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
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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.

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 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.

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 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.

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 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.

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 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.

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.

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.

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.

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.

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

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.

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.

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.

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?

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.

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.

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.

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.

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.

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.

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?

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.

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.

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.

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

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.

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 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.

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 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.

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.

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.

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.

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.

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.

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 that US law

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

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.

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.

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 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 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 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.

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 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?

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

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.

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 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.

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.

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

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.

MS CHESTER: Thank you.

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?

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, 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 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 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 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.

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

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 at this stage.

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?

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 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 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.

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 extension of existing policy that publicly funding material be openly available.

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 Welcome Trust, they all have open licensing requirements for their research.

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 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 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 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.

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 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, 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. 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 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 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 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.

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.

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

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

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 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.

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?

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 form of copyright and against the fair remuneration of creators.

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 inherently a risky business.

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.

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.

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.

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.

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.

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.

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.

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.

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 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 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 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.

(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 nimble.

(5) The Australian dollar hit parity with the US dollar around 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 advantages, Australian publishers and booksellers are striving to compete on price.

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.

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.

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.

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.

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.

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.

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 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 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 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 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 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 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 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 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 or 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 of 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 or 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

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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 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."

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 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.

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 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.

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, 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.

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 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. 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 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 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 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 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 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 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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 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, 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 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 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.

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 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 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 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.

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?

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.

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.

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.

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 - - -

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

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

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.

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.

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.

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.

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 - - -

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.

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?

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. 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.

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 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 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 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 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.

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 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 - 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.

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.

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.

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.

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

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."

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

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.

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 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.

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

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.

MS CHESTER: Thank you.

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.

MS CHESTER: Yes.

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.

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.

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.

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.

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.

MS CHESTER: Thank you.

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.

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 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.

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 there are coffee facilities just outside. Thank you.

ADJOURNED **[10.45 am]**

RESUMED **[11.00 am]**

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.

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).

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.

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.

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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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

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.

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.

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 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.

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.

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 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.

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 books.

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.

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.

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).

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.

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.

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.

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.

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.

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 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 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 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 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 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 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 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.

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 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 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 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, 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 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 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.

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 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.

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.

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?

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.

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.

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

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

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?

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.

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.

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.

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 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 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 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 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 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 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 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 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.

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?

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 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.

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 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.

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 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 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.

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.

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 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.

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.

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.

DR RIMMER: Thank you kindly.

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

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.

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 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.

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.

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 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.

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 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.

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 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.

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, 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.

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.

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.

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.

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

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

MS SUNDE: Hello. Thank you for having me.

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

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 writers centre.

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.

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 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.

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.

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 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.

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 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 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 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."

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.

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 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.

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 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 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 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.

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 up and the draft report states this on page 99 where is 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.

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 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.

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 of PIRs in New Zealand.

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 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 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, 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 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.

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 for your time.

MR COPPEL: Thank you.

MS SUNDE: Sorry, it took so long.

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.

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?

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.

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.

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.

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.

MS SUNDE: Yes.

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 - - -

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.

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 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.

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.

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.

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 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.

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 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 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 - - -

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 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 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 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.

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 - - -

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.

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.

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 subsided 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.

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.

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 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.

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

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

MS GWYTHER: 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 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 - - -

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

MS GWYTHER: 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 people. They are not taking on as many new people, the publishers there.

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

MS GWYTHER: 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 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 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.

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?

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

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

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.

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

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

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 - - -

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.

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.

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 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 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 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 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.

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.

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 drive-ins. It is an industry that is constantly innovating whether through technology, design or service.

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 converting to small restaurants, wider food offerings and healthier options.

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.

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 generate ancillary sales.

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.

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 - - -

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.

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?

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.

MR COPPEL: Which legislation?

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

MR COPPEL: Site-blocking?

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.

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

MR HAWKINS: Yes.

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.

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

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.

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.

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.

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.

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?

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.

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.

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?

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.

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

MR HAWKINS: That's right.

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.

MR HAWKINS: Yes.

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.

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.

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.

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.

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?

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.

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

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

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?

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.

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.

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.

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

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.

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.

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.

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.

MR HAWKINS: Yes.

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?

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 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 localisation to what Australian film goers 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.

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 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.

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

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

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.

MR HAWKINS: Yes.

MR COPPEL: Can you explain a little then, what you see as the 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 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.

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.

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.

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.

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?

MS CHESTER: Yes.

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

MS CHESTER: Thank you, Michael.

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.

LUNCHEON ADJOURNMENT **[12.48 pm]**

RESUMED **[1.56 pm]**

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

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.

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.

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.

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.

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.

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

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

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 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 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 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 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 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.

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 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, considering the number of defensive trademarks on the register.

MS CHESTER: Thank you very much for those opening remarks, Angeline, 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.

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?

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.

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.

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?

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 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 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.

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?

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 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?

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 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

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.

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, 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.

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.

MS BEHAN: To establish, yes.

MS CHESTER: Okay, all right.

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.

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

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.

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.

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

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

MR COPPEL: - - - as an energy drink.

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

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

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 ATMOS, and it just didn't get up.

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 his job or her job, would say, "You don't have enough."

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 certain situations.

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.

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.

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.

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?

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.

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 - - -

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 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.

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 the third one was Red Bull, so clearly indicating, again, their strong use of defensive trademarks.

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 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."

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. 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 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? 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?

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 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.

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 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.

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. 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.

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.

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.

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, owing 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 complete 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 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 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 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 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 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 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 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 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.

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 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.

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 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.

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 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.

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 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 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.

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.

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? 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 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.

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.

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 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 at great risk.

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.

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.

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.

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.

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

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

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 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 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 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 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 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.

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?

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 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 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, 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 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. 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, and look what they did.

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

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?

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, that'd be a new author or a new title by an author we had before, and take

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.

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 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 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 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 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 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 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 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 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 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.

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.

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.

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?

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.

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

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 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.

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.

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 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 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.

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 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 that?

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.

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.

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

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.

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

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 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 personal statement, thank you.

MR COPPEL: Thank you.

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.

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.

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 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 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 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.

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.

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.

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 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 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.

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 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 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.

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 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 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 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 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, 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 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 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 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 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.

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

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

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.

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 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.

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 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 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.

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 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.

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".

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.

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?

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.

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.

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.

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 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.

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 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 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 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, 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 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.

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.

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.

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 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.

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 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.

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.

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 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.

MS CARLING-RODGERS: But just - - -

MS CHESTER: Sorry, just - - -

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

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.

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.

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.

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 - - -

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

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.

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

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

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.

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.

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

MS SMITH: No.

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

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

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.

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.

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.

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.

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

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

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 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.

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 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.

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?

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 system that would improve the overall wellbeing of Australian society.

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?

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.

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 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.

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 choices. Your recommendation should reflect that fact.

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.

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 children and young adults and suggest the compensation you will pay me for my loss of projected income.

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.

I request that your productivity report note the loss of future books I might writer. 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.

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."

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 - - -

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.

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

MS CHESTER: Yes, we can do that.

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.

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

MS CHESTER: Okay, go for it.

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.

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

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

MS CHESTER: Yes.

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

MS BONGERS: Okay.

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

MR COPPEL: Go ahead.

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 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?

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 writing my books, hopefully until I die.

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.

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.

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.

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.

"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?

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.

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 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.

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.

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 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 Booktopia Popular Vote.

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.

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 to decide where to send my first book 30 years ago because there was no

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.

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.

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.

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 - - -

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.

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 earnt 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.

MS CARLING-RODGERS: Yes.

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

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 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 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.

MS CHESTER: Okay.

MR COPPEL: Yes.

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 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, "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?

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.

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.

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?

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 - - -

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.

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 be 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

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 - - -

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.

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.

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?

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.

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.

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.

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.

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 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 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 copies?

MS CARLING-RODGERS: No, eBooks.

MR COPPEL: EBooks?

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 we lose money from that".

MS CHESTER: Andrea, you raised an issue earlier that was quite important around photos.

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 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.

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.

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.

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.

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 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.

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 - 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.

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".

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.

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.

MS CHESTER: So we appreciate you coming along and your written submissions.

MS SMITH: Yes, thank you.

MS CHESTER: Thank you.

MS CARLING-RODGERS: Thank you.

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 - - -

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 - - -

MS CHESTER: Sorry, could you just repeat your name for the transcript? Thank you.

