rail against the Trans-Pacific Partnership and some of its measures.

25 But the Trans-Pacific Partnership would be quite sweeping in terms of its impacts on intellectual property in Australia and would affect copyright law and patent law, and raises some really important issues in terms of biologics. It touches upon trademark law too in terms of some of the rules in relation to the tobacco control. But the Trans-Pacific Partnership is also quite radical because there are linkages between intellectual property and investor-state dispute settlement.

30 So in that context I really, kind of, welcome the Productivity Commission's Report upon intellectual property arrangements, because it has tried to ensure that there is some sort of balance in the way in which Australia approaches its international trade negotiations. I think the very concerning thing, reading the report, is that it reveals that Australia has been the net import in relation to copyright law, has put on been huge costs in relation to some of the patent measures that have gone before us.

But such imbalances may be further exacerbated by some of the developments in relation to some of the new trade agreements that are coming along in a variety of different ways. So my submissions kind of pick up some of those issues.

5

I think the linkage between intellectual property and investor-state dispute settlement is a really critical issue to focus on. We've had the benefit of the recent decision on Plain Packaging of Tobacco Products in relation to investor-state dispute settlement between Australia and Philip Morris. The Eli Lilly case is a really important case at the moment in the NAFTA system dealing with draft patents and investor-state dispute settlements.

It's interesting to see the Canadian Trade Minister, Chrystia Freeland and Parliamentary Secretary, David Lametti in Canada in the scrub of (indistinct) an agreement between Canada and the European Union added new text to try to restrict the intellectual property copyright and was to bring investor actions in what I assume (indistinct).

That's probably a, kind of, useful overview. But I'm, kind of, happy to answer questions across some of those mains and, perhaps, pick up on some of the issues in relation to copyright laws relevant raised this morning.

MS CHESTER: Thanks very much, Matthew. Before we get into any sort of specific questions, two thoughts, so firstly, by all means you could also – I know you've been following our inquiry fairly closely, if there were any post-draft report submissions that you wanted to comment on or you think there may have been facts or evidence raised with us that you – this would be an opportunity for you to provide us any feedback reports around those as well.

Then, secondly, we might then get into the issue of how far down the track we may have gotten with some of our draft recommendations on improving the governance and transparency and accountability around our international and bi-lateral agreements. But first just to give you an opportunity if there was anything you wanted to comment on in terms of any of the post-draft report submissions that we've received relevant to your areas of expertise.

40

DR RIMMER: I'm still working on a submission at the moment on copyright (indistinct) on trade in relation to the Trans-Pacific Partnership. It's been quite strange in terms of looking at parts of this official report which, in some ways, is very sweeping and looks across all the different domains of intellectual property and tries to bring some coherence to the

45

various regimes; and looking at the public policy debate which, in some ways, has been quite one dimensional and seems to have been very focussed on isolated issues around publishing, in particular.

5 I think I do want to, kind of, address some of the misinformation that has been put out in the wider public policy debate about copyright law and some of the proposals that have been put forward in terms of the Productivity Commission.

10 First of all, let's deal with the parallel importation. The history of parallel importation in Australia is very much a Colonial one. If you look at the work of Benedict Atkinson and the True History of Copyright Law, it reveals in the early history of Australian copyright law parallel importation restrictions were borne out of British Imperialism. John
15 Keating, the politician at the time in Australia, complained about British publishers trying to blackmail the Australian Parliament to pass those restrictions to enable them to charge higher prices in respect of books.

20 So to me it's bizarre that parallel importation restrictions have been presented as some sort of means of protecting an Australian Republic of Letters. Historically, that was not the case, and even in contemporary terms I would say that parallel importation restrictions do not necessary protect local culture or local authors.

25 Looking at the debate over the years, it's been striking how many bodies have complained about the anti-competitiveness by parallel importation restrictions in relation to copyright law. In the (indistinct) case the High Court of Australia highlighted the problems of market manipulation in relation to parallel importation restrictions. In the 1980s
30 Allan Fels with the Prices Surveillances Authority, demonstrated very clearly that in relation to a number of different copyright fields parallel importation restrictions were being used to charge Australian consumers and readers with much higher prices in relation to certain copyright works.

35 The Paul Keating era saw some very strange compromises take place. If you look at the black letter text of what we have at multi-relation parallel importation restrictions in relation to books, we have this kind of bizarre provision in black letter terms that sets in place these very primitive anachronistic restrictions about when local retailers can bring in
40 books.

45 In the 1990s under the Howard Government which had also then made a move to remove some of the parallel importation restrictions in relation to certain copyright works, and even though there was a great hue and cry from the music industry, it was quite noticeable that the

restrictions didn't really have the apocalyptic affects that some, like Peter Garrett, predicted. It was noticeable that the record industry then got in trouble trying to use various different arrangements to try to keep in place de facto those restrictions after those restrictions had been repealed.

5

But since then we've had a litany of further inquiries which the Productivity Commission and the Australian Competition and Consumer Commission, the IT Pricing Inquiry, and the Harper Review have all emphasised that there's a need to, kind of, take action in relation to parallel importation restrictions.

10

Another really important context is that parallel importation restrictions are entirely anachronistic in the digital age. Professor Mark Davison in the 1990s wrote a great piece of federal law (indistinct) saying parallel importation restrictions were a relic and were going to become of decreasing importance in the digital era and he highlighted at that stage he really needed to think about technology protection measures and how they operate and some concerns were digital (indistinct).

15

20

So it's been very strange in terms of looking at the public debate over parallel importation. But some of the same authors and publishers who've been railing against parallel importation restrictions have also been selling their books on Amazon to Australian consumers in which there's been a very, kind of, free trade in place in relation to those self-same works.

25

So, to me, it's been a very kind of peculiar debate in many respects. In some ways, I think, it's also important to think about some of the comparative developments. So the Supreme Court of the United States in the Kirtsaeng case and it, kind of, emphasised that copyright law shouldn't be used for any competitive purposes and keep in place old geographical restrictions.

30

It's been striking the, kind of, strange emphasis placed upon the New Zealand example by some of the authors and publishers of late, looking at the work of Susy Frankel, New Zealand's leading IP academic and (indistinct), they were, kind of, emphasising that there had been minimal costs involved in terms of the removal of parallel importation restrictions.

35

So those are just a few comments in relation to the debate over parallel importation restrictions. I think the removal of parallel importation restrictions would also be a good thing in Australia in terms of simplifying the Copyright Act, because there are many other current forms of copyright works in which those parallel importation restrictions have been removed.

40

45

Overall, thinking about other domains of intellectual property like trademark law and patent law, there have been some real issues in relation to parallel importation restrictions. So as a scholar who does work on access to essential medicines, I have been particularly concerned, historically, about patent owners trying to use parallel importation restrictions to restrict access to lifesaving essential medicines for things like HIV, AIDS, and tuberculosis. So those are a few comments in relation to parallel importation restrictions.

Another very, kind of, important issues that has, kind of, popped up has been the issue of copyright term. I guess, that's both an important issue in Australia and internationally. I think it's important to note that the Productivity Commission's comments about copyright term have hardly been isolated. Thinking about the Kookaburra case, the Federal Court of Australia, kind of, lamented some of the costs associated with having very long copyright terms in Australia and the lack of any mitigating protection in terms of either their use or in terms of author's works. So that's certainly been an issue that the judiciary has been concerned about. But it's also been an issue that has been, kind of, repeatedly raised in parliament.

I initially, kind of, got interested in issues about the copyright term extension with the European Union engaging in a process in the 1990s and debating as – whether or not they should raise the term copyright or whether they should allow, kind of, some sort of flexibility and allow member states to choose their own terms. In a very, kind of, closed debate a move was pushed to raise the term of copyright (indistinct) years in the European Union. That had some really strange and bizarre effects, particularly because they had work that was in the public domain coming back into copyright protection.

So I did a piece looking at filmmakers in Australia who were doing the film, Shine, which involved a lot of Rachmaninoff's music, and Rachmaninoff's music came out of the public domain back into copyright protection. Then the filmmakers had to ward off actions in relation to economic rights and moral rights and infringement in relation to that. Famously, it was Bloomsday the other week and the Joyce Estate were very aggressive and litigious for many years in terms of bringing copyright action in relation to revived copyright against and a whole wide range of other entities.

The United States then, kind of, followed suit with the Sonny Bono Copyright Term Extension Act, and that was literally a Mickey Mouse Act. Disney were very concerned about expiry of some of their key

copyright works and tried to also build upon what the Europeans had done and certainly compliance.

5 Famously in *Eldred v Ashcroft* there was a constitutional challenge against the Copyright Term Extension Act. There was some really interesting briefs by Friends of the Court. So the world's leading economists at the time, like Ken Arrow and co put in a Friends of the Court brief saying that a copyright term extension would not - had any additional benefits in terms of community welfare and would have some
10 very negative impacts in the United States, and they were very concerned about some of the flow along impacts from that.

In terms of the constitutional challenge itself, it was unsuccessful. The majority led by Ginsberg said that the legislation was valid. But there
15 was very esteemed dissents by Brian Stevens, in particular, who were concerned about the impact of copyright term extension upon cultural heritage, upon competition, upon innovation, and upon questions of transaction costs. There was another challenge in the United States led by a musical conductor, Lance Golder; that was unsuccessful. The internet
20 archive also challenged it.

Strangely, the United States Trade Representative has been to try to globalise that copyright term extension. So in Australia, with the
25 Australia-United States Free Trade Agreement, there was a very peculiar situation when initially Mark Vaile, the Trade Minister at the time of the Public and Foreign Affairs and Trade was saying, "We are arguing strongly against the copyright term extension". Then under pressure from George W Bush the Howard Government folded and they agreed to accept the copyright term extension. Phillipa Dee at the time highlighted some of
30 the very high costs associated with that copyright term extension.

At the time members of federal parliament in that inquiry noted that they have concerns about passing that copyright term extension and how there should be measures in place to mitigate some of those costs associated
35 with that, particularly thinking about their use and authored works. But a decade on those have not been implemented. At the moment with the Trans-Pacific Partnership Agreement there is an effort to try to globalise the copyright term extension throughout the Pacific Rim, so particularly countries like New Zealand and Canada are under great pressure to extend
40 their term of copyright protection.

But looking at what has happened in relation to copyright term extension, it seems to me the main beneficiaries of copyright term extension would be big conglomerates who can manage assets. So the Disney CEO was

busy boasting to his staff about how well he had done getting copyright term extension in relation to the Trans-Pacific Partnership.

5 **MS CHESTER:** Which brings us back to the issue that we have approached both in our draft report on intellectual property arrangements and in the Commission's report last year on the Trade and Assistance Review in terms of trying to improve the governance and accountability and transparency around the negotiation of plurilateral and bilateral trade agreements. We have made some recommendations building on our work
10 from last year in our Trade and Assistance Review in terms of what sort of meaningful consultation with stakeholders and potential for a model IP chapter, and assessment processes during the negotiations and following the negotiations in terms of what are the economic benefits to Australians in component parts. It would be good to get your sense of is that kind of
15 enough to address these policy issues in a more enduring way to get the balance right over time?

DR RIMMER: Well, there are real structural problems at the moment in terms of the way in which the Australian Government deals with questions
20 in relation to intellectual property and trade. Partly those problems are due to the Department of Foreign Affairs and Trade being in charge of the negotiations, and then also engaging in the assessment of the agreements that they are trying to enter into. And the criticism of those processes have been widespread, so academics like Professor George Williams,
25 Professor Hilary Charlesworth, in her book No Country is an Island there are some really interesting recommendations on how to try to improve the process.

There has been a chorus of other complaints in terms of the Howard trick or treat - trick or treaty reforms have really been subverted and not
30 properly been implemented. Big businesses have complained, small businesses have complained. Civil society and a lot of other groups have been very concerned about the carriage of the Department of Foreign Affairs and Trade in terms of how they dealt with negotiations. It has
35 been particularly problematic in relation to intellectual property in relation to some of the big trade agreements like the Australia United States Free Trade Agreement and ACTA, and the Trans-Pacific Partnership Agreement.

40 It has been very disturbing for me that I can go along to the World Intellectual Property Organisation in Geneva and watch a debate open to intellectual property in public or at home watch it on the webcast, the same sort of debate came out in relation to some of the bilateral regional agreements that had been completely closed and we were then very
45 dependent upon WikiLeaks and others to reveal in dribs and drabs of the

chapters and texts. I think it is really important that there should be a greater role played by some of the other government departments who often have to wear some of the costs associated, particularly with the intellectual property issues in relation to trade.

5

It is very noticeable that Halton who was Secretary, Department of Health and then is now the Finance was deeply concerned about some of the costs associated with intellectual property if there is a dispute somewhere, because she had been involved in the debates about plain packaging of tobacco products.

10

MR COPPEL: So how would you inject greater transparency into the process without at the same time revealing the hand of the Australian negotiators for these agreements?

15

DR RIMMER: I think it is entirely possible to have agreements in the open. And I think, of course, there is a spectrum between absolute transparency and secrecy. It is incomparably in terms of looking at what has happened elsewhere in terms of negotiations of one kind or another. I think it is very notable that you often had negotiating tenets or some sort of clear position in terms of the parties in terms of what they could bring forth. And I guess the disturbing thing has often been that Department of Foreign Affairs and Trade has told the parliament and has told civil society that it is taking a stance on a particular issue in public in one way and then when you look at the final text there are great disparities.

20

25

I think that the current model is not working so I think that the Trans-Pacific Partnership, the Department of Foreign Affairs and Trade, made the offer that some politicians could visit the dungeons of the Department of Foreign Affairs and Trade and see the text of the Trans-Pacific Partnership if they submitted to a nondisclosure agreement for many, many years in terms of what they actually saw. And, as Senator Peter Whish-Wilson, one of the politicians that declined that request, pointed out, his role is to be a representative of the Australian people and really he needed to engage with his constituents in relation to that.

30

35

So, unfortunately, we are kind of slowly have been heading towards a very kind of US model. And the United States trade representative had had these industry advisory groups that have played a very kind of influential role in terms of dictating the contents and positions taken by the US Government in trade negotiations. There have certainly been concerns in Australia that a similar thing is taking place. And the copyright sector and the patent sector, particularly, trademark law, perhaps not so much, but there has been a real concern in terms of rent-seeking activity and using trade agreements to achieve outcomes that would

40

45

otherwise be too controversial in relation to some of the issues that have been previously presented before the Australian Parliament.

5 **MS CHESTER:** Matthew, I am conscious of time and we did also want to touch on pharmaceutical patents, which is another area that you have provided evidence to us in your submissions. In your submissions you did raise some concerns that you had around the Trans-Pacific Partnership Agreement and the implications that might have for pharmaceutical patents, it would be good for you to just talk through what the impacts particularly might be for pharmaceutical patents in Australia, and then also if you could touch on our recommendations around amendments to extension of term?

15 **DR RIMMER:** Well, I think the Productivity Commission has played a very useful role in consolidating some of the previous recommendations in respect of law reform in the area. And I guess that unfortunately there has not been the same level of public debate about patent law and policy and perhaps in many a way it is a completely more significant area because patent law has a very dramatic impact upon a wide range of different areas of information in terms of additional areas in terms of engineering but also lots of new fields of technology like pharmaceutical drugs, envirotech, and information technology and business methods, clean technologies, but also a host of new emerging technologies like 3D printing and robotics, and synthetic biology. And I guess there is a great tension of marketing in the patent regime between taking a technology neutral approach to scientific inventions and treating certain fields in a very exceptional way.

30 I guess the concern in relation to pharmaceutical drugs has been there has been a great deal of distortion in terms of the treatment of pharmaceutical drugs under patent law over the last couple of decades. And that has particularly been driven by, you might say it is trade representative, trying to develop special rules in relation to patent law of pharmaceutical drugs in a quite subtle kind of way. Obviously there has been a heavy focus upon patent thresholds. So I think one of the really useful things that the Productivity Commission does is to think about novelty in each extent and the utility as well.

40 I think the raising the bar recommendations as they were implemented were useful recommendations. Also, the interaction with the open-ended defence for experimental use - was written for the Government of Australia. It is an interesting contrast with the defence of fair use in relation to copyright law. In the United States jurisprudence Story J in the 1800s developed both the fair use and experimental use, and we have

defence of experimental use and have done so for a few years now, and that seems to be working well.

5 But I think the Productivity Commission is quite right in there is going to be lots of conflict in relation to novelty and inventive step. And there are flexibilities there in terms of how you set those thresholds. There has been a lot of controversy about ensuring patent quality, particularly in terms of some of the emerging field of technology, both in relation to pharmaceutical drugs and biotech but also in relation to
10 emerging technology. So I think that is a really good area to work on. Patent term extensions will be incredibly costly, you look at the report by Gruen and Professor Di Nicol and co, and that really highlighted that patent extensions introduced by Howard in 1988 had really huge costs associated with them and it kind of highlighted the need to take action in
15 relation to those.

I note that the 2004 anti-ever-greening measures haven't really seemed to have worked that were introduced as part of the bargain between Mark Latham and John Howard in terms of the Australia - United
20 States Free Trade Agreement. So direct and non-direct patent term extensions are a huge issue and continue to be so. I think the Productivity Commission played quite a useful role in relation to finding out about access to essential medicines so that the help with the Alliance report on patent law we were able to convince the Abbott Government to enable
25 Australia to finally implement the WTO Council decision and recommendations in respect of export of essential medicines, so I think they played a really useful role. There still remains debate about Crown use and compulsory licensing in Australia. Compulsory licensing provisions still had some very protectionist clauses in them which might
30 not be the best way to think about the justifications under compulsory licensing.

I think the recommendation to have greater competition oversight more generally in relation to intellectual property is a really critical one. I
35 know the ACCC have been making recommendations for this for a long time now but it seems to be very problematic at the moment that various IP monopolies are not necessarily subject to proper competition oversight by the ACCC and we really do need to change - and that's particularly critically important in relation to pharmaceutical drugs and the biotech
40 sector, and which there has been a lot of concern about anti-competitive behaviour by one another, price gouging.

There are some really new issues coming along as well in relation to biologics, and I think in some ways it was quite good that Malcolm
45 Turnbull, Prime Minister, held the line somewhat against Barack Obama

as demands for longer periods of protection in relation to biologics, and I've - the US Congress is saying that US Congress is not going to pass the Trans-Pacific Partnership unless the other countries accede to longer terms in relation to biologics. Dr Deb Gleeson gave a great talk the other week about health and the Trans-Pacific Partnership and she just went through the biologics, drugs on the PBS and some of the costs associated with those, which were massive.

I guess from the perspective some of the concerns about evergreen pharmaceutical drugs and the strategies, some of the strategies that are often used are relying upon other forms of IP, the objection to biologics, sometimes trademarks, but I think the Productivity Commission also kind of highlights the potential for arrangements to be made between brand, no name, generic manufacturers to keep things out of the market, and that is certainly the concern. I guess the big problem is a lot of the blockbuster drugs are reaching their patent clip and that's leading to all sorts of behaviour by pharmaceutical and biologic technology companies. Some of it is positive behaviour in terms of they then invest in new areas and new markets. Some of it is quite negative behaviour in terms of they try to hold on to certain behaviours - or certain companies hold on for as long as possible.

I think you also had some really interesting discussions in relation to the patentable subject matter. And I think that is certainly an area in which there has been a great deal of revolution at the moment with the strength of the United States and indeed the Alice case, the Bilski case, the Prometheus case and the Myriad case, trying to work out the benefits of patentable subject matter and work out ways of operating much of these purely abstract ideas and all this intellectual information. And I think there's an attempt by the pharmaceutical and biotechnology industry in the Sequenom case to try to overturn some of those rulings.

The High Court of Australia in the Myriad case last year had a really interesting ruling about the importance of thinking about the patentable subject matter and what is in the public domain and what is purely intellectual information and what is a scientific invention to be protected. And I think in terms of biotech and pharmaceutical and medical areas that's really important and unprecedented and I think that's an important thing to think about. In the US the Alice case has really been applied quite stringently so a lot of patents in the IT and property sector have been knocked out.

MR COPPEL: Can I just ask one quick question and then we are going to have to finish?

DR RIMMER: Yes.

5 **MR COPPEL:** You made a comment in relation to parallel import restrictions that do not necessarily favour local content or Australian authors, can you elaborate very briefly on what you mean by that?

10 **DR RIMMER:** Parallel importation restrictions generally benefit IP owners and they enable them to divide up markets and set prices at different rates in different markets. If you look at the text of the parallel importations of Australia across the different IP regimes, there's nothing in that text to guarantee that local IP owners will be the beneficiaries of those provisions. If you look at the stats of copyright law, trademark law and patent law, obviously the (indistinct). If you look at the way in which in relation to publishing and the way that the publishing market has become
15 organised, I thought Peter FitzSimons gave the game away the other week in the Sydney Morning Herald in which he said that he had been off to see Harper Collins' lawyers and they have given him advice about what to say.

20 Really Harper Collins is a huge imperial publishing network, it's not necessarily particularly Australian in terms of its outlook in terms of if you look at who are the main beneficiaries of parallel importation, you would have to see that some of those big clients would really benefit from it. But for a creative artist in Australia I think they now are in a difficult quandary in terms of they are kind of locked into these relationships with
25 these old incumbent copyright industries. Some have been rebelling against some of those arrangements, the screenwriters have been very upset with Screen Rights and the Copyright Collecting Society, and again haven't been properly rewarded out of the copyright royalties that have been collected.

30 But, on the other hand, the screenwriters seem very alarmed and concerned about some of the other new economy players. I think the IT pricing inquiry showed that there are problems with both in some of those big distributors from the old players and some of the new players. Just
35 one thing that I - I did a big submission on it and I haven't really had a big opportunity to talk about - is really the issue of trademark law and plain packaging of tobacco products and some of the related battles that might pop up in relation to food labelling and alcohol regulation. I think the Productivity Commission made some really interesting recommendations
40 about improving the quality in relation to trademarks and trying to boost consumer rights and competition policy in relation to trademarks and de-cluttering the trademark register. I think those are very productive recommendations.

5 I think the plain packaging of tobacco decision is a really important decision by the High Court of Australia both in terms of the philosophy and the community intellectual property in Australia, but also about the relationship between intellectual property and other areas of public policy like consumer rights and public health, and questions about competition as well. And I think that's a really useful judgement to draw upon with the currently increasing conflicts between trademark owners and public health advocates.

10 The High Court in the United Kingdom recently ruled that the United Kingdom Government plain packaging of tobacco products was legitimate and the tobacco industry was not entitled to compensation by facilitating the public health advocate. Australia also recently won an investor state dispute settlement battle against Philip Morris. But there's another really
15 important one going on between Uruguay and Philip Morris over graphic health warnings, which is really significant. Trans-Pacific Partnership does have some text providing some protection from investor actions in relation to tobacco control, but there's the scope for state versus state disputes in relation to tobacco control.

20 So I think that's a really important dispute, because it brings together the relationship between intellectual property and investor-state dispute settlement, and to me that's one of the big radical issue that has been thrown up recently between the intellectual property and trade space.

25 **MS CHESTER:** Matthew, I am conscious of time. We will have to wrap it up there, but thank you very much. Thanks for your submissions and thanks for coming along and joining us today.

30 **DR RIMMER:** Thank you kindly.

MR COPPEL: The next participants called to the table, we have Sheryl Gwyther and Michael Bauer, and Angela Sunde.

35 **MS GWYTHER:** So we are from Wales, Croatia and Germany.

MR COPPEL: Welcome and thank you for coming. For the record, you can state your name and who you represent and then I ask if you wish to give a brief opening statement.

40 **MS GWYTHER:** My name is Sheryl Gwyther and I'm a published children's author of both trade and educational books. I had sent in my own personal submission to the Commission but today I want to speak on behalf of the 1200 members of the Society of Children's Book Writers and
45 Illustrators and many more. I will confine my statement to two significant

points with most detrimental effect upon our members and the book publishing industry as a whole.

5 The first issue, the Productivity Commission's brief to introduce new so-called fair use exception to the way copyright is enacted in Australia. We fear these proposed fair use provisions on copyright arrangements will go far beyond the current sensible terms, especially in schools where most of copy of our work happens.

10 The fair use regime appears to disadvantage the original creators of the work. It's basically missing it - that it basically destroys the principle that we own what we create and that we should benefit financially from those works. Authors and illustrators do not want to go begging in that dried-up pool of funding grants, because we fear that all that's going to be left to us in the end. We deserve, like every other worker and consumer in
15 this country to be fairly paid for our work. We supplement our incomes in other ways like running writing workshops in schools, but we are primarily creators of literature who believe in the worth of our stories for Australian children.

20 This brings me to point 2, and I think this is probably - to us it's probably the most important thing, the worrying Harper Commission recommendation to review the current restrictions on parallel importation of books. Publishers argue strongly why this is too destructive for our
25 book industry and also how it will adversely affect their ability to take on new authors, let alone support their current ones. This will impact on the future of Australian stories for young people and add to financial difficulties for authors.

30 Of even greater concern is how parallel importation will dump foreign published Australian authored books onto the Australian market; books that have been altered to suit the country of location, for example, in North America. When sold chiefly in Australia - they're dumped in Australia - they'd compete with the original versions in bookstores with
35 consumers unaware of how altered these books have become, not just in spelling and expressions, but in places, ideas and thought. Unlike Morris Gleitzman, most of us don't have the negotiation power to insist on keeping Australian context in books republished overseas.

40 Australian consumers expect their children to be exposed to Australian literature, to read books that are written in our own spelling and idioms, that is not Americanised, and we're talking about changes like - and it will be mentioned time and time again, pavement becomes sidewalk, tap becomes faucet and probably one that horrifies school librarians the most,
45 mum becomes mom. Parents and teachers want children to read books

with recognisable Australian experiences, values, ideas, geography and landscapes; books to connect with Australian children's lives and my colleague Michael Bauer will talk about his work where geography has even changed to suit.

5

In 2009, we resisted the Productivity Commission's recommendation to allow parallel imports. Authors and illustrators will resist again, joined by book-loving consumers who want a future where Australian children continue to recognise and identify with the books they read. In conclusion, the society of children's book writers and illustrators strongly urge you to recommend against the implementation of fair use of copyright.

10

We also recommend the parallel importation restrictions remain, in order to safeguard the cultural validity of children's books and to ensure the creators of these books can still afford to keep writing. Without authors and illustrators and without our children's book publishers who search out the very best to publish, the future for Australian culture and knowledge will be all the poorer. Surely that is worth more to Australian consumers than money.

15

20

My viewpoints for the society come from not lawyers - not being a lawyer, not being an economist and certainly not being a rational economist, but in the view point of thinking ahead of what's going to happen for Australian children's books and writers and illustrators. Thank you.

25

MR COPPEL: Thank you, Sheryl. So would you also like to make brief opening remarks or are we - - -

30

MR BAUER: My name is Michael Gerard Bauer. I am a children's and young adult author. My books are published both in Australia and overseas and I've been a published writer for around 12 years. I'd like to talk about a couple of the negative effects that I see in removal of parallel import restrictions and what they would have on Australian publishers and authors like myself and ultimately on consumers. As an example of that, I'd like to use one of my books, "Don't call me Ishmael!", which was published by Omnibus Books, Scholastic Australia in 2006.

35

Subsequently my Australian publisher sold the rights - they owned the world rights - sold the rights to that book on to publishers in the USA and the UK. In the present PIR rules, copies of those overseas editions can't be imported in bulk into Australia for sale. If PIRs were repealed, as the Productivity Commission wants, my Australian publisher would have faced direct competition from those overseas editions.

40

45

That's a situation which I feel is unfair and unreasonable and would have damaging and unacceptable consequences, not just for publishers and authors, but also for the Australian book buying public. In this case, my Australian publisher in publishing that book took by far the greatest risk by publishing the original edition of the book. They invested their time, their resources, their money, their expertise in working with me, a relatively new writer to develop and carefully edit that story from my original manuscript up to the highest possible publishing standards. Is it fair and reasonable that the overseas companies who attain the rights to that book therefore take advantage of all that local expertise, expense and effort and should be able then to undermine the local publishers' hard-earned sales and profit by selling a modified overseas version back into Australia. I don't believe so.

I'm very grateful to International Rights Department of Scholastic Australia. I don't have an agent. I am glad for their efforts in securing overseas sales for my books. That's a big factor in how I've been able to move from being a full-time teacher to being a full-time writer, but would my publishers have been as keen in selling those right if that could just come back and bite them through a flood of competing imported editions. Surely the real threat to their local sales and profits would act as a strong disincentive for Australian publishers like mine who own the world rights to my books to actively pursue selling those rights to countries like the USA and UK or initially even to invest in new Australian authors such as myself.

In the case of that book, "Don't call me Ishmael!" I think that threat of lost sales would have been very real and significant. The American publisher had big expectations for their edition, but in fact it didn't sell anywhere near as well as was hoped, so it's extremely likely that without the territorial rights as they exist today, large numbers of bulk copies of those US editions would have been dumped cheaply in Australia to the detriment of what is and was a very successful Australian edition by my publishers.

If publishers incomes are reduced and undermined through the removal of PIRs, so is their ability and willingness to invest I think in New Australian writer. Fewer Australian writers means less choice for Australian consumers who are looking for Australian books. The second problem I see with allowing the UK or the USA edition of a book like, "Don't call Me Ishmael!" to be sold in bulk here is that they are not the same as the Australian version.

5 In both these overseas Ishmael editions, uniquely Australian words and expressions have been removed and replaced. Content has also been changed. In the US edition of the story, there is now a scene where we have boys who are attending supposedly an Australian school who are playing a game of American football instead of Rugby Union. The American publishers, when I sort of questioned some of those things said that they actually liked the Australian flavour, which they had watered down but didn't think their readers could understand involving a Rugby Union match.

10 Surely it's important that Australians see themselves, their country, their culture and their language in texts that they read. This point, I think, is particularly relevant and important in books written for children and young adults. I am very proud that "Don't call me Ishmael!", one of my books, is set as a middle grade text in lots of Australian schools. Occasionally though, when I visit schools I find a student has the US or the UK edition which they must have ordered online.

20 I think it's sad that that student will not be reading an Australian story as it was originally intended, but instead a story with most of the essential Australianness taken out of it. If PIRs were removed, I think it's very conceivable that I might see whole classes or year levels and consumers in general might be reading such books.

25 I understand that the Commission feels removal of PIRs is justified because the benefits of amenity; that is, I guess, the consumers outweighs the damage caused to the few, i.e. authors and publishers, but I think it's a fairly flawed conclusion considering the benefit to the many, which is the possibility I guess of lower book price, is both tenuous and potentially minimal given that Australian book prices as we've heard have already dropped by 25 per cent since 2008 and book buyers can readily access foreign additions by Amazon et cetera, or in fact borrow free from a library.

35 On the other hand, the damage done to the few and a few who, by the way, represent as we've heard today I think already, a thousand businesses in publishing and a two billion dollar a year book industry which employs over 20,000 people. The damage to those people has the potential to be devastating if you consider the range of arguments already presented today and the evidence we've heard from New Zealand.

40 In any case, surely any damage to the viability and the very existence of Australian authors and Australian publishers ultimately must also in turn damage the many, since it has the very real potential to severely curtail the Australian consumer's ability to choose from a wide range of

Australian books and hear a diversity of Australian voices and stories. The possibility of cheaper books might sound nice, but not if the real price and the real economic cost you pay ends up being far too high. Thank you.

5

MR COPPEL: Thank you. Angela would you like to make a - - -

MS SUNDE: Hello. Thank you for having me.

10 **MR COPPEL:** Try and keep it brief, because we would like to ask questions as well.

15 **MS SUNDE:** Okay. I will talk very fast. I'm an Australian trade published children's author with Penguin Australia. I am also an indie publisher, so I'm a hybrid author who is also self-published. I am also a senior teacher of literacy and language with 20-plus years of experience in Australian primary and high schools, which is quite unusual. I'm the Gold Coast rep for the Society of Children's Book Writers and Illustrators and I'm a founding member of Writers Activation, the Gold Coast's first
20 writers centre.

25 So I live in a regional centre. I represent the people of that region and I represent myself and my extended family today who work in the creative industries of writing, film making, music, song writing, play writing, journalism and photography. So creativity does run in families. I believe the draft report's proposed changes to copyright, including fair use and the removal of parallel import rules for books will detrimentally affect child literacy in Australia and the current flourishing Australian book industry which currently received no government subsidies.

30

I wish to elaborate on the three areas of my submission. Number one, firstly as an experienced senior teacher, the threat to child literacy worries me the most. Children and the parents, and grandparents who buy them books are major consumers of books in Australia. In September 2015, the
35 Nielsen Book Data Summit revealed that children's share of print markets is averaging 34 per cent across the board internationally, whereas in Australia it's almost 50 per cent. That's 50 per cent of print books in Australia in 2015 were children's books. So this is a huge market and a huge number of consumers consuming those books.

40

45 So children's book sales are increasing and children do not read eBooks. It's the one market that's seriously increasing. The Sydney Morning Herald in January 2015 reported that a - and the Australian book store chain Dymocks - a 30 per cent growth in sales of children's books since 2010. Sophie Higgins, Dymock's national buying manager credited

this growth to the impact of strong local content being produced by Australian authors for children and tweens. Strong local content.

5 Local content in children's books provides consumer welfare, not just for the readers but for their whole extended family, because the children benefit, the parents benefit, it's a flow on. Strong local content supports the Australian national curriculum's focus on Australian literature in schools. Identity and self are key areas of the Australian national curriculum in the junior school years. It's vital that our students grow up
10 with a strong sense of self and identity as Australians and, as my colleagues have said, Australian-authored books which display Australian content and spelling reflect our social and cultural values and Indigenous beliefs, and are one of the few resources still available to them, because we do have so much import through movies and online.

15 Australian children need books that reflect their world, their culture, their history and themselves. As a child of the 60s, I grew up without this. I do not want that for my children or my students. However, strong local content in Australian children's books is at risk. With the removal of
20 PIRs, remaindered foreign edition books will end up replacing Australian children's literature. My colleagues have already mentioned that.

I'd like to point out that because of the higher investment required by a publisher for picture books there will be fewer picture books published
25 here. They will not be able to afford to do it. Australian schools and early childhood centres rely on the culturally relevant Australian picture book for the reinforcing of our children's idea of self, identity and their place in the world around them. For example, "The Littlest Bush Ranger" by Alison Reynolds will become the "The Littlest Cowboy." Peter Taylor, a
30 Brisbane author, his book "Once a Creep Crocodile", will no longer live in a billabong. Instead he will be "Once a creepy alligator who lived in a swamp."

35 Australian children learning to read will be confused when their parents buy them the foreign editions. Often the socioeconomic group most struggling with literacy will also be the group most likely to buy these foreign edition books, these remaindered books, these cheaper books, thereby disadvantaging those children even more.

40 In the Book Publishers Association New Zealand submission to the Australian Productivity Commission in 2009 , they said concerns regarding overseas publishers supplying remainders directly to New Zealand booksellers when there are local agents for these titles have been realised, especially in the area of children's publishing. The wide
45 availability of imported remainders has undermined the market for

children's books, both locally and internationally published. I believe, therefore, the removal of PIRs will greatly disadvantage the consumers of children's books and with it, Australian children's literacy.

5 The price of books, I don't believe, will become cheaper. When I asked Frances Plumpton, of the Society of Children Book Writers and Illustrators Assistant Regional Adviser to New Zealand, she's also a literary agent and a trustee of Storyline Children's Literature Charitable Trust of New Zealand – when I asked her about book prices she said, “Our
10 books are high! We rely on our excellent independent book shops to feature our local titles”.

 The Book Publishers Association of New Zealand in 2009 submitted to the Productivity Commission of Australia, “There has been no evidence
15 that retail prices have reduced or that the range of books on offer to the consumer has increased. In fact, the contrary is true with many retailers actively increasing the selling price of books above the recommended retail price whilst others, particularly the chains, are also limiting the range of titles they offer”. Now, since 2009, book prices in New Zealand
20 have reduced by 15 per cent. But, by comparison, the retail price of books in Australia have also dropped by more, 25 per cent, in the last decade with the bigger discount stores offering up to 35 per cent off the recommended retail price.

25 The Australian Booksellers Association submission this year attached some documents which I looked at and one of them showed that 52 of the 63 Australian editions published in Australia in June 2016 were, in fact, cheaper than the equivalent United States edition. Books are not expensive in Australia. It's a furphy that they are. In fact, book sales are
30 up and the draft report states this on page 99 where it says, “More book titles are available to consumers than ever before. In Australia the number of titles grew by 77 per cent between 2008 and 2013”. A 77 per cent growth in an industry which is number 14 in the world is, to me, a testament of consumer satisfaction and not disadvantage.

35 Lifting the PIRs will damage the Australian publishing industry, I believe, as it did in New Zealand. The New Zealand Society of Authors in 2009 said, “Large multi-national publishers have withdrawn their distribution infrastructure in direct response to the market conditions
40 resulting from parallel imports. Peter Millett, an acclaimed New Zealand children's author who was internationally trade published said, “Here's what's evolved in New Zealand”, told me this yesterday, “Hachette, Harper Collins, MacMillan and Pearson closed their New Zealand operations and made all their stuff redundant. Local Kiwi readers now

consumer around 95 per cent foreign produced books”. Now that’s a man who writes children’s books and is active in the industry.

5 In 2009 Hachette Australia outlined in their submission that, “Distribution centres in New Zealand are being closed and now operate from Australia because they’re no longer viable”. They listed other publishers who have also withdrawn distribution centres from New Zealand as Penguin, New Holland, Wiley, Hardie Grant, and Oxford University Press. They attribute these to the loss - to the move to the loss
10 of PIRs in New Zealand.

15 Lastly, I’d like to say that how will the removal of PIRs impact on Australian consumers? I believe that consumer choice of Australian content will narrow drastically as small businesses, independent booksellers do not have the buying power to compete with the multi-national booksellers’ importation of foreign edition books. This will result in the loss and closure of many. As an independent bookseller who offers real choice to consumers, you only need to walk into one to notice the difference between an independent bookseller’s stock and what you
20 can buy at Big W.

The other impact will be reduced annual output of Australian titles for consumers. Because Australian publishers will be struggling they – and because they invest time and money in the production of Australian
25 books, lifting the PIRs and changes to copyright, will undermine their investment, as Michael said, and this will force the publisher to produce fewer Australian books, take fewer risks with new authors, and be less likely to reprint books by current authors. With little opportunity for new Australian voices to break into the market, new talent will be overlooked,
30 the old will wane or reinvent itself to suit the international market, and Australian content and flavour will be lost to consumers.

(3) Consumers may end up paying more for quality Australian books and not less. With all these job losses, as Louise said from Hachette, the
35 scale, the economy of scale, will reduce and Australian quality books may indeed become more expensive. The unproven benefits for consumers do not outweigh job losses in a thriving book industry that does not even rely on government handouts or subsidies.

40 Lastly, I go back to my first point, consumers of children’s books will be disadvantaged by foreign edition parallel imports. Australian children’s understanding of self-identity and their place in the world will be eroded. Children struggling with reading will be at risk. I see no benefits to consumers with the removal of PIRs. Thank you very much
45 for your time.

MR COPPEL: Thank you.

MS SUNDE: Sorry, it took so long.

5

MR COPPEL: Karen made the comment in the session with Hachette and the authors that the Terms of Reference had asked us to look at the issues associated with the implementation of removal of parallel import restrictions, but as I say, you've made a number of comments and you've mentioned that prices wouldn't be lower. You've made the point that there would be a hit to publishers that would lead to less books. You've made references to what's happened in New Zealand and a lot of other submissions that made similar points.

10
MS SUNDE: Yes.

MR COPPEL: But can you point to specific evidence that we can attribute these effects to the removal of parallel import restrictions?

15
MS SUNDE: Which one in particular? You've mentioned three.

MR COPPEL: If we take for example the example of New Zealand, the removal of parallel import restrictions there was in 1998 on books. Many of the publishers that have reduced operations in New Zealand were many years later and it's a sector not just in New Zealand but in many other jurisdictions which is under a lot of pressure because of the disruption in the industry associated with technology and so forth. So it's very hard to delineate those sorts of effects.

25
MS SUNDE: Yes. What Louise said was true, it was nearly 20 years ago that they were removed, and they were impacted first by the removal and then secondly by the fall of the Borders Group in the United States which affected us here in Australia as well with Penguin reducing its list of published books.

30

35
So New Zealand had the double-whammy. But the submission that the New Zealand Society of Authors and the Book Publishers of New Zealand submitted in 2009 was only 10 years after the removal of the PIRs. So I think that's quite relevant, their experience at that time.

40

MR COPPEL: Yes. I mean, you've made the point that there is a thriving market for Australian writers. It's grown phenomenally. It's a big part of the market.

45
MS SUNDE: Yes.

5 **MR COPPEL:** Why would that disappear, especially in a context where you make the point that the prices wouldn't necessarily change with the removal of parallel import restrictions? If there is such a thriving market there, why would everything fall apart?

MS SUNDE: I think that deterrence - - -

10 **MR COPPEL:** And particularly in the context where it is possible for individuals to purchase a book from overseas, parallel import. The restriction is really on the book stores which, sort of, gives them a bit of a competitive disadvantage.