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.

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

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.

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.

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".

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.

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.

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.

MS BEHAN: I may have.

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.

MS BEHAN: Okay. Thanks.

MS CHESTER: Okay, thank you.

MR COPPEL: Thank you. Is there anyone else who would like to appear before the Commission before we – thank you.

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.

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.

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 important that is and how it really furthers the debate.

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.

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.

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.

MR COPPEL: Thank you.

MS CHESTER: Thank you.

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.

MATTER ADJOURNED AT 4.25 PM UNTIL
TUESDAY, 21 JUNE 2016 AT 8.00 AM

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 SMC CONFERENCE & FUNCTION CENTRE, SYDNEY
ON TUESDAY, 21 JUNE 2016 AT 9.05 AM

INDEX

RESUMED **[9.05 am]**

MS CHESTER: Good morning and welcome to the public hearings for the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements. My name is Karen Chester. I'm the Deputy Chair of the Productivity Commission and I'm one of the Commissioners on this inquiry. I'm joined by my fellow Commissioner colleague, Jonathan Coppel.

The inquiry for this reference we received from the Australian Government in August 2015 and the government asked us to examine Australia's intellectual property arrangements, including their effect on investment, competition, trade, innovation and consumer welfare. Since that time we've consulted widely. We released an issues paper in early October 2015 and we've talked to a range of organisations and individuals with an interest in the issues. We've held a number of roundtables involving groups of interested parties to inform the inquiry and we've received well over a hundred submissions before we released our draft report in late April earlier this year.

Our draft report included draft recommendations, draft findings and a number of information requests. We've received a large number of submissions in response, with a total number of submissions now well over 500. We're very grateful to all the organisations and individuals that have taken the time to prepare submissions, to meet with us, to participate in roundtables and to attend today's hearings.

The purpose of the hearings is really to provide an opportunity for interested parties to provide comments and feedback to us on our draft report. People like to tell us what we got right, what we got wrong and what we may have missed altogether. We kicked off hearings yesterday in Brisbane where we heard from over 20 folk ranging from authors, publishers, booksellers, academics. Today we look forward to hearing from another diverse range of interested parties.

The final report will be handed to the Australian Government later this year. But before that time we'll be proceeding with hearings both in Canberra, Melbourne and then back in Sydney again on Monday. We will then be working towards completing our report. We like to try to conduct all hearings in a reasonably informal manner, but I do remind participants that a full transcript is being taken and for this reason we can't take comments from the floor. But we will allow at the end of today's hearings and proceedings that if anyone would like to be heard, and if time permits, we'll allow that to happen.

Now, participants are not required to take an oath, but are required under our Act to be just truthful in their remarks. The transcript will be made available to participants and will be available on the Commission's website following the hearings and, as many of you know, submissions are also available on our website. For any media representatives attending today – and I think we may have one or two – some general rules do apply. I think our colleague, Adam, would have given you those rules. So you know how we allow media to participate in our public hearings.

To comply with the requirements of the Commonwealth Occupational Health and Safety Legislation or what might just be good old common sense, in the unlikely event of an emergency and the evacuation of this building is required, exits are just located outside this door and to the left. There's a stairwell. The emergency assembly point is in Hyde Park, which is up on the corner of Liverpool and Elizabeth Street. If you require assistance, please speak to one of our inquiry team members here today.

Now, participants are invited to make some opening remarks and we'd like to keep those to four or five minutes, if possible, because that allows us more time to ask questions. The other thing just worthwhile mentioning is we do allow participants to, in their opening remarks or during their comments today, to also provide any views or comments on submissions that were received from other parties. I'd now like to welcome the first participant, Robyn Ayers and Jennifer Goh, up to the table. Robyn and Jennifer, just for the purposes of the transcript, if you could just take a turn stating your name and the organisation that you represent. Then, when you're comfortable, if you'd just like to make an opening statement. Thanks.

MS AYRES: My name is Robyn Ayres, I'm the Chief Executive Officer of the Arts Law Centre of Australia.

MS GOH: My name is Jennifer Goh, I'm the secondee solicitor at the Arts Law Centre of Australia.

MS AYRES: Thanks very much for the opportunity to discuss our submission here today. We really appreciate it. As you have probably learned from reading our submissions, Arts Law is the national community legal centre for the arts. Our job is to provide legal advice and education and a whole range of resources to artists and arts organisations right around Australia. This includes artists across all art forms. We look at that quite broadly, as well as having a significant service for Aboriginal and Torres Strait Islander artists called Artists in the Black.

Each year we give advice and education to between 4500 and 5000 people. So we have quite a large contact with the Australian arts community. I'd like to take the opportunity today to highlight some of the key issues in the draft report that were of concern to Arts Law, primarily concerns rather than perhaps welcoming some of the proposals. Mainly, the economic framework used by the Commission in its evaluation of Australia's intellectual property system, the lack of consideration given to indigenous cultural and intellectual property throughout the report, the proposed introduction of the US-style fair use exception, and the proposed repeal of parallel import restrictions on books.

In the draft paper the Productivity Commission acknowledged Arts Law's concern expressed in our submission to the Issue Paper that the economic framework might not take into account all the effects on welfare that could stem from changes in the IP system, including the cultural, personal or social values inherent in creation of creative work. The Productivity Commission responded to our concern by asserting that the economic approach proposed does attempt to account for all welfare changes, including those that can be difficult to monetise. And the Productivity Commission noted that the issue was with the empirics and how to value these welfare factors when determining the parameters of the IP system.

With respect, we've seen very little attempt to do that in the draft report. In focusing in the position of Australia as a net importer of intellectual property and the welfare of Australian consumers, there's been no real effort in the draft paper to consider the impact of the proposed reforms in terms of other aspects of community welfare in terms of the interests of Australia's content creators, Australians as consumers of Australian content and the special interest of Aboriginal and Torres Strait Islander artists.

The national interest in encouraging and protecting Australian content is well accepted and has been discussed at length by arts bodies in other submissions. However, we'd like to emphasise again the importance for Australian artists and audiences to be able to tell and hear Australian stories as expressed through art and culture. Having these stories available is crucial to developing a strong evolving Australian identity and protecting this identity to the world. It also has flow-on benefits to Australia's international profile, to tourism and business.

The legitimacy of taking measures to protect Australian cultural content has been affirmed by the UNESCO Convention for the Protection and Promotion of Diversity of Cultural Expressions to which Australia

became a party in 2009. The guiding principles of the Convention importantly provides that, "Since culture is one of the main springs of development, the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy and that states have the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within the territory."

The Convention is the basis for claiming a cultural exception or cultural carve-out in international trade agreements which has been utilised by various countries when negotiating trade agreements, Australia included. Adopting an IP system which fails to recognise special interests is inconsistent with this international position and undermines efforts to protect and nurture a flourishing Australian cultural environment.

Whilst the draft report states that the interests of consumers lie the heart of the Australian copyright system, it appears to ignore the fact that the copyright system is, in fact, based on an international convention that actually has the rights of authors and creators at its heart. Arts Law's submission to the issues paper on the framework used to evaluate the IP system specifically referred to the importance of taking into account the impact of intellectual property on Australia's Aboriginal and Torres Strait Islander creators and communities. These include the special cultural benefits that accrue to these creators and their communities from representing their cultural heritage in all forms of cultural expression as well as the broader cultural and social welfare benefits that accrue to the Australian community as a result of access to the art and culture that indigenous Australians are prepared to share with us.

These concerns have been voiced by the Australian Council for the Arts in its original submissions as well to the issues paper. Despite this, we were concerned to find there was no acknowledgment in the draft report of the relationship between the intellectual property system and Aboriginal and Torres Strait Islander artists and communities generally, nor any consideration of the impact of the specific recommendations on these artists and communities.

Australia's existing copyright system already falls short of its protection of indigenous culture and intellectual property. So we're concerned that a number of the reforms proposed by the Productivity Commission would strip back or threaten indigenous cultural and intellectual property even further. The Productivity Commission's proposal to repeal the current fair dealing exceptions in favour of a broad fair use exception is concerning both in relation to the indigenous community and, more broadly, for the Australian arts community.

There are already significant concerns about the appropriation of Aboriginal and Torres Strait Islander art and cultural expressions without the knowledge or permission of the relevant artist or communities in a way that can be inappropriate, derogatory or offensive. We see the introduction of a broad fair use exception is likely to aggravate this problem even further.

Looking at the arts community more generally, the Productivity Commission suggested introducing a fair use exception will pave the way for greater transformative works such as remixes and mashups. However, it's our experience that while there is some interest within the Australian artistic community in understanding the limits of transformative works, there is no serious demand for an expansion of those limits. Most artists value their own creative work and understand the importance of valuing and respecting that of others.

To the extent there is a demand for a fair use exception for transformative works, this tends to be driven from the social media sector who want to use these works for communicative purposes rather than by the creative community which relies financially on copyright. We'd say there's arguably already scope for transformative works within the existing intellectual property system. Those seeking to create transformative works can always ask for permission of the rights holders, look to use works that are in the public domain, works that are available under a creative common licence, use one of the existing fair dealing exceptions or restrict their use to material which is below the substantiality threshold.

More broadly, we're of the view that the proposed fair use exception would tilt the balance too far in favour of content users. We're particularly concerned that the uncertainty inherent in a broad fair use exception would create a user biased use first, ask later approach to copyright under which users will assume their use of copyright material is fair and others who want to challenge the use of fair material will have to obtain legal advice and prove through litigation that the use is not in fact fair.

The Productivity Commission has suggested the uncertainty could be – first of all, that the uncertainty isn't necessarily a bad thing and that it can be reduced by illustrative examples and the creation of guidelines by drawing on US jurisprudence. With respect, we're doubtful that this would be a sufficient solution. Any use outside the specific examples in the legislation would need to be determined on a case-by-case basis. The US guidelines in themselves are really complex and the case law

developed in the US is in a significantly different environment which includes the first amendment right to free speech and is largely absent moral rights legislation, which we see as being incredibly important to creators in Australia, especially when its limited utility to the Australian courts. For Australian creators to have to pursue a litigation in order to challenge a fair use exception will create just further difficulties for artists already struggling to control unlicensed use of their artwork.

Finally, the proposed repeal of the parallel import restrictions, which have already been discussed in-depth in the media, are also of concern. To summarise the arguments which have been put well by the Australian Copyright Council, numerous publishers and authors who you'll probably hear from today, even if the proposed repeal of the parallel import restriction would have the overall effect of providing cheaper books to the Australian market, this will come at the expense of the reduced viability of the Australian publishing industry, reduced authors' royalties from overseas rights sales and the eventual reduction of diversities in Australian bookstores.

We wish to emphasise our previous argument that intellectual property policy must take into account not only economic imperatives but cultural and social welfare benefits that accrue to the broader Australian community. In this case, this includes considerable and unique benefit that accrues to Australian authors in being able to tell Australian stories, the benefit that accrues to the Australian community being able to access these stories.

The Productivity Commission has suggested that the loss of long-term incentives for Australian authors through the removal of the restrictions could be addressed by direct subsidies and funding for Australian writing. But we think this is totally unrealistic. Reliance on direct subsidies in light of the current government's approach of cuts to direct funding and subsidies to the arts that we've recently seen – in fact, in the last three years $300 million has been cut from the arts budget and the last two rounds from the Australia Council funding has represented a fall of 70 per cent for individual artists and 72 per cent for individual projects. This approach particularly impacts authors who mainly work alone.

Now, our submission dealt with a number of other issues, but these are our primary concerns.

MS CHESTER: Thanks very much, Robyn, for those opening remarks, and also thank you very much for both your initial submission before our draft report and the submission that you gave us after our draft report. I

thought it might be helpful just to make two points of clarification before we get into some questions, if that's okay. I think the first one is there's been a little bit of misreporting about whether or not the Commission recommended a change to copyright term. We didn't make any recommendations with respect to term of copyright. Indeed, we went to great lengths in our report to point out why that's not practicable, given our international bilateral and plurilateral agreements.

The other thing that I just thought might be helpful, it's not straightforward from an initial reading of our Terms of Reference. Our Terms of Reference with regard to parallel import restrictions asked us to conduct our inquiry having regard to the government's response to the Harper Report on competition policy. The government's response to the Harper Report actually said that the government was moving towards removing parallel import restrictions. The purpose of our inquiry, as it relates to parallel import restrictions, was to look at transitional issues. So we'd like to touch on transitional issues around parallel import restriction removals with you shortly.

So I just thought it'd be helpful just to make those two points of clarification. I think it would be good maybe if we do start on parallel imports first. That was discussed at length at our hearings yesterday, as I'm sure you'd appreciate. In looking at the transitional issues, we identified a couple of factors. Firstly, that prices have moved and decreased for Australian books since we last looked at this matter in 2009. The Australian dollar has also moved favourably for Australian local content and Australian publishers. Thirdly, some concerns that had been raised about the dumping of books could be addressed by the robust Australian antidumping arrangements that we have. It would be good to know whether there are other transitional issues that we may not have identified that we should have in our draft report.

MS AYRES: I haven't really got anything to add to that.

MS CHESTER: Okay. The parallel import restrictions that have been in place in Australia now for close to half a century, during that period of time – and we talked a little bit about this yesterday – the Australian publishing and local authors have really experienced a great flourishing in activity compared to where the industry was back in the 50s and 60s where we were effectively importing books from the UK and the US to now a very sort of thriving sector in Australia. So there's obviously other factors at play that underpin the health of the Australian publishing industry today and Australian local authors, Australian independent booksellers, regardless of parallel import restrictions. So it would be good to get your sense of what you think some of those other factors might be.

The reason I ask the question is there's a lot of suggestions of a very pessimistic outlook for Australian publishers and the Australian local authors if parallel import restrictions are removed. Yet with no change to parallel import restrictions we've seen a flourishing of the industry from where it was previously.

MS AYRES: I suppose the concern is if you – I think there's an argument to protect our authors. I just don't understand why we would want to change a system for perhaps getting some cheaper books that might – and we don't know what the impact is going to be on our Australian publishing industry. I'm not sure what your modelling suggests, but I certainly know that authors and publishing and the booksellers are all united that this will have a detrimental effect on the production of Australian books. I suppose our position is that changes to the intellectual property system which are going to likely to have a detrimental effect on Australian authors' incomes aren't in the interests of our writers.

MR COPPEL: On parallel imports, the restrictions on other creative works like music and film have been removed some time ago. Do you see there being a difference then between those forms of creation and books or is this an example that can be looked at in terms of what could be the likely effects of removing parallel import restrictions on books?

MS AYRES: I'm sure that my friends in the music industry and the film industry would be much better placed to answer that. I'm not sure what the impact has been on the film industry. I know there have been some real concerns about the film industry and I know they've suffered fairly badly in terms of government – if we look at government subsidies to industries, certainly the Australian film industry has really been hurt by government subsidies to that industry. I can't answer on behalf of those industries and how they've fared and what sort of difference it has had to their markets for Australian music and film.

MS CHESTER: Earlier on in your opening remarks, Robyn, you talked about our report putting the consumer at the centre of intellectual property arrangements. What we were trying to do with our report, indeed our Terms of Reference asked us, was to balance the interests of the Australian community. So rights holders, consumers, follow-on innovators. In the context of parallel imports, the other area where we've had conflicting evidence is around the role of booksellers, particularly independent booksellers and the role that they play for local authors and local content.

Yet with the parallel import restriction arrangements an individual like myself can go online and get something from the Book Depository with no transportation charges at a cost under what I can get it from my local independent bookseller. Does that not sort of strike you as unfair that we're putting the local booksellers at a disadvantage that they're not able to do so, to be able to sort of compete on an evening footing with myself being able to purchase online now?

MS AYRES: My understanding is the booksellers have actually joined with the publishers and the authors in wanting to protect the Australian book industry and the booksellers see that everybody is really interdependent on each other. So it's important to make sure all those parts are in place. As a young student, I worked for an independent bookseller and I know that was a bit of a struggle for them with the parallel import restrictions. So the fact that they and the industry is mature enough to see how the booksellers as well as the publishers and the authors need to work together I thought was really heartening. So it's not all just about the bottom line, it's about actually the importance of Australian writing for Australia.

MR COPPEL: Can I ask about intellectual property arrangements and indigenous communities, if you could give your views on whether the current arrangements are ones that are appropriate for indigenous communities and how would you - are you envisaging something which would be a specific form of intellectual property? If you could elaborate on some of the issues associated with intellectual property in indigenous communities?