15 **MS SUNDE:** I don't see that they have such a restriction. They Australian publishers have the bestselling big names books out almost simultaneously with the overseas publishers and, at the moment, they have a collective agreement to have books delivered to their stores within 14 days of overseas publication. They don't even wait the 30-day limit. So I don't see that as a huge disadvantage to Australian bookseller. We
20 actually have the largest independent book store number in the English speaking world. So I don't see how that is a disadvantage. Why would we have such a thriving book store community if the parallel importation restrictions were disadvantaging that bookstore community.

25 **MR COPPEL:** The point I was making is that it's possible for an individual to purchase a book from Amazon UK or - - -

MS SUNDE: Yes.

30 **MR COPPEL:** In the case of a book store, if a title is published in Australia then that option is not available to the book store. That was the point I was making.

35 **MS SUNDE:** So if a book store wants to please their consumers, so if a consumer comes to them and requires a book and they can provide it from the Australian publisher they'll do so. I think that Australian consumers know that they can get a book immediately on line because children's books are usually bought by parents and grandparents. I was interviewed on radio last year and I got a text message, an email through my website
40 within 15 minutes of that interview. A grandfather had listened to my radio interview and then gone online and bought my book immediately. So I don't see how consumers are disadvantaged in the speed of delivery of books or in the variety of books or the – I don't see how they're disadvantaged.

45

MS CHESTER: I think it comes back to the role of the local book store. I think, we've heard from yourselves and from other authors today that there's an important role for publishers in promoting your – helping you publish and promoting your work. There's also an important role for local
5 book stores. This is one of those areas where we get conflicting evidence.

MS SUNDE: Yes.

MS CHESTER: You're suggesting that it doesn't disadvantage local
10 book stores, whereas we hear from booksellers that not being able to undertake parallel imports does put them at a competitive disadvantage and it means that they're losing business to people purchase – individuals purchasing online as opposed to coming into their store and getting it at the same price. So it's one of those areas where we're trying to untangle -
15 - -

MS SUNDE: Yes. It's a difficult one. I've been reading about the Canadian market where tertiary books, the tertiary books have left the country. All the publishers there, from my understanding, have gone
20 offshore because consumers were going into the book store, finding out all about the book from the publisher. The publisher was promoting the books through the usual channels of promotion. The consumer would find out all about that book and then go and buy it online. So - - -

MS CHESTER: So the publisher still got the sale?

MS SUNDE: No, because it was from the free use. It was not the publisher's copy they were buying, it is a free use copy.

MS CHESTER: Okay. I think there's been a lot of - - -

MS SUNDE: I'm sorry. I think I might've crossed - - -

MS CHESTER: No. I think there's been a bit of a misunderstanding
35 around the Canadian system which was fair dealing, not fair use.

MS GWYTHER: I think, when it comes back to what disadvantages authors, we would be hugely disadvantaged if publishers are effected by the changes, if any changes come with the restrictions lifted. Publishers
40 are affected. That's what goes – will flow through to the authors who are working for them, or new authors who they may come in – who may come in because of the way that the publishers are going to be losing money on them. I think that's what most concerns us.

MS CHESTER: Yes. So as Johnathon reminded us, our Terms of Reference, did ask us to consult with and advise government on transitional issues from their decision to actually move towards removing parallel import restrictions. In our report, we identified three areas where we thought transitional developments might be relevant for transitional issues. The first one is the point that's been made that there has been a compression in the price differential between local and offshore books. Secondly, the movement in the Australian dollar is advantageous at the moment for local sellers.

10
15
20
25
30
35
40
45
50
55
60
65
70
75
80
85
90
95
100
105
110
115
120
125
130
135
140
145
150
155
160
165
170
175
180
185
190
195
200
205
210
215
220
225
230
235
240
245
250
255
260
265
270
275
280
285
290
295
300
305
310
315
320
325
330
335
340
345
350
355
360
365
370
375
380
385
390
395
400
405
410
415
420
425
430
435
440
445
450
455
460
465
470
475
480
485
490
495
500

Thirdly, that we do have quite robust anti-dumping arrangements in places for the outliers of anybody who would be looking to dump books on the Australian market. So there were the, sort of, the three streams that we focussed on when we looked at what would be some of the transitional issues and the timing relevant to repeal the parallel import restrictions. Are there other transitional issues about developments in the market more recently that we maybe haven't identified there if we're looking at price differences, the Australian dollar and anti-dumping arrangements?

MS GWYTHER: What I read, I don't think I've ever seen anything looking at content of what comes back, and especially in children's books. I mean, I read books from John Connolly's books all the time, American spelling. My eyes just flick over it. It doesn't worry me in the least. I think people like the previous speaker, that's probably what he does too. I bet he doesn't pick up a children's book for either himself or, I don't know if he's got children.

I've seen a picture book, a beautiful Australian picture book that has – I knew the author, so I've seen the Australian version and I've seen the publisher version, the reprinted version from America. Not only were the words change, the idioms changed, characters were changed, the father who hugs the young person in the book becomes a grandfather because the gatekeepers there thought – sorry, the other way around – the grandfather hugs the child, the young person. But it was changed to the father because they thought the grandfather was a step further away and it was a bit icky. I mean for God's sake.

But the worst thing of all was on the last page, the subtle messages that was coming through in the words that were used had been – the words had been changed to spell it out. Australian children understand. They understand these books. They understand the subtlety. But to have it spelt out in words just took the whole magic – the whole power of that book away. That's what concerns me about books that, as you were saying that anti-dumping, I mean, they're coming in. We've seen them.

They're somehow coming in. I mean, that's what I would like to see using your power - - -

MS CHESTER: The main you've got - - -

5

MR BAUER: I just say I agree with Sheryl on that point about the changes to books to the foreign edition compared to the Australian edition. I think that's a very important point. When you're trying to encourage kids to read, they like to read stories where they – they like to read all sorts of stories. But they certainly like to read stories where they see themselves and they see a world that they recognise. Particularly reluctant readers who see themselves in a story or the sports that they play or the things that they do or their interests.

15

Some of those overseas editions where those things are, sort of, taken out - I mean, we get that in other forms of stories and movies and films and TV shows from American. I think it's wonderful to have books that reflect Australia and the various shades of Australia and the different voices in Australia and the multi-cultural nature of Australia. I think it's much more difficult for Australian publishers to support a new writer who might be writing from a unique Australian perspective because the market for that is going to be, I guess, Australia and therefore the returns on that are going to be lower or maybe doubtful.

20

25

A lot of our wonderful Australian publishers these days are willing to invest in that new Australian voice or that new book because they're able to make money from other areas as Maurice said about being subsidised in some cases by that. If the changes to parallel imports take away Australian publishers earnings and profit then new Australian voices are going to be, you would think, the first thing because they're the higher risk ones I guess, that would tend to suffer.

30

35

I think one of the great things about the Australian publishing industry today when I look at new books coming out, is like the age of a lot of the young Australian writers is fantastic. There are a lot of young people getting a chance to speak about the world that they see, the Australian world that they see. I just think, and I've got no statistics to back this up, but I think and I think the publisher would say that a lot of those books that have been published these days may not be published, those people wouldn't get a chance to have their book published and for Australian consumers to read that book. So I think that's a big thing to consider.

40

45

MS CHESTER: So just coming back to New Zealand for a moment. I'm sure you're all very familiar with the magazine, Magpies, which I've been subscribing to and reading for just over 20 years now, so you know

the age of my kids. That does profile both Australian and New Zealand children and young adult authors. I guess, during the period of time I haven't seen the demise of young New Zealand authors in that space coming to market being published, based on that magazine. But it would
5 be good to know from your experience and your networks of any New Zealand authors that you feel because of structural changes in the New Zealand publishing industry that are no longer able to publish that were previously.

10 **UNIDENTIFIED SPEAKER:** We do have the Australian Society of Children's Book Writers and Illustrators in the Australia and New Zealand region. So our - - -

15 **MS CHESTER:** That's why I'm asking the question.

MS GWYTHYR: So our region is actually New Zealand. I don't know a lot about what's currently happening. I haven't talked to anyone there lately. We have a conference in September and they're coming over and I'm sure there will be huge discussions about what's going on. Angela has
20 been studying and having a lot closer look at - and she's talked to some of the authors there, because she's from New Zealand, but - - -

MS CHESTER: I can hear from the voice - - -

25 **MS SUNDE:** I've had a virus for two weeks and my voice is - - -

MS GWYTHYR: Yes. They are certainly saying there are less people being taken on to be published. The books possibly - in Magpies are their usual - like, not new voices. The same sort of voices coming. Not new
30 people. They are not taking on as many new people, the publishers there.

MS SUNDE: You just see Joy Cowley again and again.

35 **MS GWYTHYR:** She's fabulous, but - - -

MR BAUER: Does the Commission look at a place like New Zealand and try to make their own conclusions about why things have changed or is that beyond the scope of the Commission to look at New Zealand as an example of a country that's had those things taken away and what impact
40 that has had compared to maybe other forces - - -

MS CHESTER: So we do and we did in 2009 as Jonathon sort of intimated. It's difficult to untangle what a structural change is because of technology and online, versus what happened because of something that
45 occurred in 1998. I think a lot is attributed to what happened in 1998, so

we have tried to do that, but we can't sort of do that analysis to say exactly what impact did it have. I think one thing that has been suggested - and again keeping in mind that our terms of reference were for us not to remake the case for or against parallel importation, but to look at the transitional issues, we did, of course, still revisit the case in our draft report, and for our final report we will update our analysis around the pricing, which we did in 2009, because I think some folk have suggested that we shouldn't just rest on our laurels in 2009, so we will be looking at updating those numbers for the final report.

5
10
MS GWYTHER: So when you are talking about transition - like wasn't that Joe Hockey - talking about what - looking at the issues of transition, is that assuming that it's going to go ahead?

15
MS CHESTER: So the government's response to the Harper - - -

MS GWYTHER: Because at the time in 2009 you decided not to go ahead.

20
MS CHESTER: No. So our terms of reference ask us to advise the government in the context of their response to the Harper report on competition policy. The government's response to the Harper report was to repeal the parallel import restrictions and we were to advise on the transitional issues of doing that.

25
MS GWYTHER: So that was brought in under Tony Abbott, Harper? Was that Tony Abbott?

30
MR COPPEL: The initial inquiry by Harper was under Tony Abbot, but the response was under Malcolm Turnbull and Scott Morrison.

35
40
MS GWYTHER: The Australian public really put a lot of - a huge amount of pressure came in, because we were part of that movement of people who were really against it back in 2009. So the government had a made the decision that it wasn't going to go ahead, so then this weird thing - change of government and it's always there and it's like "Push, and push, and push until we'll get it through eventually," and I'm not saying you, I'm saying whatever government is in control, and so again we will be there saying, "No. We are not going to let it through", as much as we possibly can.

MS CHESTER: Well, you are here today and it's been good to be able to listen directly to the voices of authors, and especially children's and young adult's authors, so I think we had probably better move on now. We've

got a few other people to hear from today, but thank you very much for coming along today and thank you for your post-draft - - -

5 **MS SUNDE:** I just apologise for my voice, because it dried up.

MS CHESTER: It's only the technician you might need to apologise to. Thanks very much.

10 **MR COPPEL:** Thank you. Do we have Michael Hawkins in the room? Make your way to the table when you are ready and if you could give your name and affiliation for the transcript and if you would like to make some brief opening remarks and then we will follow up with some questions for you.

15 **MR HAWKINS:** Thank you both. I do feel sorry for you having to listen to me following such articulate and passionate speakers and the promise of lunch outside, so I will be quick. My name is Michael Hawkins and I'm pleased to attend today representing the National Association of Cinema Operators Australasia, which is the national
20 association representing some 1400 cinema screens in Australia and New Zealand.

I am also very fortunate to wear a number of other hats, including as chairman of the Asia Pacific Screen Awards, chairman of the Brisbane
25 Asia Pacific Film Festival and a director of Creative Content Australia Limited, and I am also a former director and acting chairman of Screen Queensland, the state government's film agency. Previous to that I was an owner and CEO of an independent cinema group called Australian Multiplex Cinemas, which had six cinemas and 55 screen from Noosa in
30 Queensland to Frankston in Victoria.

Today I speak with the voice of the National Association of Cinema Operators, with the indulgence of the Commission; I will confine my comments as they relate to the cinema industry. NACO was a party to a
35 broader submission, one written by folk far more articulate and knowledgeable than myself and I understand that representatives of Flinders Street Distribution and Home Entertainment and Production will make appearances before this Commission in Sydney and Canberra.

40 My role, as I understand it, is to briefly outline to you and give you an understanding of the workings of the cinema industry. The cinema industry in Australia is a buoyant one, having 2080 screens in 493 individual locations, having 443,000 seats. Last year it had over 90.2 million admissions and enjoyed a record box office of 1.226 billion

dollars, which together with ancillaries represents an industry generating over two billion dollars in revenues.

5 The cinema industry employs over 10,000 people and mainly youth at that. It is a competitive industry in any given week there are 100 or more different individual pieces of content, leading features, documentaries, concerts, sporting events being exhibited on 2000 screens. There are numerous price touch points for all demographics during any given week, as there are numerous formats, from IMAX to Gold Class Cinemas to
10 drive-ins. It is an industry that is constantly innovating whether through technology, design or service.

15 That innovation means significant investment. In the past five years, the industry has invested heavily in the digitisation of virtually all of its 2080 screens having moved from platters and spools to hard drives and processors. It is now investing in immersive sound systems and laser projection. Many cinemas are undergoing as we speak, extensive refurbishments in their auditoria, moving to extreme screen formats with larger reclining seats and within-seat service. Traditional candy bars are
20 converting to small restaurants, wider food offerings and healthier options.

25 Not all cinemas are of your suburban multiplex design. Many cinemas are in small towns and quite often are the main community centre, the focal meeting place for youth and elderly alike. Like all industries and like all businesses the cinema industry and individual cinema owners operate on tight margins with any significant impact likely to have dire consequences.

30 The industry is not without risk itself. Every week it is selling a new product. It is not like the supermarket with 600 or more staple products. It is an industry that primarily sells tickets to movies and there is a new move with new stars, stories, special effects every week and most likely of a different genre, thereby requiring sales to different demographics, and its ancillary sales are just that; if you don't sell movie tickets, you don't
35 generate ancillary sales.

40 The cinema industry works within those established risk profiles. Over the past 100 years, cinemas have stared down the invention of radios, television, colour television, video, DVDs, Foxtel and streaming services. Its other competitors are other forms of out-of-home entertainment, like football matches, concerts, festivals and sports.

45 Cinema operators have built this industry and have invested heavily in all of the innovations and improvements detailed earlier on the back of one thing, the protection of intellectual property rights that encourage and

incentivise creators and producers to make content. Any weakening of copyright protection opens the door to continued or even increased online piracy which means (a) the Australian film industry and television drama production industry would be shut down. Without strong copyright protection there is just no business model and (2), Australian families and kids have the cinema as a social hub of their communities. If the product is stolen, cinemas will no longer be viable. There will be massive job losses, the heart and souls of many communities will also be lost.

Some people refer to film production, distribution and exhibition as an ecosystem. For me, it is more simple. Our industry is a chain. It starts with a pot of money. That money is used to produce films either in international studios and lots or in sheds, backyards, or streets. They are distributed locally and internationally, utilising territories to provide essential distribution guarantees that underwrite that production and then cinemas sell tickets to the public. TV networks pay fees for licences, streaming services and airlines pay licence fees, and at the end you hopefully end up with another pot of money and so it goes on.

If that chain broke or compromised it breaks down. If intellectual property rights are devalued, the chain breaks. If geo-blocking of territories is stopped, the chain breaks. If piracy, the stealing of copyright is allowed to proliferate, the chain breaks. It impacts on our investment. Cinemas close, jobs are lost, communities suffer. It is ironic that during an election campaign, where all sides profess commitment to innovation, jobs and growth, parts of this report speaks to the death of both innovation of creativity and the tens of thousands of jobs associated therein.

If I could finally close by dispelling a couple of myths, availability is often so - it is so often claimed that movies are not available to Australian audiences at the same time as audiences overseas, however, of the top 10 grossing films in 2015, nine opened in Australia before they opened in the US and invariably some films are only held back to appease the demands of the Australian audience. G or PG-rated family films are held back for a school holiday period.

As US audiences have found, content is available from a range of sources, not always Netflix. Game of Thrones is available on HBO but not on Netflix, and finally, Americans were the second highest infringers of series 3 of House of Cards, notwithstanding that it was available on Netflix for only \$10 per month. Content is more readily available and readily available at much more attractive prices. Thank you.

MR COPPEL: Thank you. Is there any of the draft recommendations in the report that you see as weakening the term of copyright?

MR HAWKINS: The term of copyright from 15 to 25 years - - -

5

MR COPPEL: It's not a recommendation. You may have missed the sessions earlier. We did want to put that on the record.

MR HAWKINS: You did? All right.

10

MR COPPEL: We have a finding relating to term of copyright, but it's not a recommendation. So I think many of the examples you are giving in your remarks related to sort of the legal downloading of copyright material. You've also made a point in your - in the submission that enforcement is too lax and we've made the point in the draft report that in one way of countering piracy is through the greater accessibility of creative works in a legal manner. Maybe I can then ask you what do you see could be done to limit piracy of copyrighted works in the film industry?

15

20

MR HAWKINS: I think we are very keen to see how the site blocking legislation works and I think we'll get some indication towards the end of July.

25

MR COPPEL: Which legislation?

MR HAWKINS: The site-blocking legislation that went through.

MR COPPEL: Site-blocking?

30

MR HAWKINS: Yes. That will allow rights holders to actually take action against an ISP to prevent downloading or to basically block the sites that allow the downloading, the pirate sites and pirated movies.

35

MR COPPEL: Maybe if we can take a step back; you represent the cinema industry.

MR HAWKINS: Yes.

40

MR COPPEL: Can you, sort of, talk us through how the industry is affected through such activities. I would like to focus more on the legal sites. We are certainly not advocating anything we think would be illegal.

45

MR HAWKINS: Well, piracy is a scourge. Take for instance an example of a movie called Expendables 3, that somehow somebody had

5 got a copy of in the United States before it was even released on screens in the USA. Now, experts there and I don't know - I can't cite it, but experts claim that that cost was over \$200 million to that studio and producer, because it was pirated throughout the world, before it even had a chance to get on a screen.

10 We have a similar issue virtually every time a film is released and you will see the second peak of piracy when it's released on DVD or streaming, because it's so easy to get a copy of it. That's the issue that we are confronting.

15 **MS CHESTER:** Michael, we acknowledge that in the report that online piracy still does remain a problem and it does undermine copyright for rights holders and they're distributors and agents. I guess we try to look at an evidence base, so in looking at the evidence base, we looked at quite a few consumer surveys that have been conducted by Choice and the like, looking at what really were the motivations to online piracy and I think it was from those surveys that helped, sort of, inform some of our thinking, so there was still a minority that would still continue to pirate, regardless of access.

20 But clearly those surveys have moved over time and the survey results do suggest that most folk do want to do the right thing and they are happy to pay for copyright product, as long as they've got affordable and timely access, and affordable in terms of fairness of price and the lack of, sort of, price differentiation by geo-blocking, setting aside currency.

25 So it was from that evidence base that we made our recommendations around certainty and circumventing geo-blocking as a way of encouraging the industry to make it more affordable and timely. So that complementing the enforcement measures that are currently in place, are there other measures that you think that we should be implementing or do you disagree with the direction the Commission took in terms of trying to address directly what underpins the greatest part of online piracy?

30 **MR HAWKINS:** I guess the problem we have with geo-blocking relates more to production than it does to actual exhibition. So an essential part of film-production and budget is the ability to be able to get distribution guarantees for different territories and we have seen the issue with Europe where they have talked about being one Europe. A film producer, in order to get his budget up and across the line, especially to satisfy either state or Commonwealth funding agencies requires a certain number of distributive guarantees in place from different territories. If you take away geo-blocking, those different territorial rights will be lost and that causes us grave concern about the future of production itself.

5 **MS CHESTER:** So I think we are not saying take away geo-blocking. We are saying that there would be, clarifying the law in Australia that there would be nothing in the Australian legislation that would make folk circumventing geo-blocking, that would be illegal under Australian law. That does nothing to the contractual arrangements that parties may have.

10 **MR HAWKINS:** Well, you are encouraging people then to take on an American VPN that allows them to circumvent geo-blocking. How is that not the same thing in effect?

15 **MS CHESTER:** So we are not saying that any - that if there's a contractual breach, there's nothing in the Australian law that has any impact on that.

MR HAWKINS: No. But you could - sorry, if I understand it, then you are facilitating people to take on a VPN that circumvents it.

20 **MS CHESTER:** We are saying that there's nothing in Australian law that would make that illegal.

MR HAWKINS: That's right.

25 **MR COPPEL:** Which may well be the case now.

MR HAWKINS: Which may be the case now, yes.

MR COPPEL: That's just the point about uncertainty.

30 **MR HAWKINS:** Yes.

35 **MR COPPEL:** We have other points that have been raised with respect to uncertainty. For instance, the shift from fair dealing to fair use. We've got - the draft recommendations there also attempt to address the question of uncertainty. This is a similar issue.

40 **MR HAWKINS:** I'm happy to leave the issue of fair use to the guys in Sydney who will deal with that, and I'm sure you've already heard the arguments about what is happening in America, and the justices over there believe you need a lawyer to be able to interpret fair use, so I'll leave that for your hearing in Sydney.

45 **MS CHESTER:** The other area of uncertainty that you touched on in your joint submission was around section 51(3) and our - - -

MR HAWKINS: That's the competition issue.

5 **MS CHESTER:** Yes, that's right, and our recommendation being that the government give along the lines of what the Harper report had recommended and that was to remove the section 51(3) exemption, such that licensing arrangements as they relate to copyright material would be subject to competition laws.

10 Now, we were very mindful that people suggested that might give rise to some uncertainty in a transitional sense, so our recommendation there was complemented by (indistinct) saying that the ACCC should provide some detailed guidance as to how that would be interpreted and applied by themselves. So I guess I'm trying to work out what's the residual uncertainty of making that change?

15 **MR HAWKINS:** If you don't mind, I am going to defer that until you hear my colleagues in Sydney, who are far more qualified to speak on it in terms of competition or the like.

20 **MS CHESTER:** Okay. Well, we will give that question on notice to them tomorrow.

MR HAWKINS: Great. He will be looking forward to it.

25 **MR COPPEL:** We might just come back to the infringement and enforcement. Can you tell us what role or organisation - well, your organisation - the bodies that you represent play in the enforcement of infringement? How does that work?

30 **MR HAWKINS:** At the moment?

MR COPPEL: I mean, there are resources involved in ensuring that property is not stolen and how then costs of that enforcement activity, who bears those costs.

35 **MR HAWKINS:** At the moment - okay, so my association itself is then involved in Creative Content Australia, which is a body set up to educate people in a meaningful way about what they are doing in the online space. So you have no doubt seen ads on cinema screens that advise people that piracy is theft. We've got a "Thank you" campaign, which basically had a host of creatives on screen who thank people for doing things the right way. That is funded by distribution in the studio, cinema exhibitors and home entertainment.

40

5 The second issue of specific enforcement at the moment is done by the studios themselves and they fund, particularly in the states, it's - the enforcement is against people who are actually doing the recording. That's a very sophisticated system between cinema exhibitors and studios, using law enforcement to identify, catch and then prosecute, but it is the physical recording, cam-cording of the film.

10 **MR COPPEL:** So these are people in cinemas who are holding the camera or more sophisticated - - -

15 **MR HAWKINS:** No, that is - so when a film is - as I said before, there's two stages of piracy. The first one is when a film comes out, yes, it is a handycam in a cinema. I could wax lyrical about the different ways they do it, when they're very sophisticated with phones on stands that sit in the cup holder and they've got a towel over it so no-one can see the red light.

20 Then there are others who - there can be inside jobs where a projectionist might have a screening himself at midnight and set up almost a perfect rendition. Australia itself contributes to piracy through drive-ins where they have FM recorders and someone will sit outside a drive-in and record a perfect FM audio recording. They are then sent to other parts of the world where the image and the perfect sound is merged. It's out on the Internet within 12 hours. It's quite extraordinary. So that's how it's happening.

25 The second stage, of course, is when there's a video release and it's not hard to burn DVDs. Studios themselves are taking what action they can in the form of watermarking, so any print of a film is clearly watermarked to identify what cinema it is in, and of course all that does is help us tell where it came from. It doesn't prevent it.

30 **MS CHESTER:** One other point that you made in your submission was around territorial licensing allowing the localisation to demand and differentiated release schedules and the like for, say, Hollywood films.

35 **MR HAWKINS:** Yes.

40 **MS CHESTER:** Can you just talk us through what actually - you point to that as one of the advantages of territorial licensing. I'm just trying to understand - so apart from school holiday scheduling issues, what are the other things that - what's localising to demand? What form would that take and how does that benefit Australian film goers?

45 **MR HAWKINS:** Yes, school holidays is one issue. The other one is it's seasonal. The peak release period in the United States of Hollywood

blockbusters is their summer period, June/July, although it's now
May/June/July and into August. Our peak release time is school holidays,
being September and then through our summer. We simply don't have the
5 screens to release simultaneously at the speed at which they release during
their summer release period, so we are having to stagger as best we can to
give as best we can day and date release.

MS CHESTER: Okay. So it's a timing issue. There is no other
10 localisation to what Australian film goes get to see up on the screen. It's
just a timing issue around school holidays and capacity.

MR HAWKINS: Capacity and trying to appease the public. That they
want family films during school holidays, not three weeks before.

15 **MS CHESTER:** Thank you.

MR COPPEL: Can I just pick up on a point that's made in the post-draft
submission about the role of an IP minister championing the rights of IP
20 holders and maybe IP holder and users, and you referred to the model used
in the UK where copyright and all other forms of intellectual property are
under the responsibility of one minister.

MR HAWKINS: Yes.

25 **MR COPPEL:** In Australia we have now copyright, the Minister for
Communication and the remaining forms of intellectual property, the
Department of Industry - - -

MR HAWKINS: And the Department of Arts and - - -

30 **MR COPPEL:** Well, Communications and Arts, and the bulk of IP in
Australia, the Department of Industry, and as I understand you, you see
merit in having all forms of intellectual property under the responsibility
of a single portfolio.

35 **MR HAWKINS:** Yes.

MR COPPEL: Can you explain a little then, what you see as the
40 advantage of shifting to a model like that and, if you can, whether you
have any view as to which portfolio would be best suited?

MR HAWKINS: Boy, that's on the spot. Look, again, probably an issue
that I best not comment on as it is outside the scope of cinema. I think the
45 point though I'm making is one that in the UK and in the USA, they treat
the issue of copyright and copyright enforcement very, very seriously and

believe that Australia could well follow that lead. Whether it was to fall into a particular department or which particular department, I'm not sure that we have an opinion on.

5 **MR COPPEL:** So is that something better posed as a question to - when we have our hearings in Sydney?

MR HAWKINS: Yes, by all means. Yes. I think the fellow in Sydney actually represents the studios, so he will have a more in-depth view of what happens abroad.
10

MR COPPEL: Similarly for questions relating to fair use?

MR HAWKINS: Yes. Look, I think so. I would confine my comments to the very general statement that fair use is a complex legal issue in the United States. We are seeing judgments come out of the states. I can refer to a Hugh Stevens article, which they will as well that the US Copyright Office has had to set up a fair use index to make the principles in application of fair use more accessible and understandable, so the same US system itself is more complex. Your brief, as I understood it, was to make it more certain and simple to understand. The US system would appear to be the exact opposite of that.
15
20

Looking at this index, apparently once you've figured out which of the 13 court circuits and which of the 16 categories you search in, you then basically need to get a lawyer to help you interpret it, so I'm sure that it's a sentiment that will come out when you question them in more detail.
25

MR COPPEL: We will leave it for them. Certainly you also heard quite a bit in terms of legal uncertainty associated with the current arrangements of the fair dealing in an area where there have been many earlier reports that are just focused on copyright, and the bulk of them have favoured a fair use exception. Well, that's all from me, I think. You're okay?
30

35 **MS CHESTER:** Yes.

MR HAWKINS: And that's all from me. Thank you very much.

MS CHESTER: Thank you, Michael.
40

MR COPPEL: Thank you very much. So I think we are right on schedule and we have a scheduled break now and we will reconvene at 1.55. Thank you.
45

LUNCHEON ADJOURNMENT

[12.48 pm]

RESUMED

[1.56 pm]

5

MS CHESTER: I'd just like to welcome Angeline Behan, did I get that right Angeline?

10 **MS BEHAN:** It's Behan.

MS CHESTER: Behan, great, up to join us. So if you'd just like to come up the front. Sorry, I should have warned you, you're next cab off the rank.

15

MS CHESTER: Please take a seat and if you wouldn't mind just first stating your name and the organisation you represent, just for the transcript recording. Then if you'd like to make some brief opening remarks, but we have been able to read your post-draft submissions, so you can take that as read.

20

MS BEHAN: My name is Angeline Behan, I'm the chair of the Queensland Law Society's Technology Intellectual Property Committee and this is the capacity in which I appear, on behalf of the Law Society.

25

The Law Society is concerned that the numeric justification for the Commissioner's defensive trademark abolition recommendations do not consider the changes affected by the commencement of the Trade Marks Act 1995, what we call "the new Act". Prior to the new Act it was only possible to file single class trademark applications in Australia. Under the new Act it is now possible to file multi-class applications, meaning that the number of applications will fall but the coverage will not.

30

Since the introduction of the new Act, 20 years ago, a total of 540 classes have been the subject of defensive trademark protection, far outstripping the 190 classes of the last 20 years of the 1955 Act, "the old Act". In short, it is the content of the applications and registrations that is important, not the number of applications and registrations.

35

The Society realises that the defensive trademark recommendation is designed to prevent cluttering. However, the reality is that the defensive trademarks are usually owned by the large companies. Of the 109 defensive trademark applications that were filed under the new Act and remain registered, 107 of them are owned by well-known large companies. If defensive trademarks are abolished these companies will

40

45

simply file standard trademark applications, in respect of goods and/or services which they do not provide and may never, ever provide.

5 The removal for non-use provisions will likely have no impact on these trademarks because once these trademarks have been on the register for a period of time, approaching five years, five years being the magic time after which a trademark will become vulnerable for removal on the grounds of non-use, the trademark owner will simply file a new application for registration of the same trademark, in respect of the same
10 goods and/or services.

Companies such as Red Bull and Aldi currently employ this tactic. The defensive trademark abolition will increase this with many owners employing this tactic and consequently there would be a double up on
15 inappropriate trademark protection.

As regards consumer confusion, the Society contends that certainty in the register reduces confusion. The longer a situation is unresolved the greater the uncertainty in the register and the increased opportunity for
20 consumer confusion. A defensive trademark can properly prevent registration of a confusing trademark during the examination period. No defensive trademark means opposition proceedings, which can go on for years. The Society references is Longine Watch case and the discussion it involved, and notes that the opposition proceedings went on for three
25 years while the defensive trademark was registered in half that time.

Defensive trademarks remain the preferred alternative as opposition proceedings remain lengthy undertakings. Indeed, despite recent legislative amendment section 60 oppositions are still taking
30 approximately two years to complete. Finally, the Society references its submissions regarding the lack of discussion of the how or the ramifications of defensive trademark abolition and reiterates that this is problematic.

35 The Commission may wish, however, to consider an alternative. This alternative being keep defensive trademarks but amend the legislation so that when the time comes to renew the registration on which the defensive trademark is based the trademark owner must not only pay renewal fees but provide some evidence that the base trademark is being
40 used in respect of the goods and/or services for which it is registered. If it is being so used, the defensive trademark may remain on the register. If it is not, the defensive trademark must be removed. However, the base trademark may remain, provided the renewal fee is paid. The evidence requirement just mentioned should not be unduly onerous to effect,
45 considering the number of defensive trademarks on the register.

5 **MS CHESTER:** Thank you very much for those opening remarks, Angelina, and for the pre-draft report and the post-draft report submission that you provided to us in the trademark area. So it was a very broad inquiry that we've had with copyright, patents and trademarks, geographic indicators and plant breeder's rights. Also, thank you, in your initial submission, for providing a breakdown of the statistics. Looking at the classes versus applications for defensive trademarks and your comments on comparing the use of defensive trademarks, pre and post changes to the Trade Marks Act in 1995.

15 I guess, in terms of trying to unbundle what that kind of means for our evidence base, and what we're trying to do by establishing a sound measure of use and the importance of defensive trademarks it would be good to get a bit of a handle on what's the share of classes covered by defensive trademarks, as a proportion of classes covered by all trademarks. Is that sort of an appropriate way of approaching a sound measure of use?

20 **MS BEHAN:** Not at all, because many of the applicants of the standard trademark do not need to branch into this very specific area of trademark protection. Many people have a trademark, it's just their business name that they've registered. They have a local business, their business may be a grocery store, but it's not a holding. Jones Black Hardware Store and Logan Hardware Store is not going to be something that's designed even to take on the world. It's there, the trademark is there to protect the business name, to ensure that the trademark has proprietary rights to that name, which he would not have under the business name.

30 There's more of those kinds of trademarks on the register, especially with IP Australia's inclination to encourage self-applicants, rather than specialists to advise the self-applicants and to file on behalf of the applicants. So there is no way that a defensive trademark can be properly perceived as being a proportion of the mass of trademark applications that are out there or the classes that are out there. In that respect, it's very much like the certification trademarks and the collective trademarks, they have very specific uses and you would not assess a certification trademark as a proportion of the standard trademarks.

40 **MS CHESTER:** In your submission you also note that sometimes defensive trademarks are the only possibility of a - and I don't want to misquote you here - the only possibility of a trademark owner would have of curtailing the confusion generated by a third party using either the owner's trademark. I guess what we're trying to get a handle on, from your experience then, in the absence of a defensive trademark would a

traditional trademark, if it was being misused in that way by a third party, wouldn't they be able to use - bring a successful action under the passing off provisions?

5 **MS BEHAN:** Passing off provisions, they are exceptionally expensive. Obviously all trademark infringement actions are expensive. Trademark
infringements give you the possibility of a compare and contrast, first off. Passing off, you've got to prove three things. You've got to prove that
10 you have a reputation, you have to prove that the other side has made a misrepresentation of an association with you and you also have to prove that you've suffered damage.

Now, that's rather difficult to prove all three and you need to prove all three. So in the case of the Longine matter that I mentioned earlier, it
15 would be difficult for Longine to prove that they'd suffered damage because they don't sell luggage, they sell watches, and that's been their perspective, "Well, how can we show loss if we don't sell that product?"

So they would be effectively scuttled by running a passing off action.

20

MR COPPEL: But that's a good question, isn't it? Why would there need to be protection that a watchmaker have against someone using the same name for something totally different?

25 **MS BEHAN:** Well, I guess the reality is it's not totally different, in this day and age of brand extension. You have certain brands you expect them to expand their business interests as well into other classes. Even if they're not providing under those classes, there's often the gift with purchase process. So you might be lucky enough to buy a Longines watch
30 and there may be a, at this particular time, a particular leather case that comes with it and it may have Longines on it. It may not be something Longines sell regularly or if at all, it's just this one time for Christmas.

MR COPPEL: How do you draw the line between watches, suitcases?

35

MS BEHAN: You have to present a lot of evidence, a lot of evidence. You have to present evidence – in many instances you need to prove evidence that your trademark is well-known and that it would not be inconceivable that this would happen. In my own experience of filing a
40 defensive trademark I needed to show, and this was a milk product from a very well-known, Brisbane-based milk company, I needed to show that it did have a reputation and that involves not just referring to its earlier registrations but also its marketing. It's always shown during World Cup Cricket, it was shown during Lost, these are big, big programs, everybody gets to see it. Then you have to show that it's not inconceivable that this
45

product could extend to medical based products. In that instance I had to - this is for a flavoured milk, it was chocolate milk, and I had to prove that this is not inconceivable and referred to Sustagen, which is a pharmacy based product, which you add milk to which is flavoured. It was on that basis I got that trademark registered. There's a lot of work involved and I have to say a lot of the work involved in obtaining a defensive trademark registration is far more, far more than getting just a standard registration.

Examiners will make you work for a defensive trademark registration. They will not make you work - it's not a reflection on the examiners, examiners do not need to make you work as hard to get a standard registration, they will do what they need to do, but they're not going to look and say, "Well, this is a well-known mark." What they're going to look at status of the register and whether it's descriptive. If there's no defensive trademark there, the status of the register makes it clear to go.

I'd like to point out one more thing, which I think is probably important to know because you may be thinking, "Well, deep down everybody will know that this brand is well-known, or this brand could expand in this way." There's a single cross-class searching. Examiners can't type in a trademark and search all 45 classes, it just can't work. It'd take too long and it would throw up too many things that are irrelevant, so they have classes that are listed as deemed as being associated. In the Longines case, that's the subject of the submissions, this is why this one slipped through, because class 14 is not deemed to be the same as or associated with class 18. That's why there is an opposition process instigated.

MS CHESTER: I guess one thing we also look at is intersection of other provisions and protections that that rights holders may have. And in that regard, there are provisions under Australian consumer law as well. You mentioned before that to get a defensive mark you have to be well enough known to secure registration. I guess the other flipside though is that you have to be well enough known to secure registration but then if someone were to use that name in another class, take the Longine, then they have to not well enough known to not be able to establish that that would be false and misleading and deceptive conduct, under the Australian consumer laws. So I'm just raising the issue there are other avenues through which these rights can be protected.

MS BEHAN: It comes back to the same thing. Consumer law, while is more favourable to, say, in this case, Longines. It's them passing off. It's still not an avenue you want to go down because much of consumer law parallels passing off. Not to such an extent, it's not as harsh, clearly, but it

still does and it throws in an element of uncertainty, which is not what you want, which can be avoided by a defensive trademark.

5 This is the thing, cutting confusion off at the knees. This is why defensive trademarks are there. They're not bandied around by the office and they're not granted easily. As an example of that, when you file an application for a defensive trademark the online system will say, "Usually information is needed in support of a defensive trademark, please attach your evidence here. Please attach any supporting correspondence you have here." So that's before it even gets to the examination stage. In fact, 10 it's even before it's given an application number, that's asked. So that's an indication of the importance of thorough examination that's attributed to defensive trademarks and it's an indication of the importance that defensive trademarks are granted.

15 **MS CHESTER:** So just to make sure I understand what you're saying, so you're saying that passing off and Australian consumer law, yes they are remedies but they're more difficult remedies to access, compared to a defensive trademark.

20 **MS BEHAN:** To establish, yes.

MS CHESTER: Okay, all right.

25 **MS BEHAN:** It's long been held or it's long been understood that passing off and ACL are more difficult to prove than a trademark infringement.

30 **MR COPPEL:** Is passing off the same argument as confusing consumers? Is that a different rationale?

35 **MS BEHAN:** Passing off really doesn't consider the element of confusion to the market place. If you go back to the holy trinity, as it's described, of you have a reputation, the other people have made a misrepresentation that they're you or associated with you and that you have suffered damage. So, as you can see, the issue of market confusion doesn't really factor in there at all.

40 The ACL, with its misleading and deceptive or intention to - the possibility of misleading and deceiving, that's more open to market confusion, certainly, but it's still very hard to prove because there's a great deal of - generally the courts are a bit circumspect.

45 **MR COPPEL:** We have examples of Duracell and - - -

MS BEHAN: Now, I'm glad you raised that Duracell - - -

MR COPPEL: - - - as an energy drink.

5 **MS CHESTER:** I was going to raise the Viagra one, but go ahead.

MR COPPEL: Viagra is the other one, an alcoholic beverage.

10 **MS BEHAN:** When we had the discussion with Leo Soames, in January, the Duracell one got raised. I think the big concern was the Duracell, it was the battery. I think one of the big concerns for the Duracell one was that, frankly, it had gone straight through and there were no queries. The reality is, that you never know what happened beforehand, and what had happened beforehand, although it wasn't a defensive trademark application, having filed for the word Duracell, an extensive amount of evidence had been filed, because you can see that from the history at
15 ATMOS, and it just didn't get up.

20 It went on and on and there are at least two declarations and I would say, my summation here is that the examiner said, "You do not have enough here for the word but you do have enough here for the logo, for the battery device." That's entirely probably because if you're working very hard to get a defensive trademark you would put anything in you could to promote that. And it's entirely possible that an examiner, doing
25 his job or her job, would say, "You don't have enough."

30 So a subsequent application for the logo was applied for and I believe there was some correspondence but there wasn't a declaration and I believe that frankly the attorneys for the applicant said, "We refer to the evidence filed in respect of application 1234 and we refer to the final comments of the examiner. We submit that in light of the foregoing this application for the defensive registration should be accepted." In fact, that's all I can tell, but I have no doubts that that was the situation. It was probably even the same examiner, because they will tend to do that in
35 certain situations.

40 For energy drinks, I think it's not inconceivable and it comes back down to brand extension and supporting - you know, Duracell make a great sponsor of mixed extreme sports event, and with the event comes all kinds of energy drinks or just soft drink and they brand it. Somewhere along there they got "sponsored by" and one of those people will be Duracell, or they'll have the battery and that's how NY defensive trademarks have taken this very particular approach. So I can definitely understand why the Duracell one proceeded to that and there would have

been oodles of evidence, I'm telling you this now, from what I can see. That's Duracell.