MS AYRES: I could be here all day talking about this particular issue. It's very complex. And Arts Law does a lot of outreach to Aboriginal and Torres Strait Islander communities right around the country and the issue of protection of indigenous intellectual property is something that's really a serious cultural concern for indigenous Australians. The message that I get is that the current arrangements are inadequate to protect indigenous intellectual property. The indigenous people would like to see a stronger regime that actually protects their traditional cultural expressions and their traditional knowledge, which are embodied in work that they create. So it's really looking - it comes at intellectual property from sort of a different perspective and which sort of - and it's very communal in its nature and it has been passed down from generation to generations over thousands of years. So it's not all about individual rights for individual rights holders or creators.

So I suppose the starting point is that the current system is inadequate to meet those needs but community, indigenous creators and

indigenous communities, okay, use what they've got, what's available, but what is of concern is some of the recommendations. One in relation to fair use, secondly in relation to orphan works, and would actually exacerbate the problems that already exist for indigenous creators and communities. So appropriation of culture, appropriation of taking even things that are in the public domain, is of concern to indigenous communities and their artists. So by expanding the uses that could be made of their cultural heritage is really serious.

MR COPPEL: So I think you're making two points; one is the difficulty with enforcement when a creative work has been illegally copied, one which is protected; and the other is that the shifting from fair dealing to a fair use exception would expand the amount of work that could be used without a payment. But can you, I mean, you can design a fair use system to be akin to a fair dealing exception, we've made our fair use recommendation a broader one. It's not a proposition that is new, there have been a number of reports that have proposed fair use. And the more recent one for the Productivity Commission was the Australian Law Reform Council, and their recommendation was designed to be quite similar to the fair dealing exception. With that wording would you have the same point, vis-à-vis an expansion of unremunerated use?

MS AYRES: Yes. I mean, we expressed those same concerns about indigenous intellectual property to the Australian Law Reform Commission as we have expressed to the Productivity Commission. I suppose what is sort of more difficult, or of greater concern, is the expansion of fair use and what could be used. And it's not about payment for most Aboriginal and Torres Strait Islander people, it's about taking it and using it, appropriating their culture without permission, without their involvement. It is seen as abusive.

MR COPPEL: So fair dealing is a set of prescribements(sic) as to what may be, or what is, an exception. Fair use sets out a number of principles. What is it, I'm trying to get at what is it in those principles that leads you to conclude that the actual use that would be unremunerated would be broader than the current arrangement? Because there are many uses that would be - the bulk of uses would still be remunerated use of the fair use exception, it's prescribed by the fairness factors, it's prescribed or guided by illustrative use of - what is it in those that you see as opening the amount of works that would be able to be used without remuneration?

MS AYRES: Well, my understanding of what the Productivity Commission has presented is that in they are anticipating greater access and greater use of material than was - and I'm sure though it's stated in the report that you don't think that the Australian Law Reform Commission

went far enough in providing exceptions for use without permission. And I suppose that any expansion - I mean, if there was something specifically in the principles which actually considered the damage to Aboriginal and Torres Strait Islander artists and communities in Australia then I suppose that would go some way to addressing our concerns but we'd certainly want to see what they look like and how that could be - how that would be applied.

MS CHESTER: So one of the fair use principles does actually consider the impact it would have on - the broader impact that the use would have. Maybe, Robyn, it might be helpful if we go back to what the ALRC recommended because I know that you were involved in that work as well, were there particular examples that you had in mind of moving from the current fair dealing to the ALRC's proposed fair use model, examples of what would be now subject to exception that hadn't been previously under the current arrangements?

MS AYRES: Yes, I was just going to use an example. Looking in America, one of the examples of what was found to be fair use in the US, which has got I suppose some sort of parallel to what I'm talking about, is the Richard Prince, the appropriation artist, who - and I don't know if you're familiar with this example, but he took images from a book that a photographer, Cariou, had published. The photographs, Cariou had spent some time living in a Rastafarian community, establishing a relationship with trust, and these were very beautiful portraits that he had taken of the Rastafarians in the community. Appropriation artist Richard Prince took those, blew them up on to canvasses, added electric guitars in fluro colours, and sold them for tens of thousands of dollars.

So that's exactly the sort of example where if you kind of put an Aboriginal person into the Rastafarian, you interchange them, and look at someone doing that to a work that was created in that sort of context, I can see that's really harmful. It's harmful, one, to Cariou, the photographer who spent the time in taking the beautiful portraits, and secondly, it has a secondary and perhaps even more significant harm to Aboriginal or Torres Strait Islander people who worked with the photographer to create that body of work.

MS CHESTER: You touched on earlier the issue around orphan works and your submission did suggest that it should be established, a clear description if necessary, steps that should be taken to locate and identify a copyright owner. This is one of the areas of the report where we tried to spend a little bit of time coming up with some holistic recommendations, i.e. what the law can do but what we also might need rights holders to do to make the identification of the ultimate rights owner a little more

practicable for follow on users and consumers. Can you just talk us through what you've got in mind there in terms of what you think would be reasonable endeavours from a consumer or a follow on user in terms of identifying the copyright owner, given we have no system of registration for copyright?

MS AYRES: Yes, I think that some of the models that have been put in place overseas in the UK and Canada where they've established processes requiring reasonable searches to be undertaken and then having a database, I mean, obviously having something like Copyright Hub in place would certainly assist with those sorts of endeavours. I certainly haven't worked through a detailed model of how it would work, but I suppose when we look at it from a creator's perspective rather than - and what the creators are going to want to make sure that - and I know the photographers are really concerned about this because it's so easy to strip away the identifying information about them, so that there is a proper process in place to identify if there is an author of the work and who they are and if they can - so I think that's really important.

MR COPPEL: You're a community legal centre that represents the area of arts law and the draft report has a chapter that looks at enforcement issues. We've looked closely at the model used in the UK Intellectual Property Enterprise Court, which is designed to provide greater certainty and lower the cost of bringing cases in the area of, well, intellectual property. Do you have any views on our – well, we haven't actually reached a draft recommendation per se in that area but we think there's merit at least in adopting some of the rules and procedures of the IPEC. That's quite a limited and defined period of discovery, it sets up prescribed costs that can be maximum costs that can be awarded. Do you have any views on that area of the draft report, or, more broadly, on the arrangements that currently exist with respect to your experience with enforcement?

MS AYRES: Yes. I suppose the thing for most of our clients is the difficulty in taking legal action because of the resources that it requires and unless we're able to obtain pro bono assistance for many of most of the artists that we would be providing services to they can't afford to pursue infringement. So we are very interested in low cost models whether it be along the lines of the IP court in the UK or giving - having the Federal Circuit Court with a judge with that specific expertise, but certainly a model which provides greater access for creators than the current system would be something that we'd be really interested in looking at further.

I mean, we haven't really sort of worked through all the different issues because we don't actually have a huge amount of experience with litigation because we can't afford - we haven't got the resources, we're a very small organisation with nine full time staff providing services to the whole of Australia, we don't have the resources to provide that representation. And whilst we get an enormous amount of support from the Australian legal community, an enormous amount of pro bono support, it's a big ask to ask a lawyer or law firm to take on litigation on behalf of a client on a pro bono basis. So it's something that we would look at in more detail if the recommendation is put on the table.

MR COPPEL: Okay, thank you.

MS CHESTER: Robyn, in our report we made reference to some surveys around what actions copyright holders might take when they feel that their copyright has been breached and I was actually quite surprised at what was reported in those surveys, a very low incidence of rights holders even sort of issuing a cease and desist letter, which is what I would have thought would be sort of like a low cost first step. It would be good to get from your experience set, does that align with those surveys that suggest that most copyright holders don't even take that sort of first step of a cease and desist letter, or is that not your experience dealing with the rights holders that come to your centre?

MS AYRES: We don't think about them, really, I suppose as rights holders. I mean, I think it's interesting even the language in the Productivity Commission report. When we see them we're giving advice to creators that's who we advise, and we would certainly be giving them advice around cease and desist letters, in fact we have sample letters that are available for creators to use, both in terms of infringement of their copyright and infringement of their moral rights, which is also a really significant issue for Australian creators.

So that's part of the advice. I mean we would explain the things that they needed to be wary of but that would certainly be a part of the advice that we provide. But I think there's recent work that's been done despite the fact that we reach between four and a half and five thousand people each year, there are a lot of creators, I suppose, who don't have a really good understanding of the legal system and who actually are perhaps hurt by what happens if they discover an infringement, but they don't feel they have the resources to do anything about it.

MS CHESTER: Robyn, thank you very much and thanks, Jennifer, for coming along as well.

MR COPPEL: Thank you.

MS CHESTER: I would like to call our next participants, Lorraine Chiroiu and Rob McInnes from AusBiotech to join us. Good morning, Lorraine and Rob, thank you, for joining us. If you wouldn't mind just stating your name and the organisation that you represent for our recording transcript, and then if you would like to make some opening remarks?

MS CHIROIU: Sure. My name is Lorraine Chiroiu, the Chief Industry Affairs Officer at AusBiotech where I work with biotechnology companies commercialising Australian biomedical research. I support policy settings that help these companies and seek to influence policy that hinders that process. I am accompanied by Mr Rob McInnes who is a partner at DibbsBarker in the Intellectual Property and Technology Services Group and the Life Sciences and Healthcare Group. Rob advises established businesses, start-ups, research organisations and investors on the commercialisation of novel technologies and in the IP related aspects of major projects. Rob is a longstanding member of AusBiotech and sits on its intellectual property expert panel.

AusBiotech provides this evidence in addition to its submission to the Commission on the draft report after also making a submission to the issues paper in November 2015. AusBiotech is a network of over 3000 members in the life sciences area seeking to promote the sustainability and growth of the Australian biotechnology sector. The core of AusBiotech's membership is Australian biotech and medical technology companies working to commercialise biomedical research, which has usually been publically funded in universities and medical research institutes.

The industry consists of about 400 therapeutics companies at this time. In Australia, with few exceptions, these companies are young, small and pre-revenue competing globally for investment dollars which will most likely run into the hundreds of millions of dollars before regulatory approval is achieved, let alone PBS listing. As in many first world countries, in Australia pharmaceutical development is a public/private compact. Typically the research should it show promise as a therapeutic enters a translation process that relies on the attraction of private money. Given no Australian Government has ever brought a product to market public/private compact is activated. The task ahead is to attract hundreds of millions of dollars required over the 10-plus years of the clinical trials and development that it takes to make a therapeutic.

Intellectual property protection obviously is a fundamental source of that value that is used by these companies to attract the investment it takes

to bring these treatments, cures, tests and devices to the patient. It's also important to note that AusBiotech's membership also consists of members across the entire bio technology development ecosystem, including multinational pharmaceutical companies. These companies play a valuable role in the ecosystem in Australia in two key ways; by providing expertise and investing resources in local companies and in local technologies via licensing and partnering arrangements; and by investing in local clinical trials which bolster Australia's clinical trial capability and community and gives Australian patients early access to medicines in development, as well as local jobs.

AusBiotech believes the findings of the Commission in regard to the pharmaceutical patents is at odds with public policy in three key areas; the recent commitment to the $20 billion medical research future fund; the national innovation in science agenda; and the recognition of medical technologies and pharmaceuticals as one of Australia's areas of strength for its future. Therefore the Australian Pharmaceutical Industry has an important role in the transition of the Australian economy as the mining boom fades as we seek to translate our world class research into real value in the form of therapeutics.

Ensuring that Australia has a globally competitive and harmonised IP system that enables development of new biotechnologies is key to Australia's future. Notably there is a vibe throughout the pharmaceutical chapter of the draft report that is negative towards pharmaceutical developers, which we find disappointing. It is also disappointing that many of these recommendations revisit issues that have already been given detailed consideration. Many of these were raised in the period leading up to the implementation of the Raising the Bar Act in 2013. The Act raised the quality of granted patents to more closely align Australian patentability standards with international standards.

It's not clear why the new provisions have not been given time to settle and their impact properly assessed before further changes are considered or recommended. This is especially pertinent in regard to the Commission's recommendation to amend the definition of an inventive step. AusBiotech believes the recommendation that the innovation patent system should be abolished is premature and instead proposes serious consideration be given to improving the system. AusBiotech urges that the patent extension period not be decreased. Extensions to patent life for health technologies like pharmaceuticals are important because the regulatory and reimbursement processes consume many years of patent life. And the period or possible period of that patent influences decisions of and value to investors.

Australia is not an IP island and global harmonisation is not only important but also a sensible approach. The industry in Australia suffers from market failure so far as investment is concerned and it means simply that the usual approach to product development is different in Australia. The real impact of these recommendations is that they're likely to make it harder for local biotech companies to develop and deliver new medicines to patients in Australia and it further challenges the sustainability and growth of the emerging biotech industry here. In short, these changes recommended, albeit unintended, could have a negative impact on social value. Thank you.

MS CHESTER: Thanks, Lorraine, for those opening remarks. One that resonated with me was public policy, and I think the pharmaceutical patents is one of the key areas where we're trying to get the balancing act right from a public policy perspective. The pharmaceutical sector is probably the archetypal sector in terms of where patents make a lot of sense. You've got a large number of the pharmaceutical innovations and inventions do have large upfront sunk costs that do need to be recovered otherwise we're not going to attract financing for that to occur. But we are also mindful that we need to balance the interests of generics coming to market, of cost to government, particularly with the PBS, and also cost to consumers. So it's that entire melting pot that we're trying to take into consideration.

On the issue of patents and where the threshold is set, and we are mindful that there was an increase in Raising the Bar a couple of years ago and that is being implemented, the analysis that we did in our report suggested that Australia still has a plethora of very low quality patents, and we're not yet to receive any evidence to suggest that's not the case. We're also mindful that our current arrangements particularly around the inventive step and non-obviousness, is below that set in the EU. So given the evidence that we have low quality patents, we have a low threshold still and we're not even up to where the EU is at, what sort of evidence can you point us to to suggest that we should hold off and wait longer?

MS CHIROIU: Well, Rob actually has got a mass example.

MR McINNES: Do you want me to talk about that?

MS CHIROIU: Yes.

MR McINNES: I might just start by saying that most of my practice is in helping Australian biotechs to commercialise their innovations and so I tend to see things from the patentee perspective. I've got a number of partners who make a living litigating on behalf of generics and so I'm - I

will start by saying I don't want anything I say to be thought to be a statement on behalf of or binding any client in the firm, or indeed the firm. These are my personal impressions.

But when it comes to the patentability threshold and the pharmaceuticals, I just don't think the system has been given time to work in the ways that it works after the Raising the Bar reforms, which were intended to align Australia's patentability threshold more closely with the rest of the world. And the Commission is focused on the scintilla word in one judgment that, "A scintilla of inventiveness is enough to create a patentable invention". But all that means is that wherever the bar is the invention has to jump over that bar, and whether it clears that bar by a millimetre or a metre doesn't matter at all. It's not to say that trivial inventions are fine.

But the specific case I wanted to bring up was a - I think it was 2012, 2013 and went to the High Court in 2015, it's the Rosuvastatin case, so the drug Crestor, it's an AstraZeneca product, selling 350 million a year, and there were a number of patents that were litigated and they were what some would call evergreen and some would call follow-on patents. And they were, if you like, the typical kind of patents that brought up when these kinds of discussions come up. It's definitionally impossible of course to re-patent the same invention.

But one of these patents was for a specific dosing regime for the drug, one was for a specific new indication, and another one was a reformulation of the drug with a different chemical salt. The Federal Court had no trouble knocking those patents on the head. And the High Court two years later had no trouble affirming that decision. And this was on the standard pre-Raising the Bar. And now we've raised the bar. So I'm just - I see that as a case of the system works. So why would we further raise the bar when the system worked two bar raises ago?

MR COPPEL: One area where the bar is deliberately lower is in relation to innovation patents, and I noted that you are against the recommendation that we make a draft recommendation to abolish the innovation patent. Can you tell us a little bit more about the extent to which the pharmaceutical industry is using innovation patents?

MS CHIROIU: Sure. Yes, I think that the position is that the recommendation to remove the system is premature. Effort might be given to improving the system before it's thrown out completely. That seems a more sensible approach than determining that it's not useful and it's not helpful. That we made some recommendations about how we think that that system could be improved, and I think that there

are - there's a discussion in the paper about the strategic use of patents and this would be an area that I think is a - the second tier patent system is used at time, strategically. I don't think that's necessarily a bad thing. It's portrayed as a bad thing.