5 As for Viagra, Viagra is incredibly well-known and I haven't looked at the ins and outs of the Viagra one, but I would have to say that I'm sure it's relatively specific, but I'm sure there's plenty of use to justify certain things. Again, Pfizer probably does make T-shirts, maybe not with Viagra plastered all over it, but as merchandise, to give to doctors. So the class 25 for T-shirts, they make it, it's part of a branding situation and it justifies a defensive registration. They've probably also been able to show a bit of evidence of other people using a word, similar to Viagra, on T-shirts, that's not been approved by Pfizer. That's equally influential.

15 For another one that I did, for the same milk company based in Brisbane, they were contacted by somebody and they said, "We would like to call our café the X café and I just want to check with you to see if it's okay because I don't want any confusion between you and me and you may not want that either." They sort of said, "No, it's not okay, you can't do that." But that kind of interest, which is a recognition of how well that mark's known and it's also a recognition that other people want to use it, that's a good motivator for getting a defensive trademark. I included that in my statutory declaration and the difference between that trademark and the other trademark was that the defensive trademark also got registered in class 35, for retailing.

25 **MR COPPEL:** New Zealand is a country that has both removed parallel import restrictions on books, you heard a lot this morning, and it's also removed the defensive trademarks. Are you in a position to be able to tell us about what were the consequences of that?

30 **MS BEHAN:** I'm glad you asked. I have done my research here. There were only 67 defensive trademarks on the New Zealand register at the time of removal so my research did not reveal anything and I think - it's a country of three million people and at the time of the introduction of the Trade Marks Act 2003 there weren't even a lot of trademarks on the register. There was midway through the 600,000 and around that time Australia was probably in the one millions or 900,000s.

40 So 67 defensive trademarks, it's a bit difficult to determine the ramifications. I think one of the big things, though, about the abolition of defensive trademarks in New Zealand was that all became standard trademarks and that's clearly not really, with greatest of respect - - -

45 **MR COPPEL:** So all the defensive trademarks became standard trademarks, in lots of classes?

MS BEHAN: Yes. Well, at the time New Zealand - this is another thing to remember, at the time New Zealand only had single class trademark registrations so there was 67 marks for one class each. So the number of
5 actual trademarks in question could have been quite smaller. So removal of defensive trademarks, they all became standard trademarks, so then you're left with the problem of the non-use. That's a big problem. But because the numbers were so small to begin with, I couldn't find any real papers or comments to discuss today on that issue.

10 I do know that in a research paper that was done three entities indicated their concern, AAT, and I've got to indicate my ignorance here, I'm not exactly sure what AAT is. The other one was KPMG and I think KPMG was probably doing it from a critical assessment perspective, and
15 the third one was Red Bull, so clearly indicating, again, their strong use of defensive trademarks.

20 That's as much as I can tell you about New Zealand, I'm afraid, but I think it would be dangerous to go down the path of making them all standard applications because then it would be open slather for removal applications. People would - these trademarks are defensive trademarks, they don't need to be used all that needs to be done is the registration on which they are based remains current and the renewal fees for that base registration and the defensive trademarks registration is paid. If these
25 defensive trademarks become standard trademarks suddenly there's eight years of non-use, or more. So then it's just open slather, "Okay, we can get rid of this, there's no problems here."

30 That's a serious problem. It's a big problem for the entity that invested very strongly because equally it was difficult to get a defensive trademark in New Zealand, invested their time and energy to get a defensive trademark, which then invested in peace of mind, rest assured that their intellectual property rights were complete only to find that they're not complete and worse than that, they're the subject of removal.
35 That's New Zealand, as far as I can tell you.

MS CHESTER: I just had one more question, if I may, Angeline. Your submission talked about another advantage, from your perspective, of defensive trademarks, and that is that a trademark examiner can make a
40 quick decision about a potentially infringing mark without having to go through an opposition proceedings, in the absence of a defensive trademark which, I think you say, are not exercises in speed. So I guess that raises the question then, is that an argument that defensive trademarks are worthwhile or is it more an argument that the opposition process is slow?
45 If we were to improve the timeframe around oppositions

proceedings, would that then lessen the merits of defensive trademarks, given that's one that you highlighted in your submission?

5 **MS BEHAN:** Well, I hate to break it to you, but we've already improved the opposition process. There were substantial amendments raised, under the raising of the Bar Act, which was designed to speed everything up. Extensions of time are rare. You know, if you don't file this document the opposition's over and the other side is successful. If you wanted an extension of time you can't have that. Previously you used to be able to
10 get extensions of time, initially quite easily. You could get another three months quite easily, now that's not the case. But when you look at it, what we've done, we've managed to decrease it from three years to two years. That's still a long time.

15 A defensive trademark application, like any other application, needs to obtain acceptance within 50 months of the examination report, plus another six months, if you want to pay extensions of time, so no later than 21 months. So that's a big, big, big time saving. Again, generally people who file defensive trademark applications are people who have the
20 information behind them to do it. It's not something that's done lightly. It's not a more expensive process, the official fees are not higher, but generally these people know what they're going into. So I don't see that there's any way that the opposition process can be sped up any more than it has been.

25 I made a point of indicating those two section 60 trademarks in my talks, because the Commission had flagged section 24 and section 60 talks as oppositions. You can't speed up the opposition process anymore. There's only a limited number of hearing officers in the trademarks office.
30 Even if we put oodles more on there'd still be quite a delay and it wouldn't match the speed of getting a defensive trademark application accepted or registered. They should work in unison, they shouldn't be competing.

35 **MS CHESTER:** That's all the questions that we have for you today. Thank you very much for coming along this afternoon and thanks again for your submissions.

40 **MS BEHAN:** Thank you.

MR COPPEL: The next participants are Bill Concannon and Candice Lemon-Scott. So if you could make your way to the front table. When you're ready if you can give your name for the transcript, who you represent and then a short opening remarks. Thank you.

45

MS LEMON-SCOTT: Good afternoon, thanks for hearing me today. I'm Candice Lemon-Scott, I'm an author and I'm a bookseller of Fig Tree Books, on the Gold Coast, in Burleigh Heads. So today I'm speaking as one of the - we've heard, before, the number of people working in the book industry. I'm an author of 11 books with trade publishers, such as Penguin Books and Pearson Education. Many of my books are on recommended reading lists and so on and I've won awards, but I can't derive enough income to support my family on author payments alone, even though my husband also works full-time, so these proposed changes make it even more impossible to draw an income from writing, with reduced royalties, less books being published in Australia, as others have outlined here today. So what I wanted to talk about mostly is that my second job is as a bookseller. I work as a sole trader, owning the book store, and this is my main source of income.

As an independent bookseller it's already a challenging business to run successfully, amid rising rents, mass order discounts that department stores and discount retailers offer and then you've got remainders, eBooks and online competitors. But despite this, my business is growing and has actually almost tripled its turnover since I took it over three and a half years ago. To me this supports ABA, Australian Bookseller Association, statistics that Australia has the largest independent bookseller sector in the English language market and that it's continuing to grow, with more book stores opening in the last year.

There are an estimated 900 book stores operating in the country, bringing in \$1.1 billion annually so it's an industry that I feel that is already contributing to the economy and should be helped to grow. But with these changes independent book stores will struggle, in my opinion. If books are bought from overseas, under proposed changes, we won't be able to compete against places like K-Mart and Big W, because we can't buy those bulk amounts of stock required under the changes and we'll have to - also, currently we rely on taking risks on books by being able to return unsold stock through returns. We can't do that if we have to buy stock from overseas, which means stock levels will diminish, or we have to sell remaining stock at a loss and this, in turn, results in taking less risks on less best seller titles.

We'll also have fewer titles to offer customers, with less publishing in Australia, that's been outlined earlier today, which will inevitably lead to less sales and the books we sell will have to be sold for less to remain competitive. When all that happens I see the business fails.

So what? Books will still be available through online retailers and department stores, won't they, like your K-Marts and so on. Well, the

answer is, it's another small business sector gone in Australia, which means for every bookseller I lose my job and my staff lose their jobs. Other small businesses I use lose income, local distributors, printers, cleaners, pest control, bag manufacturers, postal services, IT companies
5 and so on, and times all that by 900 stores affected. Many are much bigger with more staff and so on than mine.

But so what if many of these jobs in the book industry are going, impacting negatively on employment levels, the economy and the societal
10 impacts that leads to when people are out of work. Well, to me a bookshop forms that part of the retail sector in Australia. A bookshop forms part of the fabric of a society. A bookshop is a place where people can feel part of the community, where they come to chat, where they get personal recommendations, where local authors can promote their work
15 and get it known at a community level first. You don't get that online or at K-Mart or at Myer.

Our customers are not just people who enable a business to grow. They're people who we know personally. We know who reads crime
20 novels, who likes paranormal, romance, which kids like fairy stories and who loves adventure. We also know the customers who are going through cancer treatments, those who are reading a book for the first time and have no idea what to buy. We support the mentally disabled young man who comes in every day and talks aloud about which books he likes and
25 doesn't and, after several months visiting, has found the courage to start purchasing the books he loves. We remember the customer who was contemplating suicide but didn't, after receiving a book recommendation. We contributed to saving a life.

What of local authors, like one of our local authors of a book about
30 her experience supporting businesses and communities in their communication through her work with horses? We followed her three year road to publication with a major publisher in Australia and excitedly promoted her book heavily. She came in with tears in her eyes when she
35 saw her book in the shop window because at QBD they put her book on the back shelves and Target left her book out of the all-important Mothers' Day catalogue.

But why am I mentioning the people? What does it have to do with
40 the economics of it? Well, evidence shows book stores contribute that \$1.1 billion to the economy but, more than that, studies show a strong community builds a strong economy. A strong community builds a strong economy and, likewise, a strong economy builds a strong community.

Independent book stores play a part in both of these roles so it doesn't make economic sense to me to not keep pricing competitive. Thank you.

5 **MR COPPEL:** Thank you. Bill?

MR CONCANNON: Thank you. My name is Bill Concannon and I'm the CEO of Mary Ryan's. Mary Ryan's is a small chain of bookshops in South-East Queensland and they've been around since 1975. I've been
10 the owner for 15 years and have rebuilt the business into a sustainable book retailers. During my career of 40 years as booksellers I'll try not to be repetitive of what my colleague has said here, because we're both booksellers, and I've take a different slant on it.

15 Independent booksellers in Australia perform a very important function. I refer to them as the village well where people congregate and they interact with the other customers, with the proprietors and, more importantly, with the writers. We perform lots of functions in providing employment for young people who want to gain an insight into our
20 industry and how it performs and we are a very good learning rock for the future people working in the publishing industry. We quite often watch our staff go on to work in some of the big publishing houses and are very successful.

25 The issue of parallel importing has been around for 40 years. I've watched it over the years. There's been inquiries, there's been adjournments, there's been votes in cabinet and thank goodness, to this date, nothing much has changed, except the 14 day rule. In the early days
30 it was the US copyright that was sold to the Commonwealth and if the US publishers were quick they got it onto the market in Australia before the rights were enacted on and there was the issue of withdrawing it from the market. We went through all those stages.

35 The current situation works very well for the industry at the moment and, in particular, the independent bookshops and, I would say, many of the franchisees who own their own business and are licensed to use the name of some of the big corporations. To think that the US product will be lending in the market here infrequently, unknown to us what quantities, what stage, what timing, it puts us in a very difficult position when we are
40 approached, on a regular sell in visits by the publishers, when they will sit down with us, or our buyers, and present to us the future books coming for three, four, five months. There will be some key titles there which they expect us to buy quite a sizeable amount of books. We've always enjoyed the protection of a sale or return from the publishers and that encouraged
45 us to make a feature display of those books and, in particular, to include

them in our catalogues, in particular, at Christmas time, Fathers' Day, Mothers' Day.

5 With the changes that are being proposed how can we sit down and make any future plans with the publisher when we're unaware of what quantities might be on the high seas of that book landing in Australia, a different edition, which can be the US edition or the UK edition, which will be more like what we'll be purchasing.

10 The publisher will have to take the risk of pressing the button on 200,000, 400,000, depending on the author, for a particular title. How can they assume that they will sell the majority of those books, if they are under the threat of a huge quantity arriving by sea or by air into Australia on or about the same time as they make their release into the market?
15 Their sale or return will be out the window because after two or three experiences like I've described, they will not be printing the quantities of the book and we will not be able to make a display or we won't take the risk. Of course we can go to wholesalers in the US or the UK and order quantities of those books ourselves, the same edition as may be imported
20 by the large conglomerates, probably at a higher price, but we may not be able to land them as soon or as quick or as effective as the big chains or the DBSs.

25 Our finances cannot support something like that as we would be subject to the fluctuations of the currency and the timing, of course, of shipments and we don't have key people, like they will have, on the ground overseas collating those shipments for them and sending to Australia ASAP to hit the market on time.

30 Another key factor will be who will promote the titles within the industry in Australia? Who will bring the authors to Australia? Who will coordinate the TV, radio interviews, the press interviews? I don't expect the wholesalers, who will sell the product to the DBSs or the big chains in Australia to allocate any money towards those events. So therefore books
35 will be dumped on the market, they'll be sitting there and it'll be the price that will sell them, if they will sell. Our consumers and the book readers in Australia will be denied the opportunity to meet, interact and enjoy the events that we put on, and the publishers put on, for the authors when they arrive in Australia and tour the country. I see that element of the industry
40 at great risk.

45 As independent booksellers here in Australia we enjoy 24 per cent of the market, far greater than any other country. We are lucky that the chains, in particular Borders out of the US, when they arrived in Australia they had run out of puff, a lot of their monies had been spent. But had

they got the same run in Australia as they did in America and the UK, the independent booksellers would be decimated here in Australia. For example, in the US they only enjoy 8 per cent of the market and about 9 per cent in the UK.

5

The independent booksellers in Australia survive and that's why we've got a healthy margin of 24 per cent of the market at the moment. That will be at risk because we won't have that working relationship with the publishers, like the New Zealand experience. The major publishers have now withdrawn from New Zealand and it's serviced out of Australia.

10

In terms of the price of books, cheaper books, which is probably one of the main ideas of making the product cheaper to the consumer in Australia, and we all want the product to be cheaper, we, the booksellers - the publishers never stand in the way of individuals buying their books overseas, either the UK or the US. They can buy any edition they like, they can buy at whatever price they like and get it here, at a reasonable time, through the post, through Amazon or one of the book depositories, one of the wholesalers. So we're not standing in their way of getting cheaper product, if that's what they want. However, we do encounter some consumers that we know, some of them we don't know actually, coming to our store with the American edition of a book and ask us, "Do you have the local edition?" because they've been greatly disappointed in the quality of the product that they've imported through, say, Amazon in the US.

15

20

25

In terms of the price of books coming down, books have come down 24, 25 per cent in Australia since about 2008/2009, which is a great reduction. But let's say the price of books come down 30 per cent with this change, what is going to happen to our businesses in relation to occupancy costs, rents and wages? There's very little profit in bookshops at the moment, if any. It's (inaudible). Nobody in small business is making a fortune at the moment and I can only talk about bookshops. If the price of books did come down to that extent, nobody's going to buy two copies of the book. If our turnover increases because people buy more books it will be only bringing us back up to the level where we were pre change of the market and I would think that we would probably suffer because of the dumping on the market.

30

35

40

Now, you could have a situation where wholesalers will spring up in Australia. In the 70s and 80s there were wholesalers in every state selling wholesaling books from the publishers, before the publishers increased their presence in Australia. At that time, in the 80s, they set up their own distribution, their own reps on the road, which I think was great, and the wholesalers disappeared. Wholesalers may come back in again and

45

wholesalers will be buying off the back of the print run from the US and the UK.

5 It's very easy for a wholesaler, the same as the remainder market now, to go to the US or the UK and find a printer or publisher who will add on 20-30,000 copies at the end of the print run to ship into Australia and it will come here at a much cheaper price. But what's going to happen to the book then? Unless you've got somebody to promote the book out in the marketplace the books will sit on the shelf. Our business
10 moves through the advertising, through the media, whether it's the print media, the electronic media, you have to tell people what's coming out and you have to have the authors interviewed or you should have the authors interviewed on TV and radio and in the papers. You should have author events in the main capital cities. I can see that disappearing with
15 the fragmentation of the market.

So I am very concerned about the dumping on the market of, in particular, the American edition, which usually their paperbacks are throwaway. The train station, the airports and that, they just pulp them at
20 the end or if they found an Australian wholesaler who will buy them for 10 cents a copy and bring them in here. So our business, I believe, is at risk. There are probably many people who will speak to you about the author side, the intellectual property and the copyright and that, I see that as being at risk as well. I don't see myself versed enough to talk about
25 that in detail. I'm sure there are people more versed than I am to talk about that.

I am here to talk about our business, the independent bookshops, and how this change in the legislation will affect us and our good relationship
30 with the publishers here in Australia and it will see the diminishing of what I call the village well, where people congregate to get information, knowledge and to interact with other readers, booksellers and authors and we do that on a constant basis within our stores. I think that's all I've got to say but I'm speaking from the heart from a bookseller of 40 years.

35 **MR COPPEL:** Thank you. Can you tell us what proportion, just the context proportion of titles that you stock in your bookshops that are Australian authors?

40 **MR CONCANNON:** Probably 60 per cent. There's 80 per cent print books, now 20 per cent electronic books and Australian authors form a very large proportion of our business at the moment. They are really good to us, by way of having a good solid business, because they're not far away from us and they're constantly popping into our store and signing
45 copies of their books and that. It's great to have that support of people

like, if we talk about Tim Winton or (inaudible) quite a lot. But people like to see their books in print and come into our store. What we call, we've got a section for self-published books as well and a lot of those, through the opportunity to display in our stores, they go on to be picked
5 up by the publishers and published on an international level.

A good example, Matthew Riley. Matthew Riley couldn't get a publisher for his book. He put them in the boot of his car, 400 copies, and went up the east coast of Australia and sold them into all the bookshops,
10 two and three copies here. One retailer, in Rockhampton, in Angus & Robertson's, bought a copy of the book and read it and thought it was the best book that she'd ever read, it was a he, sorry, and recommended to Angus & Robertson they should put this book into all their stores, which they did. Pan McMillian picked up that book and published it, the rest of
15 the story is history.

We listen to those people, we encourage them to sell - we take their book, encourage them to sell it and we recommend them to submit to publishers, we introduce them to publishers, that's part of the function.
20 We work on both sides of the fence. We don't like self-published books because there's a problem with them in distribution. We like to direct them in the area of a publisher or a distributor that will get their books out into the marketplace. A lot of them don't know where to turn, we're prepared to listen to them. They can't go to Big W or K-Mart and ask those questions, or a really big chain. We had the chains here, Borders,
25 and look what they did.

MR COPPEL: Do you have any idea of what margin gain that you have from parallel import restrictions?
30

MR CONCANNON: What margin gain will I get?

MR COPPEL: Well, as a book retailer, you're arguing that the removal of parallel import restrictions would put a lot more pressure on prices and other impacts. Do you have any sense as to what the current arrangements are providing, in terms of the margin that you receive?
35

MR CONCANNON: The margin we receive now will probably remain the same from the publishers here. We import, as we speak, from the wholesalers in the US and UK. But when we apply the exchange rate and the cost of freight and that, our margins are less than what we get from the local publishers and we do not get sale or return rights. We get the better margins here at the moment, from the publishers, with the protection of sale or return. You can also deal with them on a major title coming in,
40 that'd be a new author or a new title by an author we had before, and take
45

a share of the risk. We can negotiate to buy 50 per cent from sale at a higher margin and the other 50 per cent on the sale or return. That gives us an opportunity, because the display sell - if we only buy two and three copies, our bookshops will be like libraries, with spine out, two copies, two copies, two copies. We need to make a display and attract attention, that sort of cooperation.

Point of sale, where will be get point of sale? When you buy a new book from a publisher now, a new release, you've got the options of a dumping, which is the floor display, the header card, a window display. They give us a subsidy for a window display, they run competitions for the best window display and our staff get enthusiastic about that. We get a subsidy for our catalogues. How can we put a catalogue together if we haven't got publisher support? There's no margin in the industry to put a catalogue together for the individuals.

MR COPPEL: The reason I ask these questions is that our terms of reference have asked us to look at the transitional arrangements towards a world where parallel import restrictions are no longer in place and you're not the only participant at the hearings today that have painted a picture of - - -

MR CONCANNON: Doom and gloom.

MR COPPEL: - - - doom and gloom. I think you've probably painted it at its gloomiest and - - -

MR CONCANNON: That's a matter of opinion.

MR COPPEL: Okay. But I think, from what I've heard, there are certainly lots of down sides and in the context of where we've been asked to think about transitional arrangements I'm just wondering what your view would be, in that given the world that you've just depicted, without parallel import restrictions, do you see a path, in the absence of parallel restrictions? Do you see a path to a world where booksellers are - - -

MR CONCANNON: A transitional period where we would be able to live with it? Probably if independent booksellers work together or formed a co-op and to strengthen their relationships with the wholesalers overseas to make available to them the same, as near as possible, terms and conditions as would be offered to the - we'd have to import in bulk. But that would mean setting up a co-op, that would mean having people and why are we independent? Because we can't get on together. I think that you'd have a dog's dinner there.

45

Okay, I put it back to you, who will replace the publishers if the publishers wind back in Australia? What you're saying the transition, we say look at the New Zealand case. Who will replace the publishers to us? Will we be buying blind our titles from overseas, based on a different jacket treatment in the US to the UK? Which edition will be bring in, the
5 UK or the US edition? There'll be a marked difference in the quality of the paper and the production. If it's an Australian book it'll be Americanised or it will be the British, whatever it is. We'll have a problem in coming to grips with all that and we're not financially - the
10 industry is not profitable enough to afford us that, unless we get a great government subsidy to establish those sort of buying rights, if it were.

Now, in doing that we'll be going around the publishers that are here at the moment and we're going to lose their support. They'll lose faith in
15 us because we'd be seen as going around them. Yes, we could get cheaper books, but they'd be sitting on the shelves, who is going to market them? Getting the books on the shelf is one thing, marketing them is the next thing. The wholesaler in the US and UK won't be interested in giving us
20 subsidy to take ads in the major newspapers.

MS CHESTER: So, Bill and Candice, of your current stock or your sales over, say, a year, what percentage of them would be books that are provided from local publishers versus books that have been provided that
25 you've arranged, from offshore publishers?

MR CONCANNON: Local publishers, we'd be getting 90 per cent. More than 90 per cent of our books come from the local trade here.

MS LEMON-SCOTT: I'm very rarely ordering from an overseas publisher, unless it's a special order that a customer wants and then it's
30 pretty much at a loss because of the freight costs and so on to get that in, but we do that for customer service.

MS CHESTER: Are they typical statistics across the independent bookseller group, that it would be 90 per cent to 100 per cent are sourced
35 from local publishers?

MR CONCANNON: It depends on how you set your shop up. If you're a chain of remainder books, discounted books, you can source most of our
40 product overseas because the wholesalers will sell it to you. If you're a traditional front list/back list independent bookseller, you would expect to source as much as possible from the local trade. Again, like my colleague, we would only order from overseas special orders, or a book that is not available here that we would go through the catalogues and say, "We
45 could sell that book here but they don't have an agent in Australia." It

might be a small publisher in the US or UK. We trawl through those lists to find something to have a point of difference in our store. But predominantly 90 to 95 per cent of product comes from the local publisher and suppliers.

5

MS CHESTER: That's helpful to know because I guess one of the things that we're grappling with is we get disparate views from booksellers, in terms of the pros and cons of parallel import restrictions. But as Jonathon rightly pointed out, we are trying to keep fairly focused on transitional issues and that was really a lot of the focus of our draft report.

10

MS LEMON-SCOTT: Because everything is done through local distributors so all the books are ordered through local distribution companies and bookshops look on Title Page, which lists all the books available within Australia. So for an independent book store that's just selling remainder stock it would be ordered locally.

15

MS CHESTER: I think, Candice, some of your opening remarks today really did demonstrate that perhaps, and I might suggest that we're not looking at widgets here as well, we are looking at a whole service that's offered when someone goes to a book store, that would make me think that maybe you're not a direct substitute to a K-Mart or a Target book buying experience. I mean the books that you would get there would be different to the books that you have on your shelves and the whole experience would be a different one. So do you see yourself as a direct substitute to them?

20

25

MS LEMON-SCOTT: I think if you go to your Big W or K-Mart you're looking to buy a best seller title that is already well known. Whereas the point of difference with an independent book store is that you're looking at finding something unique or special, or you might be able to get books that - they have a very limited range in your K-Mart and things but the difficulty is if those parallel importation restrictions are limited I already get customers who, say, the latest Judy Nunn book, yes, it's an Australian author, but they can get it bulk discount so it's \$16 there and they say, "Why do I have to pay \$32?" Occasionally someone will walk out on that basis so that will become more of an issue I would think.

30

35

MR COPPEL: I've just got one final question. It could be a question that I could have asked a number of other participants. We've been in a situation where we've had parallel import restrictions for decades and we heard that in the 60 years up until maybe the 70s, Australia was basically a jurisdiction where we just imported books from the UK and from the US, it was very little work in terms of promoting Australian authors. Now we're in a flourishing period where a large, particularly for children's

40

45

books, proportion of sales are Australian authors. Over this full period have been parallel import restrictions, I'm just trying to understand then what has changed to lead to a situation where we have ourselves today, with so much support for Australian writers, even though the parallel
5 import restrictions, if anything, have become more liberal over that time. Because as an individual I can order a book on Amazon or any other internet book retailer.

10 It seems as though there's something else going on than parallel import restrictions and therefore I'm asking the question that if you remove parallel import restrictions, I'm not sure why all of these negative effects would materialise. It's sort of like the inverse. Something else seems to be happening that has created an increase in interest in Australian writers, particularly for children's works.

15 **MR CONCANNON:** Well, what could happen with the removing of the restrictions is the unknown or the dumping. We don't have the dumping, as such, now and if we were making selection of the full titles now, in September, coming up September and October, we wouldn't be worried
20 about the dumping but maybe in 12 months' time, if the parallel importing restrictions were removed, we will say, well, the previous month this book was brought in by one of the big chains, the DBSs and was there in the marketplace and it might be \$5 cheaper or \$10 cheaper. I don't think that it is as much price issue as the skulduggery that will go on behind the
25 scenes with the unknown, that the publishers will be printing books for the Australian market and they'll be left with them. They will not continue to do that, therefore they'll withdraw because the fear of the unknown.

30 Now, in my early days, in the 80s, we were able to go to the US and the UK and buy container loads of books, bring them in here and spread them around and make good money. We were dirtying the market in a way. But now the industry is much more sophisticated and the new Harry Potter coming out, they'll all know when it's coming out, they'll all know when it's released and the buyers for the big chains in the US and the UK
35 will be fossicking around looking for a supplier that will get access to huge quantities, container loads of that book, to get it on the seas and get it here and that will destroy the market because the traditional supplier, who is the publisher, they'd have invested a lot of money with the printer, will be left with the copies of the book. How many times are they going to do
40 that?

45 So you ask me, "What can you see happening in the trade if the parallel importing restrictions are removed?" It'll be the confidence of the publisher to risk their money to print a book here that's going to be on the high seas coming in, the American edition, \$5 or \$6 cheaper. Are they

going to print 50 or 100,000 copies of a book again, when they know the risk is there? So our share of the market could be well reduced because we would only be buying five or 10 copies whereas we'd be buying 50 or 100 as we speak now. Then the publisher would only print a small quantity and they would be in the situation where they'd have to make a decision on a reprint because the market is asking for it. How can they make a considered decision on the reprint if there's the threat of another shipment arriving from overseas? Therefore they could be left with that print run. Books are such that once you press the button to print you've got it, physically.

A couple of experiences like that will sour the relationship with the publisher and the printers and in future they'll step back so then the dumpers will take over the market. That's my fear.

MS CHESTER: I only have one more question, if I may and, Candice, if you don't mind I might give it to Bill because he's been in the industry a little bit longer and it's an historical question. You both mentioned before that local publishers will take back your unsold stock, which I can imagine is a huge advantage for both of you as booksellers. Bill, has that always been the practice in the local market, for as long as you've been - - -

MR CONCANNON: As far back as I can go, 1975. It's been a sale or return. The trading terms have never changed much. In actual fact, it was sale or return on all stock. Somebody came from the UK to visit us, twice a year they'd cull the stock of all titles and they'd rip off the jackets and give us credit. That was on the back list. Then as the years progressed and we had a lot more independent bookshops in Australia and there was a huge expansion in the 90s and early 2000s of franchise stores around Australia and the sale and return was greatly abused on the back list, what we call, books that are over 12 months on the marketplace, and they withdrew that facility of sale or return because people would be using it as a cash flow.

It's hard to live with not having sale or return but they do give us very good trading terms on back list, especially coming in to the peak trading times like Christmas. You can buy at good terms to have a good stock for your holiday reading. But the sale or return on front list has always been in the marketplace. Some of the big chains tried buying big titles, like a Bryce Courtney, will give you an extra 10 per cent for buying through sale and the risk on it, because they can afford to work it out. But now I think 99 per cent of new titles are sale or return.

MR COPPEL: Thank you very much. So on our schedule we have a final group of participants, Jacqui Carling-Rodgers, Christine Bongers,

Melanie Hill. We also had Isobelle Carmody who could not make it. We will also hear from Andrea Smith, who's speaking from the perspective of the musicians. So I was going to ask whether we could cover Andrea after speaking about the authors and then have the perspective on music, or we can keep it - - -

MS SMITH: I'm Andrea and I teach copyright, so I'm speaking on behalf of all artists, not just musicians.

MS CHESTER: You can stay with this group then.

MR COPPEL: Okay. So can I ask you to state your name and your affiliation, for the purpose of the transcript. Will you each be giving an opening statement? Could I ask you to try and keep it brief. Thank you.

MS BONGERS: Hello, my name is Christine Bongers. I'm here, as an author, to join the ground swell of dissent and dismay that has come from my fellow authors, our local publishing industry, our booksellers and those who care about a thriving Australian literary culture and book industry.

The Commission's draft recommendations of removing territorial copyright, reducing copyright periods and moving towards a more litigious US style system for copyright exceptions threatens not only author's livelihoods but the viability of our bookstores and our publishers, as well as our ability to create and innovate and to tell and sell the stories that shape our nation.

I've written for a living for most of my adult life; as a journalist, as a professional writer in business, government and in public affairs, and for the last seven years as a published author of literary fiction for young people. My novels are quintessentially Australian, they're full of Aussie vernacular, humour and Aussie characters. They've won and been short-listed for numerous awards in this country and are studied in Australian primary and secondary schools and also at university level. My first two books continue to sell, six and seven years, respectively, after they were first published and like many works of Australian literary fiction for young people, they have a shelf life far beyond the two to five years mentioned in your report. Over a lifetime, with current copyright protections in place, my books may even generate sufficient financial return to recompense me for the time, effort and thought that I've put into creating them.

To date my books have not sold into overseas territories, but I'm working towards that goal and I do live in hope. Hope that apparently the

Commission would like to destroy by doing away with the territorial rights system, which allows Australian authors like me to sell their works into overseas territories, a right that all of our colleagues in the United States and the United Kingdom, for example, have. I think it's the only way that Australian authors can make a viable living is by selling the rights to their work in overseas territories.

The current system underpins not only our own book industry but the huge markets of America and the United Kingdom. Existing parallel import rules are the global standard. The only country that has removed them, New Zealand, has seen its publishing industry shrink to a fraction of its former size. Every day, at writing festivals and in school writing workshops, I work with New Zealand authors who have left their own country because they cannot make a living there anymore. The amount of New Zealand content on the bookshelves over there has shrunk with their publishing industry.

I don't think that's something that we want to see in Australian book publishing. I don't think that the United States or the United Kingdom has any intention of doing away with their parallel import rules, but I'm sure that they would love to see Australia fall on that sword. I'm sure they would love to dump their huge market of books into our market and we would be unable to reciprocate.

I think if parallel import rules had been removed when first mooted by this Commission, eight years ago, I doubt that any of my books would have been published. I don't think that, as a distinctly Australian voice, I would have appealed to the overseas markets. I was taken up by an Australian publisher, Random House, at great risk I think. I mean I was an unknown, unpublished Australian voice with an Australian story to tell. They did take me up and they've continued to publish me for the last seven years. I don't know that we can ask publishers to take a risk on unknown, unpublished authors if they don't feel that they will have the support from booksellers who will sell those works of fiction in our own country.

Arguing that the Australian government could subsidise publishers to take on Australian content is actually a bit absurd because we, in the arts community, have seen how quickly government patronage can be withdrawn from the arts, so I don't think that's a viable option for us.

I think one of the disappointing and frustrating elements of this debate has been that we're beating our heads up against the same old brick wall. In 2009, as an unpublished author, I made a submission to the Productivity Commission's inquiry into parallel imports and seven years

later the Commission seems to be recycling many of those same recommendations, with little or no discussion of their impact or how things have changed in the intervening years.

5 Then and now the Commission's arguments seem to be predicated on a single article of faith, that removing current copyright protections is somehow necessary. I don't accept that as an article of faith. Copyright protects the creators of works of fiction and of other works.

10 **MR COPPEL:** We're not recommending any removal of copyright protections.

15 **MS BONGERS:** You're actually recommending removal of territorial rights, the ability to sell into overseas markets. The whole of our system is underpinned by territorial rights and parallel imports is tied up with that. You can't say, "We'll get rid of parallel imports" without impacting on our ability to sell our work into overseas territories. And you have recommended a reduction of copyright to 15 to 25 years.

20 **MS CHESTER:** No, we haven't. We'll come back to some points of clarification and let you finish your opening remarks.

25 **MS BONGERS:** I don't believe we need to reduce the life of copyright and I don't think we need to remove current parallel import arrangements. I also don't believe that we need to do away with our own fair dealing copyright exceptions and replace it with the American style litigious system that puts the onus on, I think, very poorly paid authors to prove, by suing in a court of law, that there's been unfair or excessive copying of their work. I think it would be a retrograde step to go down that path. I would urge the Commission to reconsider its position and support
30 Australian writers, books and publishers. I think that our industry may be small, on a global scale, but it puts out 7000 new titles a year, it's worth \$2 billion to the economy and it nourishes and sustains our culture and I think, in my book, that's definitely worth supporting. So that's my
35 personal statement, thank you.

MR COPPEL: Thank you.

40 **MS CARLING-RODGERS:** Hello, thank you very much. My name is Jacqui Carling-Rodgers. I'm an ex-newspaper journalist, a former director of an award winning advertising agency and, under the name of Elizabeth Ellen Carter, an award winning historical romance and historical fiction author.

5 First of all, I would like to thank the Australian Productivity
Commission for the opportunity to discuss my concerns with the findings
of the Intellectual Property Arrangement Report, specifically finding 4.2,
which I quote: “While hard to pinpoint an optimal copyright term, a more
reasonable estimate would be close to 15 to 25 years after creation,
considerably less than 70 years after death.” The obvious question is,
reasonable to whom? Certainly not to me, certainly not to the United
States nor to the EU and why Australia would want to be an outlier on this
issue invites speculation worthy of a suspense novel.

10 I’ve read through the relevant section of the report. I’ve gone back
to those two studies cited, the one from 2002 and one from 2007. The
recommendation that copyright protection should be severely curtailed
comes from an erroneous premise and a lack of understanding of the arts
15 and entertainment industry. Creative works do have a life after 20 years,
all you have to do is just listen to the radio or watch an ad on television for
proof of that. The truth of the matter is, the opportunity to maximise a
back catalogue is integral to an author’s earning capacity, every title is
important. People who buy my latest book will search out my back
20 catalogue and more than likely buy my previous titles, that’s how I earn a
living. The bulk of my sales are eBooks.

So limiting the length of copyright would give anyone with a pdf or
epub or a .mobi file the right to trade on an author’s name, reputation and
25 product without compensation. In effect, I’d be competing against myself
for sales and receiving no income for it. Each book is unique, it’s both
intellectual property and a tangible asset that can be bought, sold and
traded. Protection, even after death of its creator, is not at all
unreasonable.

30 I have a personal example; Phillip Rodgers was an English musician
and teacher who wrote arrangements for recorder, flute and guitar, for his
music students. After he passed away royalties from those books helped
support his widow and her young son.

35 According to my husband, the amount of money his mother received
each month might have been small, but it was enough to pay for groceries
for a week, which mattered quite a bit when there was very little money
coming into the home.

40 Copyright protection and duration matters for another very important
reason; the preservation of natural rights. To quote 17th century jurist,
John Locke, “Every man has a property in his own person. This nobody
has any right to but himself. The labour of his body and the work of his
45 hands, we may say, are properly his.” Locke did not come to this

conclusion from a vacuum, the unviability of property rights is one of the enduring principles in the 800 year old Magna Carta, on which our common law is derived. Any abridging of intellectual property rights, with respect to copyright protection, sets a dangerous precedent, it dictates
5 how long you may own your own property. If protection of intellectual property is eroded today, then ownership of physical property is at risk tomorrow, all because of an erroneous premise based on demonstrably incorrect academic research has decided what you may own and for how long you may own it.

10

MR COPPEL: Thank you.

MS HILL: Hi, my name is Melanie Hill and I'm representing myself. I'm a mother of four children, under 10 years old, I have a Bachelor of
15 Arts in English Literature and a Masters in Industrial Relations and Human Resource Management. I'm a 26-year veteran of the Royal Australian Air Force with experience in planning domestic and international operations and exercises, including the combat and logistic support for the Air Force's deployments into the Middle Eastern Area of
20 Operations, where I was awarded a Conspicuous Service Cross for excellence in logistics planning. I've worked as a supply chain consultant and I'm currently a senior project manager overseeing two capital projects, an innovative digitalisation project, of which are all totalled at over \$40 million.

25

I'm also a published children's writer and adult writer and poet. I'm mainly published in the indie industry, through purchase on demand and eBooks. I tell you this because it's going to make it much easier to understand some of the points that I make in my comments today. I'm
30 also here just to add to some of the points that I've raised in my written submission to the Commission.

So when I looked at the paper I prioritised the three most significant things to me, as a writer. I looked at the finding that you made into the
35 duration of copyright and I acknowledge the fact that you're not making a recommendation, but I'd still like to make these statements as someone - well, you've made it a finding, it could become a future recommendation, so I just want to clarify that. The second priority would be the changes from "fair dealing" to "fair use" and then, finally, the lifting of parallel
40 importation of book restrictions. There have been plenty of others today who have spoken about the parallel importation issues, so I won't be addressing those.

When I first read the paper I did what most people with my
45 background do. I look at what the intent of the paper is trying to get to. I

look at the strategic intent and the commander's guidance, I suppose. My answer was, you want to move in a very from a very strategic point of view from an economy that imports innovation to an economy that also exports innovation. Then I looked at the point of origin of innovation,
5 which I believe comes from creativity.

So how do we, as a nation, increase creativity? And I think the answer to that is really through education. The most important determinant of success in education is literacy. There is a large body of
10 research supporting reading as a clear determinant in developing cognitive skills as well as providing foundations for motivation, curiosity and memory. As a writer, I create the raw material that contributes to literacy. I am one of many who generate content and it seems to me that, as a nation, we would like to keep motivating writers to do what we love doing
15 because it has a very direct link to the objective of your paper.

As a mother of school-aged children I see the direct impacts of stories and literature. My children explore the world around them via fiction and non-fiction books. Their ideas and innovations are evident
20 when they draw inventions, such as machines to suck up cyclones and rubbish reducing recyclers. They invent worlds where people don't have to undergo operations like their sister, who underwent open heart surgery at five months old.

I'm excited for my children as they move into an increasingly digital world. I make it my business to know what skills they need to succeed in this world and it is clear to me that creativity and idea generation will be the key to their success. I know reading will increase their knowledge of what's possible, teach them to think critically and expand their horizons. I
30 want to be part of that solution. I want to be engaged and to work in a country that values innovation because it is the future for my children. But I also believe that there needs to be incentives for me to be able to participate in that.

As someone who has led and managed people I've worked hard to incentivise the individual and the team to meet objectives. I have seen how punishment and lack of personal recognition demoralises people and stops them working towards a common goal.
35

As an example of this I have been planning, for quite some time, to start my own ePrint, to tell the stories of Australian and New Zealand service women. My company's objective is to expand our country's understanding of what it means to carry the ANZAC tradition forward, as a service woman, into the next century. The first book would have been a
40

collection of writing and artwork from women who have served since we were allowed into the permanent Defence Forces, in the late 1970s.

5 This project may not have much commercial success, but is a book which I believe would have added to our collective understanding of military histories in our countries. My intent was to leave something of value for future generations who have benefited greatly from the struggles and success of these amazing women.

10 I put my project on hold because I want to be able to guarantee those who contribute that I am a worthy custodian of their stories, that I will protect them and any proceeds that we have will go towards programs for veterans. If I can't guarantee their copyright and a specific outcome I will not do it. I would rather those women retain ownership of their stories
15 than have someone else take them. For me, the changes to the duration of copyright, or the potential for those changes, is a disincentive for me to publish.

20 Now, just quickly, to touch on "fair deal" and "fair use". I've looked at this as a person who potentially could be operating in this system. I see from most online sources, especially from the US, which is obviously where we draw most of our examples from, that the only way to determine what "fair use" means is via a court system. This seems to be contradictory to the Commission's desire to reduce litigation with
25 copyright.

To me, this change is the equivalent for moving from the set of rules of engagement that clearly state when you can use your weapon and under what circumstances. If we changed those rules to, "Just go into that area
30 of operations and do what you think is right, we'll work out if you shot the right person or not afterwards" seems very confusing and I would mean that any damage that was done would be extremely difficult to undo. I believe it moves us into a reactive system, as opposed to a pre-emptive system.