The ability to use a second tier patent system is available in other countries. It's not unusual. I guess our position is that we just feel that there's one step to go before determining that the system should be overturned.

MR COPPEL: To what extent does Australia Biotech use the innovation patent system which was designed, really, to make it more accessible to small and medium sized enterprises?

MS CHIROIU: I think there's some evidence that the majority of use is not in that area. However, there is use in that area and that use is important to those companies.

MS CHESTER: Are you able to give us some examples from your membership when you talk about the innovation patent being strategically used and you see that being a good thing? Are you able to talk through some examples?

MS CHIROIU: Rob works for the companies that do that.

MR McINNES: Unfortunately, where I've seen it used hasn't been in the life sciences, but if I can talk about it more generally. I mean, sometimes people are forced into strategies. So in circumstances where a standard patent application is held up in an opposition process that might take years, the ability effectively to spin out an innovation patent application, get it examined more quickly, get it granted in a process where there isn't the ability on the infringer to string out an opposition so that it takes years.

Now, you can call that a strategic use. But, to me, it's a feature, not a bug. It's why that system exists. I think that personally – and this isn't an AusBiotech position – the innovation patent system is flawed. I think it was a bit of a sock to the SME sector originally to say, "Hey, we'll give you a granted patent so that you can put a nice certificate on your wall, but then you won't be able to enforce it unless you go through the examination process." I think that's a little artificial. But I do think there's scope for a second tiered patent system like they have in other countries? I think probably the German utility model system would be regarded as the international standard.

So a cheaper patent that doesn't go for as long and has fewer claims and is a little bit simpler overall, I think there's certainly scope for that. I don't think the innovation patent system exactly as it is now gets it exactly right, but I think there is scope for a second tier patent system, particularly if you're looking at jacking up the fees on standard patents as a way of getting people to drop patents they're not using. Then that's perhaps where you might slot in a cheaper alternative.

MS CHESTER: Rob, given the way that you just described the current innovation patent system – and we'll come back to how it could be improved – I guess it was seeking to address an issue from the SME perspective of the costs of getting a patent and then having a patent that would then allow them to get financing. So it would be good just to get your thoughts and experience on, given your comments on the innovation patent system, whether or not it did serve that sort of bankable objection.

MR McINNES: I can talk about this because I act for a number of venture capital investors and other investors and do due diligence on our key portfolios. An unexamined innovation patent would be properly regarded as not worth very much at all by an investor. So that's really the aspect of the current system that I would question, this idea that something gets granted automatically on application but then you can't do anything with it until it's examined. That's probably the aspect of a second tiered patent system that I would look at. I think it hasn't really proven to be advantageous and some people dealing with people who've got innovation patents who aren't well advised are sometimes misled by this idea that someone's got a granted innovation patent.

MR COPPEL: So you see the innovation patent more as a stepping stone towards a standard patent?

MR McINNES: Not really. People tend to fail step – well, proper businesses, as opposed to people who draft them themselves and have a crack. But proper businesses will typically fail a standard patent application and spin off innovation patents unless they really are just looking at – they're an SME just looking at the Australian market.

MR COPPEL: Because what intrigues me is that a standard patent has the term of protection of 20 years, innovation patent is eight years and in the pharma sector with the level of the upfront costs and the period it takes to bring a new drug to market, people are already saying the standard patent is too short. Why make use of an innovation patent?

MR McINNES: Biotech includes a multitude. It's not just human therapeutics.

MS CHIROIU: That's exactly what I was going to say.

MR McINNES: So we would include under our purview diagnostics devices, even people with health-related aps on their iPhone can be regarded as the kind of life sciences companies that would come under the umbrella.

MS CHESTER: That then brings us back to your submission, Lorraine, which talked about retaining innovation patents but with a raised innovative step and mandatory examination. So it's kind of starting to sound like a standard patent. Where do you see it falling in the spectrum?

MS CHIROIU: I think where it has the most use is not in the patent in the pharmaceuticals space. So it's probably the medical technology space would be – and particularly the digital health space – that this would be more relevant now. Just worth noting too that the digital health space is a very fast-growing and emerging area of biotechnology and this area – it is a more cost-effective option and obviously a shorter process to go through. It's of less relevance in regard to the pharmaceutical patents in this context.

MS CHESTER: In terms of the inventive step itself then, how is it going to differ from a standard patent? You said raise it.

MS CHIROIU: Yes.

MS CHESTER: But I'm not sure what we're raising it to and how far away that is still from the standard patent.

MS CHIROIU: I'd have to come to you with some technical information on that.

MS CHESTER: Okay. So one way we then do approach the SME needs – and when we looked at the evidence base it was more around the issue of enforcement for SMEs, that there were obstacles and impediments. We touched on it a little bit earlier, but when we looked at international experience and the cost of enforcing patents, we looked at the UK for the Intellectual Property Enterprise Court there. It would be good to get your sense on is, given your membership is quite diverse, Lorraine, and from your experience, Rob, whether that could have potential to help address the SME issues when it comes to innovation inventions with respect to patents.

MR McINNES: I'm afraid not having been litigated for many years – I

mean, it appears that the UK system is working, I think, because they didn't go too far in train to make it cheap and quick and acknowledge that it's still a deliberative process about a very complicated set of issues. But, yes, all I can say is the folklore seems to be that it's a workable model. But I don't know a lot about it myself.

MS CHESTER: It might be worthwhile then if we come back to extension of term. That was an issue discussed at last week's roundtable as well, Lorraine. You quote in your submission a couple of venture capitalists that say the length of the patent life is important and if the patent life is shorter than it should be, it would negatively affect investment. I guess just trying to get our head around from the experience of your membership what really is the term of patent life that's required to effectively get financing and how does the extension of term fit in with that?

MS CHIROIU: I think that it's commonly accepted throughout the industry that 15 years of effective patent life is reasonable. It's well-known that many companies don't get that, particularly with the PBS listing process becoming more onerous as time goes by. There's work underway to speed the regulatory process, but that's fairly glacial at this point in time. Investors work strategically. They look at all the provisions available in Australia. They decide whether they want to commercialise here or commercialise elsewhere.

The degree to which we can harmonise with other jurisdictions is really helpful and anything that's seen as an impediment in Australia, not only in the specific detail but more generally in the acceptance of – or the intellectual property provisions more generally – becomes "folklore" is a good word. And it spooks investors. They have been – the research into (indistinct) tax incentive is a good example of something that has grown a reputation overseas now and is starting to be seen as a really important incentive to invest in and to commercialise in Australia. That's taken many years.

These decisions have long-term flow-on effects and they are part of the decision-making process as it goes along. How much it would affect that decision, I think I said to you on Friday I don't know to what extent it would impact that decision. I haven't got any quantification around that. But investors tell us that the constant reviewing, the constant moving of the goalposts does influence their decisions.

MR McINNES: Maybe if I can just expand on that briefly. Acting for the small biotech companies and also acting for those who invest in them, it's kind of easy to sit and say, "Well, we're a small market and the

Australian companies are going to look at overseas markets and they're the ones that matter." But for companies that fall into that category, they're the ones who'll be straight across to San Francisco or Boston as soon as they possibly can, the ones that discount the Australian market because there's not much in the Australian market for them.

Now, in a nation where we've got a government focusing on start-ups, focusing on home-grown innovation, focusing on keeping the commercialisation of the innovation in Australia, it just seems odd to be predicating a policy on we're a small market, we're primarily a consumer of intellectual property, so let's have a weak system. To my mind, it sends the wrong signals. If we were designing the intellectual property system from scratch now in Australia, you could look at say China and India and contrast the two. China's approach to intellectual property is we want home-grown innovation, we're going to go from being a – as most developing nations do, including the United States 200 years ago. We're going to go from being a thief of intellectual property to a responsible consumer of intellectual property to a producer of intellectual property that will want our intellectual property recognised around the world, the innovations by our companies.