35 In the United States the case against Google Books, initiated by the Author's Guild, has gone on for 12 years. In the most recent round the Author's Guild has asked for the courts to clarify the "fair use" guidelines and a number of contradictory precedents before ruling in favour of
40 Google Books. They've also asked for clarification of what "transformativness" really means. I believe that this contributes to most people's view that it will be a very confusing system to operate in and I see a system with few rules and only actions and reactions is a backward step for us.

45

5 I would like to put forward, though, a suggestion that the Australian Law Reform Commission, which is their suggestion, to consolidate and expand the existing “fair dealing” exceptions as an alternative to “fair use” and I think that we should actually look further into that, as opposed to going through a major change from “fair dealing” into “fair use”.

10 In summing up, from a systems perspective, an IP system that is only effective if it understands the origin of the genuinely new and valuable intellectual property and that is through literacy and education. I believe your paper has missed these significant points when it comes to people like me who create intellectual property.

15 I’m an educated person, I am motivated and I don’t live on the fringe of this society, I live in the heart of it and I live at the coalface. Through my own children and my writing I contribute to a creative and innovative future. Thank you.

MR COPPEL: Thank you, Melanie. Andrea?

20 **MS SMITH:** Thank you. My name is Andrea Smith. I’m a graphic artist and illustrator, a published author. I’m also a creative business teacher who’s been educating in copyright for 20 years. I’m an advocate and educator for an online group called Who Stole my Images, mostly US creators that I assist, designers, artists, photographers, writers and musicians who have their work stolen and sold commercially for products such as T-Shirts, mostly through Amazon. Most of those people are struggling with the fair use laws in the US and the conflicting advice that they get from various sources as to whether their products have been stolen or not.

30 My husband is Doug Ford who is the writer of the Masters Apprentices song, Because I Love You, as well as many other songs. It’s been used commercially many times over the last 15 years. He’s retired and his royalties and licenses pay what would any - to anyone else would be his superannuation. He also has no significant assets other than his songs. So while also you have said that the reduction of copyright is not on the table, I believe if it’s there it still could potentially be on the table and I’d like to talk about what potentially could happen to my family if, and plenty of others in a similar situation, if that was on the table.

40 Doug only started making money from that song and many others in the early 90s. If the copyright laws were changed to, say, 25 years, they would be out of copyright, so he would be making zero income. At the moment, funnily enough, I’m not working because I’m actually writing an eCourse in copyright to educate all the people that I spoke of earlier,

authors, writers, visual artists, et cetera. His income from his royalties and licenses pays our day to day expenses. So we earn no other income, bar the occasional other work that I do.

5 I also self-published a book two years ago based on illustrations, hand
letter work from a significant music venue that I used to run. Again, those
would've been out of copyright. I've had to undertake a lot of take down
on various people that had put them over the internet. That book made me
a – while it was self-published and while it was a niche work, it made me
10 significant profits and my co-author, and that again would've been out of
copyright and there would've been no product to sell. I have many
graduates and other friends that work in publishing for Collection
Societies and related industries whose jobs would be in jeopardy if there
were changes to the copyright duration.

15 I also want to deal with the fair dealing change to fair use. Copyright,
as we know is an independent skill and labour. It is labour therefore it is
our work. From the experience that I've had working as an advocate for –
and that's totally free because I'm personally horrified with the emotional
and financial issues that my fellow US creators go through day to day with
20 their issues with stealing of their work.

The fact that many of them are micro-businesses who can't afford to
take legal action, and really struggle with – some of them have stopped
25 creating just dealing – just to deal with take downs through various
Amazon and various print on demand production sites, mostly through –
probably Chinese people that are stealing their work. They find that the
Court system is erroneous. They don't understand it. They don't
understand where they can get assistance and they find that people are
30 using the public domain argument that if it's on the internet therefore it
belongs to everybody.

I think the change from fair dealing to fair use will be detrimental to
our Australian writers, authors, visual artists, graphic artists, musicians,
35 photographers, who don't earn massive income as it is. We have a small
country. We have a small market and we certainly won't be able to afford
legal action for every case that comes up. Some of the people I'm dealing
with might have 50 or 60 products with multiple, sometimes hundreds,
sometimes thousands of people who are stealing their work. It's a very
40 difficult situation where they can't take thousands of people to Court so
they have to let it be. Most of them have had significant reduction of
income because of this.

45 So, yes, as someone who educates in copyright, I believe that is a
significant right that we have. It is our income. It is there for a reason and

I think there's enough argument and enough of what I'm seeing for being an advocate for this group to argue against both premises. Thank you.

5 **MR COPPEL:** Thank you. Intellectual property rights, for all forms of intellectual property whether they are copyright, trademarks, patents, it's a period of exclusivity and that period varies across the forms of intellectual property. Copyright is the one which would have the longest period of exclusivity. It was life plus 50, it became life plus 70. Patents is 20 years. It used to be 16, it became 20. Trademarks can be shorter still.

10
Talking about term, we've looked at the sales following initial publication, as one source of information. We've looked at Australian Bureau of Statistics data that also illustrates that most of the revenue from royalties is shortly after the first publication. We've made those
15 observations. I repeat, we haven't made a recommendation that proposes a reduction in the term of protection. We've also noted that this wouldn't, under current international obligations, be something that would be possible for Australia to do unilaterally. I wanted to set that point there.

20 **MS CHESTER:** Yes.

MS SMITH: I'm interested in first publication of what? One of the other jobs I've done is as a researcher for an organisation called the Creative Industry Skills Council. It no longer exists. Our job was to advocate and
25 work with creative education, vocational education, and tertiary education, employers and industry. In the research that we have done, copyright was one of the things that we researched. I would argue that that would not be the case. Many of the artists, visual artists, photographers that I work with are selling works that 50, 60, 70 years old.

30 **MS CARLING-RODGERS:** There are TV commercials at the moment that are using songs that are 50 years old. To suggest that the copyright holder should not be recompensed for that is absolutely absurd, just because it happens to be out of the Top 50.

35 **MS CHESTER:** So maybe just to clarify that point a little bit. So we've looked at the evidence base, which is the statistics that are gathered by the ABS and other analysis that's been done. We're not disputing that there will be outliers, but what we are saying is that if you looked across all the
40 creative works and particularly those of authors, the normal commercial life is about five – the average commercial life is about five to seven years. Then when you look at income streams over time and discount them, the optimal term of protection in terms of the author getting the most from it, would be the 15 to 25 years.

45

MS CARLING-RODGERS: But just - - -

MS CHESTER: Sorry, just - - -

5 **MS CARLING-RODGERS:** But does that matter - - -

10 **MS CHESTER:** Allow me the courtesy of just finishing. That was for us looking at it in terms of what would be optimal if the copyright was to be just purely from the perspective of on average creating an incentive for somebody to undertake that creative endeavour, what would the term be? That's what that finding was about. Separately, we have obligations under our bilateral, plurilateral, and multilateral agreements that are life plus 70 years. So please don't misunderstand a finding from a recommendation. So there's no recommendation to reduce the term of the copyright. It's not possible for the Australian government to contemplate that.

15 **MS CARLING-RODGERS:** Thank you. I do appreciate you saying that. But it is worth mentioning that article 78 in the Berne Convention states that "The copyright law of the country where copyright is claimed shall be applied. It's the law of the shorter term". Now the reason why, in terms of not limiting copyright duration, I want the zombie dead and buried so it never raises its head again.

20 One of the studies cited by the ABC is the Pollock Study of 2007. Now Rufus Pollock is an economist with an agenda. He runs the Open Knowledge Foundation. He has a laudable goal of using advocacy technology in training to unlock information. But he has a particular agenda in mind.

25 Now to suggest that this couldn't become law, I refer to what happened only last year in the UK, the UK Greens Party using Pollock's studies actually had, as part of their policies, to limit copyright duration to 14 years. What could happen in Australia if a political party decided to advocate that is, regardless of what international treaties are in place, because you've got the issue of the rule of the shorter term from the Berne Convention. This is - - -

30 **MR COPPEL:** Which would be 50 years. In our case it's limited to - - -

35 **MS CARLING-RODGERS:** No. That is it unless the legislation of that country otherwise provides the term shall not exceed the term fixed in the country of origin on the work, that is an author is not normally entitled to a longer copyright abroad than at home, even if the laws abroad give a longer term.

45

MR COPPEL: I'm not sure that's correct, but we can certainly look into that. Maybe text that subsequently - - -

5 **MS CARLING-RODGERS:** Yes. That is the Berne Convention article 78.

10 **MS CHESTER:** So the legal advice that we've drawn upon from the Department of Foreign Affairs and Trade previously, and from our understanding of our international treaties and obligations, Berne, TRIPS, and I think there's about another 14 other bi-lateral and multi-lateral treaties as such, that we would need to – it's not possible for the Australian government at this point in time to contemplate any shortening of the copyright term.

15 **MS CARLING-RODGERS:** No, at this point in time is fine. It's future I see this as a zombie raising its head again and again. I think it's important that we express in the strongest terms possible that this is not acceptable to Australia's creators.

20 **MS CHESTER:** So no one is recommending a shortening of the term.

MS SMITH: No.

25 **MS CHESTER:** We've identified the obstacles to doing it.

MS SMITH: That's fine. But I, myself, would like to - - -

30 **MS CHESTER:** I think it would be better if – maybe if got into other issues that you've raised that we might get a more fruitful discussion from.

MS SMITH: Yes.

35 **MS BONGERS:** May I ask a quick question? Would you like me to read Isobelle Carmody's statement now before we get - - -

MR COPPEL: Sorry, yes.

40 **MS CHESTER:** Yes, please. We were very disappointed to hear that Isobelle was not well enough to join us today.

MS CARLING-RODGERS: She was very disappointed. She has suspected whooping cough.

MS CHESTER: We're hoping she might be – well, hopefully not. But if she's well enough she might be able to appear at our Sydney hearings. We've offered that to her next week.

5 **MS BONGERS:** Excellent. Also if you had questions for her, she said I could phone her and relay any questions you have.

MS CHESTER: Okay. Thank you very much.

10 **MS BONGERS:** Would you like me to read it out?

MS CHESTER: Yes, that would be great, thanks.

15 **MS BONGERS:** “My name is Isobelle Carmody. I'm 58 years old. I have written more than 30 books and many short stories, largely published for children, young adults, but also for adults. I wrote my first book in 1972 Obernewtyn when I was 14 years old, which was published in my 20s. I've been published for over three decades. Everything I've written is still in print. I've written for long enough that many of those who

20 started reading me when I was first published are now mothers and fathers, aunts and uncles, even grandparents, many of whom still read my books and a good many of whom give them and read them to their children and grandchildren. This is what it is to be a children's author.

25 There's a remarkable longevity in it because an adult who loves a book as a child does not forget that book as they may forget an adult book they read last year. They cherish the books they read as children and young adults as part of their childhood and in time pass them on to their own children and share that love with them. Presumably, some of the

30 Productivity Commission have children and it may be that they were read to as children and read to their own children. I certainly hope so.

35 Did you think of the part we played in your childhood and that of your children's childhoods when you drafted your recommendations for changes to intellectual property arrangements? Do you think how your recommendations would affect us, the creators, and our work past and future?

40 Mr Hocking directed you to consider whether current arrangements provided an appropriate balance between access to ideas and products and encouraging innovation and investment in the production of creative works. You were to consider such matters as Australia's trade obligations, the relative contribution of intellectual property to the Australian economy, and you were to recommend changes to the current

45 system that would improve the overall wellbeing of Australian society.

5 Did it ever trouble you that the copyrights held by authors and illustrators were lumped in with the rights of the holders of industrial patents, trademarks, registered designs, plant breeders' rights and circuit board rights? Did it never strike you that this might not be appropriate and that your document might say so?

10 You came up with two recommendations that I'd like to protest and argue against. You recommended that Australia scrap parallel import protections and, in the now infamous clause 4.2, you suggested doing what no signatory to the Berne Convention has done not just cutting the length of the copyright term, you suggest cutting it to 15 to 20 years after creation, not after my death.

15 Do you understand that your clause means you are suggesting cutting off my ability to earn from an original piece of work that you did nothing to aide, promote or produce, and what is my living and the sole support of my partner and daughter since I am the only breadwinner in my family? I do not like to talk about money. We've had a few tough years because I
20 was finishing the last in a seven book series I began at 14 years of age, because one fact of being a full time writer is that when I don't publish, I don't earn. But I've always taken the time I needed to do the best I can, despite the pressure from readers, my publishers, and the people to whom I owe money.

25 Do you understand that by recommending a reduction to the length of time I can own my work, you are effectively forcing me to write an entire series within your timeframe, rather than the one that will produce the best creative work? In that way, you are directly impacting on my creative
30 choices. Your recommendation should reflect that fact.

35 Do you see how your statement, 'The commercial life of most works is less than five years' does not fit my work? In fact, it does not fit the way in which children's books and books for young adults are published and sell year after year, generation after generation. Nor does it fit any classic book that continues to sell.

40 Your statement encompasses only airport novels that sell off the frontline and then cease to sell, or books that are not successful commercial for one reason or another. That's not most books. Certainly, it's not my books. My books have had a commercial life of three decades and counting. I would like you to correct your draft to include an acceptance of the damage you will do to me as a writer of books for
45 children and young adults and suggest the compensation you will pay me for my loss of projected income.

5 Your recommendations will not only impact on my ability to support my family, but my ability to write. I am a full time writer. If I cannot earn a living by writing then I must do so in some other way, if indeed that is possible for someone who has spent their entire life in one career. If I get a job working at something other than writing then I will write less, if at all. That does not increase my wellbeing and it might well be that several hundred thousand who've read my books over two generations would not feel this would improve their wellbeing either.

10 I request that your productivity report note the loss of future books I might write. To use your terminology, if you keep your recommendations as they are then I wish you to acknowledge the damage you would do to my productivity and I would like to know what it is that Australia will gain by doing so.

20 In addition, your Commission statement says that evidence suggests much of the returns from copyright protected works are earned by intermediaries rather than authors. That may be so. But over my life as a writer, save for the last few years, I've earned a great deal of money. My last six monthly royalty cheque was not small, 40,000 of it was for my backlist, including three books that I would not now own were your recommendations in place."

25 **MS CHESTER:** Christine, I'm sorry to interrupt, just how many more pages are there to go because I'm just conscious we're going to run out of time for questions which - - -

30 **MS BONGERS:** Yes.

MS CHESTER: And we can always take that and have that recorded in the transcript as evidence, if that – I just don't want to run out of time to ask all four of you some questions, that's all.

35 **MS BONGERS:** You can take this and have it included in the transcript.

MS CHESTER: Yes, we can do that.

40 **MR COPPEL:** Can we? It would have to be read into it.

MS CHESTER: We can do that. We'll do that separately later.

MS BONGERS: Okay. Yes, all right then.

MS CHESTER: I just don't want us to run out of time to be able to ask some questions that's all.

5 **MS BONGERS:** I understand. She does go on to make comments about parallel import.

MS CHESTER: Okay, go for it.

10 **MS BONGERS:** You want to hear about that?

MS CHESTER: I give up. I'm not going to fight Isobelle Carmody, even when she's not here.

15 **MR COPPEL:** Pick up from where you left - - -

MS BONGERS: Do you want me to read the whole thing?

MS CHESTER: Yes.

20 **MR COPPEL:** I think you can pick up from where you left - yes.

MS BONGERS: Okay.

25 **MS CHESTER:** Yes, keep going. We might just run a little bit over, folks.

MR COPPEL: Go ahead.

30 **MS BONGERS:** Okay. "While it's true that Penguin Books and Allen, and Unwin and Ford Street Books, and Hachette and Lothian, and all of the publishers that have published over the years and who will publish me in the future, if they survive your recommendations, which means all of the people who work for them too have earned a good deal as well. Perhaps more than me collectively. But how is that a problem to the
35 Australian government or the Australian people? Surely, that's productivity at work. How would cutting off my living address that, if it is a problem?"

40 I would like to take issue with the statement that, few if any creators are motivated by the promise of financial returns long after death. I hope that I've made it clear that I have, and do, make a living out of my writing and I expect to do so despite the vagaries, ups and downs of the market and creative life. Because I can make a living as a writer, I can go on
45 writing my books, hopefully until I die.

5 A good portion of my income, and the income of any long time writer is their backlist. A good writer is a writer with a strong backlist of books that continues to sell because it supports you while you write. Let me tell you sincerely that I've seldom met a writer who was not striving to be a full time writer to build a backlist that would enable them to write full time. In fact, every writer is surely motivated by the hope they will be able to make a living from their writing.

10 As to earnings after my death, I have a daughter and the only thing I will be able to leave to her is ownership and guardianship of my body of work, unless this Commission's recommendations ensure I have nothing to leave to her.

15 Frankly, most writers sacrifice the security of health care and superannuation and a job with benefits, for writing and filling in the gaps by teaching, speaking, editing or doing any part time job. Your report presumes people willing to work for nothing don't want payment. It ignores the reality that working for nothing is sometimes a necessary hardship on the road to actually making a living. If your clause 4.2 is taking up, you will end the dream and hope of almost every writer in this country to be a full time writer. You will make a nonsense of their sacrifices and the sacrifice of their families until now.

25 What of the movies and telly series and plays and animations based on my work? Did you consider how your recommendations would impact on my ability to earn money for work based on my work? Last year I signed a contract to allow the Obernewtyn Chronicles to be turned into a television series". She has also signed contracts for rights to her books as movies.

30 "You might wonder why I've spent so much time on clause 4.2 when it appears you may set that aside. That it is still part of the draft requires that it be addressed thoroughly. It's also the product of the same mindset that produced the recommendation to set aside parallel import restrictions. I wonder, as no doubt many other writers have wondered today, why you would suggest setting aside those restrictions giving an advantage to the dominant US and UK publishing markets, which they would certainly not give to us. They are not about to set aside their parallel import restrictions, so why should we?

40 Especially, why would we when we have seen the impact exactly this action has had on the New Zealand publishing industry. I toured both islands last year. Book prices have not gone down and the local publishing industry languishes. In preparing for this presentation I used

social media and direct contact to ascertain that my impressions were correct.

5 Since the abandonment of parallel import restrictions there are less
New Zealand publishers, less books by local authors being published and
sold, and books are not cheaper. At least they are but not only because
books everywhere are selling at less today than they were in 2006. As for
books being cheaper following the abandonment of PI restrictions, people
10 have always been able to import cheaper books or to request book stores
do so on their behalf, which enables a book shop to bring in more than one
at a time. Book shops make use of this all the time.

15 I wasn't born with a silver spoon in my mouth. I was the eldest of
eight kids, the eldest daughter of a working class accountant and his
uneducated wife. I knew nothing about publishing when I started to write.
I wrote for myself, for solace, for comfort, for love of words, and most of
all in order to think. My dad died in a car crash when I was 14 and my
mother brought us all up with desperation, optimism and hope on a
widow's pension.

20 I was the first of my family to go to university. Following university I
began work as a journalist. Not long after becoming a journalist, I sent
my first book off to be published. I didn't have an agent. I didn't even
know that such a thing existed. My book was accepted by the first
25 publisher I sent it to. I've never had anything rejected. Penguin published
Obernewtyn, which was shortlisted for Children's Book of the Year, as
was its sequel The Farseekers, which also won two other awards. Others
of my books have been shortlisted for various prizes, twice won Book of
the Year here. This year I was voted Australia's favourite author in a
30 Booktopia Popular Vote.

35 I mention all of this not to admire my own career, but as the
background for a few salient points. I'm an Australian author. My voice
is an Australian voice. I do not write books with gumtrees and
kookaburras in them but, nevertheless, my stories are firmly rooted in this
soil. I have been published overseas but never to the acclaim I have found
here. I have published overseas in translation, and in Britain and the
United States, those great protectorates of their own literature.

40 But while I did well enough, I have always found my greatest
audience here. I have no doubt that had I been forced to send my books to
those overseas addresses all those years ago, I would not have found a
publisher." Sorry. "I have no doubt that had I been forced to send my
books to those overseas addresses that I found in books, when I was trying
45 to decide where to send my first book 30 years ago because there was no

5 local publishing industry, I would not have been accepted. The UK and US only took me on because of how successful my books were here. Because what I have to say with my stories belongs most truly to my own country. The more I have travelled overseas, the more deeply I have understood that.

10 Simply put, your proposal to drop parallel import protections would've ensured that a writer like me was not published here. What publisher would take a risk on such an author unless they were part of a robust industry? Your recommendations will diminish the Australian publishing industry. That is an industry, particularly as far as children's and young adult books go, which is the envy of the English speaking publishing world. Ours is a thriving robust industry which, as well as earning right as a living, sees vigorous cultural exchange between writer's schools, libraries and the community. We need to tell our stories and we need to hear them in order to grow and change and evolve.

15 I'm part of that industry. I'm a full time writer. I make a living out of my writer and I wish to go on doing so. I want to be able to protect my work and pass on the fruit of my labour untarnished to my daughter." Thank you.

MR COPPEL: Thank you.

25 **MS CHESTER:** Thank you.

MR COPPEL: So this may seem a little bit disjointed but, I guess, I want to come back to one of the points that you made at the beginning, Christine, about the work that the Productivity Commission did in 2009 on this topic of parallel import restrictions. You made the point that it's a very different world today. Things have changed from 2009. If you can talk us through the sorts of things that have changed and why they call into question - - -

35 **MS BONGERS:** Well, I mean, the price of books was one of the drivers of that Commission's recommendations back in 2009, I think.

MR COPPEL: Yes.

40 **MS BONGERS:** I put a submission in, I think, January 2009 and one of the overweening drivers was the need to bring down the price of books that it was the only way, so many people argued, to bring down the price of books was to get rid of parallel import restrictions.

Of course, we didn't get rid of parallel import restrictions and the price of books has come down. I suspect it's come down for a lot of reasons, including the internationalisation of the market, the fact that Amazon sells willy-nilly all over the planet. It's forced local booksellers to have to compete bringing down the price of books. I suspect authors have earned a lot less in the intervening seven years.

I know when Isobelle first returned to Australia she said her royalties had never been as low as they were when she came home, and part of that was because authors are paid 10 per cent of the selling price of the book and – less GST. So if your book sells for \$15 instead of 20, you get a small royalty. So there have been a lot of, I suspect, pressures that have brought down the price of books.

It's interesting that that was, I think at the time looking back on that Commission and the response from the public, it was all about the price of books, which have come down. Now it's incredibly cheap to buy a book. Books for young people sell for less than \$20. All of my books sell for between 15 and \$20. It costs \$15 to go to the movies and you can't hand that experience onto someone when you're finished with it.

MR COPPEL: Neither of us were at the Commission at the time, but my understanding from that report is that some of the biggest differences really were relating to books like text books where the price level is also considerably higher to start with. But the point I want to, or the message I wanted to give is that we will be looking at that work and the extent to which some of that analysis can be updated. When we look at these lists of prices, I mean, it's not looking at 15 or 20 books from a particular genre, we'll be looking at literally thousands of titles. It's in that sense that the work was also done in 2009. It's quite a lot of work, so we aren't in a position to know what that update says at this point, but it is something that we're looking at.

MS BONGERS: Thank you.

MS CHESTER: The reason we didn't do that before our draft report was largely our Terms of Reference, which we receive from the government and that's the basis upon which we're meant to undertake our inquiry, was to say – was for us just to look purely at the transitional issues of moving towards removing parallel import restrictions.

It's a little bit difficult by just looking at our Terms of Reference, but they say for us to have regard to the government's response to the Harper Report on competition policy. If you go to government's response to the Harper Report on competition policy it says that parallel import

restrictions will be removed and the Commission will advise the government on transitional issues. So that was very much the focus of our draft report. But as Jonathon's pointed out, we're going to update that analysis we did back in 2009 around prices to take into account that things have changed.

MS BONGERS: It would seem their now main duty would be to lobby the government because they've given you the wrong Terms of Reference. They've given you marching orders that we don't agree with. It's the Terms of Reference - - -

MS CHESTER: I think it's fairly clear that you don't agree with the marching orders. The other thing, just to clarify, so I think one or two of you mentioned earlier on that by removing parallel import restrictions it would preclude you from being able to sell offshore. I just wasn't quite sure how that worked. That's not anything that we've received - - -

MS BONGERS: I think territorial copyright which your territorial rights, your ability to sell your works into other territories is actually bound up with the rules that govern parallel imports, that you can't unpick one without unpicking the other. If you see what I mean?

MS CHESTER: So at the moment US in substance doesn't have parallel import restrictions with the way that the Courts have interpreted the first right of sale, yet Australian authors today can sell and publish into the US markets. So there's other jurisdictions within which Australian authors currently have publishing arrangements and selling to that don't have parallel import restrictions. So I just wasn't sure - it's not something that had come through in our earlier submissions or evidence base - whether there's something that we've misunderstood or - - -

MS CARLING-RODGERS: I think I might be able to provide a clarification there. When an author signs a contract they sign a contract for a particular territory. They can sell the same book - I mean, for instance, they may have a Commonwealth right which would, say, preclude the US. They may choose to sell that title into the US separately through a different agent, indeed through a different publisher. I think the concern is that if you have somebody who has, say, not included Australia as part of the territory because, for some reason, they wish to negotiate that separately, the removal of parallel imports means that the ability to strategically put together a jigsaw of rights to maximise sale opportunities becomes lost to authors.

MS CHESTER: Okay. So I think I now better understand what you're saying. So it doesn't preclude anybody from exporting or having a

publishing arrangement offshore, it just changes the strategic dynamic to what they can and cannot do in terms of if they wanted to completely avoid the risk of a parallel import of their book coming from another country.

5

MS CARLING-RODGERS: Yes.

MS CHESTER: Okay. No that's fine. Thank you.

10 **MS SMITH:** I think it's also about economy. Speaking from someone who's working in the music industry for some time, someone like Bernard Fanning, for example, from Powderfinger is signed to Universal in Australia. He's signed to a totally different label in the US because they gave him a better deal. So it's about economy as well. He has that right
15 because he signed a territorial agreement in Australia, that's for Australia only.

Now the US might say "There's no market for you here". So Universal in the US might say "Well there's no market", and that – this
20 has happened in the music industry since time immemorial and "We will not" – "We have no obligation, even though we're a global company to release your products". That then leaves that author, if you like, that writer, the ability to make a deal in different territories with different companies.

25

MS CHESTER: Okay.

MR COPPEL: Yes.

30 **MS CHESTER:** We might move to fair dealing and fair use, and similar to our recommendations on copyright, I think that's been subject to a little bit of fictional reporting in the media. But I like good fiction. So what we're trying to achieve with moving from fair dealing to fair use, is just really putting technological adaptation within the legal system. So when
35 technologies change and the way people access things differently, the laws can keep up with it.

It's not dissimilar to what countries, including Australia, have done with Australian consumer law. Australian consumer law today is not,
40 "This is right, this is wrong" in a very highly prescriptive sense. It's the principles and then allow to interpret the principles in terms of how different business models might emerge that could effectively, rip off consumers.

I guess what I'm trying to understand is what's behind your concerns if you had a book that was commercially available, why would there be a difference in the royalties that you would receive under fair use versus fair dealing?

5

MS BONGERS: From what I've read it actually – a lot of the copying is done by large organisations, educational institutions, and they pay in Australia for copying your work. For example, my books are studied in schools and so schools will copy sections of the page and they pay a copyright fee which comes back to the creator, whereas I understand where the fair – American fair use system has actually – I think it was Canada, wasn't it, when they moved to that system they stripped about \$30 million from the creators where that money didn't go back to the creators.

10

15

MR COPPEL: Canada still had the fair dealing system, but they removed the educational licence.

MS BONGERS: That's right. So that they don't pay that.

20

MR COPPEL: Australia still has an educational licence and we're not suggesting any change to the educational licence.

MS BONGERS: You're not looking at interfering with that?

25

MS CHESTER: No.

MR COPPEL: But under fair use there may be areas that are currently paid for under the educational licence that may be considered fair use, and that could have, therefore, an impact on the payments under that – well, the negotiations for that - - -

30

MS BONGERS: I must admit it's very concerning, I think, to all writers that the onus would be on them to prove that it had been excessive copying of their work, and that the recourse in the States is to go through the Court system and they're a much more litigious society than we are. I think it would be a mistake for Australia to go down that more litigious route to prove that someone is unfairly copying your work. The onus is on you to prove it.

35

40

MS CHESTER: So I think a couple of things, so CAL will still be here, educational licences will still be here. So that sort of infrastructure and support for monitoring usage will still occur. One point to note the difference between – even if we were to adopt fair use in Australia versus the US - our different legal system and how costs are awarded are such

45

that we are structurally lower in a litigious sense than the US. The other thing that's interesting that we got a lot of evidence from - - -

5 **MS BONGERS:** I think, to be fair, very few Australian writers could even afford to go and get legal advice on what they should do, to be perfectly honest that any legal costs would be beyond them. Generally speaking, they're poorly paid.

10 **MS CHESTER:** No, so I understand what you're saying. I guess I'm just trying to explain. There's been a lot of things purported in the media about fair use that either would not translate to Australia or have, sort of, been misunderstood in terms of how it's operated in other countries.

15 **MS BONGERS:** Perhaps, if you say it would be different here then the onus would be on the Commission to explain what system they're talking about bringing in. Is it the American style system and all that entails or not?

20 **MS CHESTER:** So what I'm saying is it's not a pure transplant of the US system. US has a different legal system. It has a different way of awarding costs than we do in Australia, which means that costs can be awarded here which is a dis-incentive to be litigious and to go to Court. That's not the case in the US. So there are things about the US legal system that wouldn't automatically translate to Australia.

25
30
35
There are some good things that we can draw from the US legal system, their jurisprudence about how fair use principles would be interpreted. That would help deal with uncertainty in the transition arrangements for a fair use system. Also, the industry has really risen to the fore in the US a lot of legal practitioners in the copyright area have given a lot of guidance to schools and to other third party users as to really tangible examples of what's fair use and what's not fair use, so they've got a better guide of what's right and what's wrong in terms of what they still need to continue to pay for. Noting though that here we still have licensing arrangements and we're not recommending any changes to those.

40 **MS BONGERS:** I mean, obviously, we need to understand better what those – what the – what use as there's been incorrect reporting in the media.

MS CHESTER: There's a whole chapter to it.

45 **MS BONGERS:** But you see it's very difficult to know exactly what the impacts will be, and they need to be spelt out.

MS CHESTER: Yes. No, understood.

5 **MS SMITH:** I think it's also about the users that are not schools and not legitimate users. So I would spend probably a day a month scrolling through mostly Amazon and (inaudible) looking for bootlegged products of my husband's that we then report to the publisher and the record company. The laws are clear, it's like they're bootlegged, they're illegal, take them down. Get rid of them. In some cases they can, in some cases
10 they don't take legal action depending on if they nip it in the bud. We call it whack-a-mole, that's what it's called.

MS CARLING-RODGERS: I've given up trying to put a cease and desist on pirates. All of my titles have been pirated. My publisher is too
15 small to take any legal action against them. Often they're out of the United States, Russian, Germany, the Eastern Bloc countries. I've just got to wear any loss.

MR COPPEL: Are they paper copies, printed copies or electronic
20 copies?

MS CARLING-RODGERS: No, eBooks.

MR COPPEL: eBooks?
25

MS SMITH: And in our cases they're actually vinyl and CDs so they're actual physical copies. I can tell you that in the last, say, three months I have had about eight people that I know say, "Look at the vinyl I bought", you know, "Will he sign it?" And it's like, "No, because it's illegal and
30 we lose money from that".

MS CHESTER: Andrea, you raised an issue earlier that was quite important around photos.

35 **MS SMITH:** Yes.

MS CHESTER: And it's one of the areas that we did focus on in our report. It's the classic long tale of high volume, potentially low value work, which people just click and save it off the internet and use it. A lot
40 of the consumer survey suggested that people would be happy to do the right thing but they can't find the owner of the photograph. Sorry, I'll get to the question.

45 We did point to a development that's occurring in Europe with the UK Copyright Hub where they're looking at, effectively, pulling together

a digitised library and embedding photographs with a unique identifier and then it's, "Right click buy \$5" done and dusted. I can use that in my PowerPoint presentation. I've respected the copyright of the photographer and I've done the right thing. But my transaction costs were not high. Is that a development that you're aware of, and do you think there's potential for that?

MS SMITH: Definitely. But really that already exists. I subscribe to two. I'm also the president of a not-for-profit peak body arts group in my local area. On behalf of them I subscribe to two Clipart, if you like, websites that we use that work, and that's photographs, illustrations, vectors, that we significantly change but we're using in products like brochures. For example, we've just produced a brochure where we absolutely cannot afford to take – get photographers to take photos every time we do something, so we subscribe to those photo websites. We pay about 100 to \$200 a year depending on which site, and we can use their fonts, illustrations, photos. So they already exist and they work.

MS CARLING-RODGERS: Yes. The general public doesn't even need to go that far when they do a Google image search all they have to do is click under "More". They'll find a dropdown tab that looks at right and if you have – I've forgotten the wording of that. They can actually choose work that the copyright holder has said, "Yes, this is free for you to reproduce". It's just that, essentially, people are lazy and they don't want - - -

MS SMITH: I think there's a misnomer about the words "public domain" that people – and this is what I found in my advocacy role that I'm constantly educating people that "public domain" doesn't mean it's on the internet so it's free.

MR COPPEL: Did you say this is Google images?

MS CARLING-RODGERS: Yes.

MR COPPEL: Because the Copyright Hub did something very similar and it's a response to – for some reason images are uploaded the – some of the metadata is stripped out, which is the key of identifying the owner. The Copyright Hub puts it back.

MS CARLING-RODGERS: It sounds like the wheel is being reinvented here - - -

MR COPPEL: It's moving.

5 **MS CARLING-RODGERS:** - - - because you already have created comments where creators can choose what level of copyright protection that they wish for their work. I know from updating websites and producing brochures, back in my agency days, if I didn't take the photograph myself or use a stock photograph library for which I paid a licence fee, I could go to Google, check the appropriate license on the image. It would display only those images that carry that. Pixabay is one that has free use of its images. So I don't see a need to have anything particularly special.

10 **MS SMITH:** I think it's more about education because it's not only photographs, it's blog posts, it's writing on the internet, it's music, it's everything.

15 **MS CARLING-RODGERS:** Heavens above, the one client that we had – I did some work for their staff decided, “Well, we need to illustrate the ingredients. We'll just take images from Google”, and one of them was a Getty image. Of course, they enforce their copyright very assiduously. I had to go through 200 separate images to make and strip them all out of
20 this client's website and make sure the images that I re-used in their place either had the copyright licence in place or were demonstrably copyright free and available to use.

25 **MS SMITH:** I think, it's an interesting point to make that, as I mentioned the song, “Because I Love You” has been used a lot over the last 20 years, last year or the year before we just had a usage in the US for a QuickBooks ad so it's quite significant. It was, I think, all over the US. I probably had 15 to 20 people either ring or email or Facebook and say -
30 either US friends or people visiting, “Did you know this is being used and illegally?” So they don't understand about licensing and royalties and illegal uses of music. Again, in the last couple of years the same song has been in two movies and we had the same level of contacts from people.

35 So, I think, it's more about educating the public than – and changing words. So when people use the word “public domain” about Clipart I say, “No, it's royalty-free Clipart. The word ‘public domain’ doesn't come into play”.

40 **MS CHESTER:** They're all the questions that we had this afternoon. So thank you all for being able to come in. Thank you for your written submissions.

MS BONGERS: Thank you.

MS CHESTER: Please pass on our best wishes to Isobelle. I hope she recovers soon because I'm sure she'd love to talk to us in person on a day in Sydney.

5 **MS BONGERS:** Yes, I'm sure she would.

MS CHESTER: I think one of the neat things that we have at the Commission with our public hearings is really to get out to speak to all stakeholders, it's not just the representative groups, it's also the authors and individuals that can - - -

MS BONGERS: Thank you for coming to Brisbane.

15 **MS CHESTER:** So we appreciate you coming along and your written submissions.

MS SMITH: Yes, thank you.

20 **MS CHESTER:** Thank you.

MS CARLING-RODGERS: Thank you.

25 **MR COPPEL:** Thank you. So, ladies and gentlemen, that concludes today's scheduled proceedings. For the record, is there anyone else who wants to appear before the Commission today?

MS BEHAN: I just want to make the comment about - - -

30 **MS CHESTER:** Sorry, if you want to be on the transcript you have to come up.

MS BEHAN: Yes. This is very, very brief. I can't really speak to money and authors. Forgive me for that. But there was discussion of fair dealing and fair use - - -

35 **MS CHESTER:** Sorry, could you just repeat your name for the transcript? Thank you.

40 **MS BEHAN:** Okay. My name's Angeline Behan. I'm the chair of the Queensland Law Society Technology Intellectual Property Committee. Some years ago there was an ACIP report about – it covered a few – several things including changing from fair dealing to fair use.

45 I think there's one thing that really needs to be pointed out that is a concern and it's from a legalistic perspective rather than a – the comments

5 you made about in Australia we're not as litigious and there's an urge to settle so money is – monetary issues may not be so much the problem. I think the real concern is that these matters can get tied up in the Courts for an exceptionally long period of time. From a legalistic perspective that creates uncertainty. As it's been established, there are conflicting decisions in many areas of copyright law in the States so that causes problems.

10 If you're going to bring in jurisprudence from the States to assist in the introduction of fair use in Australia, how are you going to choose what you bring in, and how is it literally going to mesh with the Australia system which, as you pointed out, is different from the American system of law? Not greatly, but there is a difference. So these are things that are of concern from an operational perspective.

15 Also, there's a sad truth to this, in many instances when it's a case of might versus right, might will win. There are people with lots of money behind them and they can just continue to bring in people to draw it out until the other party says "I can't afford to do this anymore".

20 **MS CHESTER:** So I think we mentioned earlier this morning that in addition to having our public hearings we also have round tables. We had a very substantive round table in Sydney last week on fair use versus fair dealing. Leading up to that we also had the benefit of meeting with and speaking with the people involved in the ACIP Report, the people involved in the ALRC Report, and we got a large number of submissions.

25 So one of the key issues in our report was looking at the issue of uncertainty in fair dealing and uncertainty in fair use and looking at what's happened in other countries like Israel, South Korea and others that have rolled out a fair use system. So these are not issues – these are issues that we're going into in great depth and leverage on the work and expertise, including of the legal practitioners. So I hope you didn't misinterpret my comments this afternoon to suggest otherwise. But anyway, I hope that's helpful. There is an entire chapter in our report on this, if you'd like to have a read.

30 **MS BEHAN:** I was just concerned about your comments about Australia being more inclined to settle and there is the encouragement there is to settle. My concern was that that shouldn't be a focus when you've got these clear issues in the States.

MS CHESTER: Maybe you misinterpreted what I said.

45 **MS BEHAN:** I may have.

5 **MS CHESTER:** I just said that the way that our costs are awarded in Australia versus the US, we'd received evidence to suggest that Australia, at the margin, is less litigious than the US where people point to the fair use system and Court proceedings there, that it may not be a strict parallel for comparison to Australia. But please have a read of the chapter, I think it would be a lot more eloquent and elegant than I am at explaining these things. Much better written.

10 **MS BEHAN:** Okay. Thanks.

MS CHESTER: Okay, thank you.

15 **MR COPPEL:** Thank you. Is there anyone else who would like to appear before the Commission before we – thank you.

20 **MS STAGER:** Hi. My name's Fiona Stager. I'm from Avid Reader Bookshop here in Brisbane. I was president of the Australian Booksellers Association in 2009 when the changes were made, and I was supportive then of changes to the 30-90 rule. I just want to say I think the 14 day rule is working really well. I think the publishers have become much more price sensitive and they've certainly been much more proactive in international simultaneous publication.

25 I think, especially for my customers, that's really important. My customers are online. They know which books are being published where in the world and they want to be able to access those books in a timely way. I think the publishers have made great improvements in that.

30 I think, as I said, prices have come down and, very importantly, books are arriving in a really timely way. I think publishers have continued to invest in Australian writing and authors and that's very important for our business. Like Bill was saying, publishers invest in bringing authors into Australia to talk, to participate in writer's festival. We all know how
35 important that is and how it really furthers the debate.

40 So I think a lot of today's focus has been on Australian writing, which is really important, but at the same time a large number of our customers are reading books published overseas and wanting to engage in international debates. I think that's really important.

45 I think the other thing to remember in terms of pricing, it's much more expensive to do business here in Australia. The wages are much higher than in the US, much, much higher. An average bookseller in the US would be on 9 to \$11 an hour, that's a senior bookseller, while I'm

paying much, much more than that. I'm paying more than twice that. There's also the tyranny of distance that publishers have to deal with, getting books around such a large country is much more expensive than in the US.

5

I think some of the things that we really need to consider is what kind of society we want to live in, and how much we want to pay people, and we need to have a certain amount of money to be able to afford those wages. Thank you.

10

MR COPPEL: Thank you.

MS CHESTER: Thank you.

15

MR COPPEL: Is there anyone else who would like to appear before the Commission? If not, I adjourn these proceedings. That concludes the Commission public hearing for the IP arrangements inquiry for today. We'll be reconvening tomorrow morning, I think, at 8 o'clock in Sydney. Thank you very much.

20

**MATTER ADJOURNED AT 4.25 PM UNTIL
TUESDAY, 21 JUNE 2016 AT 8.00 AM**