In contrast, the Indian approach currently seems to be – and I get on the comments sections of the Hindustan Times when they have articles in IP and I read it played out. The approach seems to be, "Well, we're going to be really efficient copyists and we're just going to make cheap copies of stuff and that's going to be our business model." If you choose that model, you can't do both. If you choose to have strong IP protection, then you can have an originator industry, you can also have a generics industry as well. If you just want to be the nation that copies stuff and sells it cheap, you can do that too but that's all you can do. So we kind of have a choice here and I think we should be the proudly original innovative country that helps our home-grown companies to commercialise home-grown intellectual property rights.

One more tiny point. iPhone. You ask an uninformed person who makes the iPhone and they'll say Apple. Of course, the iPhone is made by Foxconn, it's not made by Apple. Foxconn, high-tech manufacturer, fantastic manufacturer, a high-tech product, 3 per cent margins on making the iPhone. Apple owning the intellectual property in the iPhone, 30 per cent margins. I'd rather build an economy favouring those who are going to make the 30 per cent margins on IP than favouring those who are going to make the 3 per cent margins on making cheap copies or making to other people's intellectual property rights. Sorry, I'll stop now.

MS CHESTER: And I think we cite in our report how many patents,

trademarks, design rights cover the iPhone. Your comment about the choice between a strong or weak IP system, I guess what we've been asked to do is come up with a well-balanced one. When it comes to extension of term, our draft recommendation there is to leave the extension of term in place. Indeed, we're obliged to under some of our multilateral, bilateral and plurilateral treaties. But to only allow an extension of term to occur when there's been an unreasonable delay with the regulator. It would be good to get your sense of the reasonableness of that or not and also from your experience in the pharmaceutical space, is looking for an extension of term just an automatic process, everybody does it?

MS CHIROIU: To the first one, TGA has been doing a lot of work around trying to make the process for listing for registration faster. There is no doubt that we've made representations in the past that that still needs significant improvement. As I mentioned before, there are changes (indistinct) to recognise data packages in different ways to hasten the process. But none of those – they've been in train for two years now and are not yet – have been given the green light.

That said, one of the things that – so the TGA works on a complete cost recovery process. We've asked on numerous occasions that an option be offered for a fast track option because of the cost to an innovator company of that delay. Many innovator companies would be pleased to pay for a faster option. I think that goes to how much that impacts the company. The alternative to that is to allow an extension of patent term so that income can be made up at a different point in the process.

MR COPPEL: Does this fast track option exist now or is that something you're suggesting?

MS CHIROIU: We've been suggesting. It's not available now.

MR COPPEL: The reason that it hasn't been adopted?

MS CHIROIU: The review has recommended to the health minister, the health minister has accepted the recommendations of the review and we're waiting for detail on how that will look. But it was a position where there would be some faster track options available, not necessarily the fast track option that we were advocating.

MS CHESTER: Would our draft recommendation then in terms of linking extension of term to unreasonable delays by the regulator then be helpful in terms of maintaining that sort of healthy pressure on the regulator to make those decisions in a timely way at less cost to the patent

holders?

MS CHIROIU: Sorry, could you ask the question again?

MS CHESTER: If our draft recommendation is to link extension of term to unreasonable delays by the regulator, would that then not be helpful, given the issues you've raised about the time delays with the regulator? It would put a healthy discipline and a pressure on them.

MS CHIROIU: I think they're separate issues. If there is a delay for whatever reason it seems reasonable that a company should be able to make a claim to extend their patent. I think whether there's pressure or not on the TGA to make that decision more quickly is a separate issue.

MS CHESTER: I guess I'm looking at it from whole-of-government perspective that extension of time we know to cost the Australian taxpayer and, indeed, consumers a quarter of a million dollars annually. So that would put healthy discipline and pressure within the government sector for the regulator to be much more time-effective from the perspective of the patent holder and also for the government fiscal perspective.

MS CHIROIU: I'm not sure how to respond to that. I don't think it's applied pressure in the past. I'm not sure of why it would in the future.

MR COPPEL: Just one last question relating to data protection, which is an area of the report that we've essentially said leave it as it is. In your submission you've suggested that there can be costs associated with the data protection system as it stands today and that can have an effect on investment from the pharma sector. Do you have any examples that you can give to us where data protection has acted as a break on research and development on a particular molecule or something more tangible than making a claim that it has or is having an effect?

MS CHIROIU: For small biotech companies, they're not yet in a position of this being applicable. It's a virtuous argument in the sense that it impacts – it's likely to impact in the future.

MR McINNES: I've certainly seen investors go through the shorthand analysis of okay, the patent position on this biological might be a little questionable, it might be possible for analogues to be made that don't fall within the patent claims. But we've got 12 years in the US, tick, off we go. We've actually got a viable product. But without them sitting at that table going or saying we've got 12 years data protection in the US, tick, the investment would not have gone ahead. I just think there's an argument for an international (indistinct).

MS CHIROIU: Agreed. We're working in a global markets that what Australian companies are producing now is being assessed – or developing now – is being assessed on the basis of the protection that it can likely claim once it's in market. Investors will make their decisions based on that and they'll make decisions about which market they commercialise in, according to what the provision is here and what it is in the US; and the US looks like a better option in that regard at this point in time by far.

MR COPPEL: So you're saying that the harmonisation should be harmonising towards the most stringent in terms of – or the most generous in terms of data protection. Because there's a whole range – I mean, Australia is at one point and the US is an example at the other. How do you make the assessment as to the US being the preferred level of data protection?

MS CHIROIU: I think we're the lowest, apart from one other country in the world. So we've argued for eight years, which would be around the average of most countries. Every country has a slightly different rating.

MR McINNES: I think it was TPP benchmark.

MS CHIROIU: Yes, it was; quite right.

MR COPPEL: I thought we were consistent with the TPP, but that's probably another issue.

MS CHESTER: I'm conscious of time and we have a few other folk that we need to hear from today. But, Lorraine and Rob, thanks very much for joining us. I'd like to ask our next participant, Ian David, to join us up the table. Good morning, Ian. Thanks for joining us this morning and thank you for both your initial submission and your submission following our draft report. If you could just state your name and the organisation that you're representing for the purpose of our transcript recording and then if you'd like to share with us some opening remarks. But, given time, if you could limit those to five minutes, that would be much appreciated.

MR DAVID: My name is Ian David. I'm speaking on behalf of the Australian Writers Guild and the Australian Writers Guild Authorship Collecting Society. I'm 63 years old and I have spent all of my adult life, apart from a couple of years, in New Guinea as a missionary working as a writer. I see the introduction of the recommendations that are provided in the draft report as having a disastrous effect upon creators, particularly performance writers. The Writers Guild and the Writers Guild Authorship

Collecting Society represents over 2600 writers of stage, radio, film and television, including the vast majority of writers who work professionally at a level which is, I think, largely misunderstood by those outside the industry.

I am very disappointed at the framing of the Commission's draft paper which constitutes an attack on the livelihoods of Australian creators without much of an understanding of the process of creation and the creative industries. Intellectual property and particularly copyright creates essential incentives for authors to foster their creativity, particularly screenwriters, and the majority of whom are self-employed individuals who contribute significantly to the Australian screen industry.

I might just say here that creators, particularly writers, create copyright right at the beginning of the chain. Behind us there is a void. We start the business of filmmaking and theatre and stage and we're usually there at the end, if a little tired. Copyright in literary and dramatic works allows for fair remuneration and gives performance writers an entitlement to an ongoing income stream similar to superannuation.

Many years ago I wrote a piece for television called "Joe Jury" which I got paid the princely sum of $21,000 for. That was a year's work and I continued up until about three years ago to receive an annual cheque because it was used in the Police Academy Law Schools. That money stopped when Joe Jury was uploaded to YouTube. There was no longer any requirement for people to pay me a lending right or a fee through the ABC.

Copyright is also important to screenwriters as a form of artistic control through moral rights. The Commission has suggested a reduction in the term of copyright to 15 to 20 years from creation. This demonstrates a depressing lack of understanding of the commercial realities of film, television and stage production. The impact that such a recommendation would have on these creators would be, if even possible, would be devastating. For performance writers whose works may not be initially commercialised for a decade or so, which is usual in our industry, the average time for development of a project is seven years. Such a reduction in copyright duration would have devastating effects.

Many classic movie scripts from the flowering Australian-grown cinema in the 70s would now be unprotected by copyright should that provision go through. I simply don't agree with the proposition that "the average commercial life of film is between 3.3 and six years" and that "the literary works provide returns 1.4 to five years on average". This

assessment in the report is basically simplistic and misleading. And I can expand on that later.

Frankly, the introduction in terms of fair use, fair use provides no clear benefits to Australian creators or consumers and the current fair dealing provisions in Australian copyright law are sufficient to balance the interests of creators and users. Personally and on behalf of the Australian Writers Guild, I respectfully urge the Commission to reconsider the critical importance of copyright for creators, including screenwriters. I urge the Commission to re-evaluate its recommendations for the reduction in the term of copyright for 15 to 25 years and the introduction of US-style fair use. Australian performance writers rely on copyright in their literary and dramatic works for fair remuneration without which there would be no incentive to create those screenplays and theatre pieces that underpin the viewing of the millions of Australians every day in terms of storytelling. Thank you.

MS CHESTER: Thanks very much for your opening remarks, Ian. I thought it might be helpful – you may not have been here a little bit earlier this morning – just to make a point of clarification. I do enjoy a good piece of fiction. But there's been some media reporting around our report that could be suggested to be works of fiction as well. There's nowhere in our report do we recommend a change to the term of copyright for Australia. There's a finding that some people have misinterpreted as a recommendation where we say if you look at the evidence base and the statistics and wanted to come up with an optimal term of copyright, it would be 15 to 25 years. But we note that we're bound by our current international treaty obligations such that moving away from the current term of copyright is not possible.

You did mention though in your opening remarks that you thought some of the statistics and analysis and academic works that we cite were flawed in the average terms of commercial life that we identified. Can you point us to some evidence that we would be able to draw upon in our final report around commercial life for copyright works?

MR DAVID: Sure. If you look at the entire production there is a high failure rate, about 90 per cent of films that are made – doesn't obviously work for television because there's an audience already there. So investors and funding bodies and all of the collaborative team that work on them appreciate that there's a nine in 10 chance of failing; in other words, not getting your money back. To try and get a statistic and say, "Well, it's only got to last three to six years," ignores the fact that what people are trying to do is create something that has a much longer life.

You cannot judge, I think, the mean success in the film industry. That applies for Hollywood and applies for Bollywood. It applies just about everywhere around the world. So in the few examples one has where a film production takes off and becomes successful it has a very, very long life and may go into decades. If you cut that short, essentially what you're doing is taking away the rewards of success.

MS CHESTER: I'm not quite sure then how that changes the term of commercial life based on the statistics and evidence. You're talking about the probability of success or failure. That doesn't change the commercial term.

MR DAVID: What I'm saying is that you can't judge the return on a film as being on its average three to six because films that one makes one's living out of, one hopes that they go on for many, many years and have an audience for many decades.

MS CHESTER: Your initial submission also provided us with some suggestions around that there needed to perhaps be more transparency of existing statutory licensing schemes.

MR DAVID: Yes.

MS CHESTER: And you suggested reviewing the collecting society code of conduct. In our report governance is quite important in two respects. Governance in terms of getting the right settings for policy settings of intellectual property within our government but also the governance arrangements around collection agencies, given that some of them really have a sort of statutory monopoly arrangement. It would be good if you could elaborate on some of the concerns that you have and what you had in mind for such a review.

MR DAVID: I think what we're looking at here is transparency. In the case of Screenrights, when it was set up it had a division of return so that 70 per cent of the money that was collected would go to producers and about 25 per cent would go to screenwriters, the other five to composers. What's happened in the last 20 or so years is that there's been a form of bracket (indistinct) in a sense where writers have become increasingly more marginalised and they have to fight harder to get their share of every dollar, such now that it is a requirement by Screenrights that the writer has to actually formally apply for funds and provide all sorts of documentation when 20 or so years ago you didn't.

Now, that would indicate that producers and investors perhaps have got a larger claim. The problem is that in trying to investigate that it is

almost impossible since one is not given access to the data. I think a review is actually high overdue because in a sense one is unable to find out what is happening to the money but, more importantly, what the policy is.

MS CHESTER: The current collecting society code doesn't give you adequate comfort in terms of the transparency and accountability of these collection agencies in terms of what information you would need to assess whether the moneys being collected are then appropriated as they should be?

MR DAVID: No, and in fact the way the Screenrights operates is that basically it's an autonomous organisation which does not allow for any sort of investigation at all. So one is always operating in the dark.

MS CHESTER: Part of our Terms of Reference asked us to also look at international jurisdictions and best practice. Indeed, we had some very helpful feedback from Europe and, in particular, from the UK from the music recording industry, about the EU Directive on collective management organisations 2014. I'm happy to steer you in the direction on it, but it would be helpful – and I'm not expecting you to be aware of it today – to get some feedback from you as to whether or not that sort of code of conduct policy that the EU has applied to collection agencies in Europe would give you the sort of comfort that you're looking for and would address those issues and concerns, given that our inquiry provides an opportunity for us to address these governance issues.

MR DAVID: Yes, the guild is aware of that and I think that's where we would like to go.

MS CHESTER: So the guild has had an opportunity to have a look at that directive. Would implementing that as a code of conduct in Australia, would that address the issues that you have at the moment?

MR DAVID: Largely I believe it would, yes.

MS CHESTER: Thank you. Returning then to your sort of comments around fair use versus fair dealing – and I don't think we're the first folk to recommend Australia move from fair dealing to fair use. Indeed, there's been a number of reviews that have done so. It would be good to get your sense in a tangible way of what activities today would be remunerated under fair dealing that wouldn't be remunerated under fair use.

MR DAVID: Most of the content. The issue about fair dealing is as an

American concept it works for large companies. It doesn't actually work here. We've got fair dealing here in terms of critical analysis and education purposes. But, as I tried to point out earlier, if you look at a piece of work that I had written which was available to the public and I got some small remuneration, under the fair use, according to YouTube, they can upload nine minutes of that particular piece in 12 segments and literally deny me having a small amount of remuneration for that. That comes under fair use and it becomes in a sense an opportunity for them to stretch the envelope, which is what's happened, I think, with just about every filmmaker finds sooner or later unless they're aware of it. Somebody has rather generously uploaded it to YouTube for everyone else's benefit except for the creator.

MR COPPEL: Is this uploaded on a US server to be considered under fair use or is it uploaded here, in which case it would be something which would be challengeable? But then the issue becomes one of access to - - -

MR DAVID: It is challengeable if you're aware of it. The situation is that the culture in America is such that to provide the users with access to material – because they can because the digital age allows them to copying very easily and transfer material. What that does is it denies the copyright creator access to a revenue stream which has always been taken as part of the industry. This is not sort of patent business where you create a new mousetrap, this is the creation of ideas and a cultural narrative. If that's taken away from you and uploaded to YouTube for anyone who wants to have a look at it can have a look at it and bypasses you completely, you're going to be denied an income.

MR COPPEL: I guess the question is, is it fair use? I mean, fair use has to pass tests based on fairness factors and also often illustrative uses that can guide whether a decision to use or not is one which is consistent with fair use. The example you're giving suggests that it is something that goes beyond – which isn't fair use. The issue then is – I mean, in that example what course of – what can you take to seek redress and is it one where simply the costs of seeking redress are not worth the effort because it's such an expensive process or is it something else? We've heard many people in talking about the introduction of fair use saying that it will lead to a greater level of litigation. The numbers are not extremely high, the ones that we've heard. But you're suggesting that the use of copyrighted material which is contravening fair use could be quite substantial. I'm just trying to understand how you would reconcile those two pieces of evidence.

MR DAVID: Well, I've been a writer for 40 years and me taking on Google is impossible and when I talked to the ABC about how they

allowed such a thing to happen they say the same thing. So if the ABC is incapable of taking on and doing something about that, perhaps they lack – they're not inclined to do that. But I think the answer is that enshrined in law must be the principle that there is fair remuneration for the owners of copyright. If that's not the case, then you're literally swinging in the wind. There has to be some sense where the provider has a responsibility to make sure that the system works. At the moment it's not.

These huge corporations operate very clearly on a principle that they don't pay for copyright. They use phrases like "fair use" but, essentially, they purloin it, they put it out to the public and they get the benefit because they often sell advertising to keep their business model going. Once again, the creators, those who were right at the beginning who actually made the content viable, entertaining and worth watching, they miss out.

MS CHESTER: I think, Ian, the issue that we're kind of struggling with is a lot of people see infringement and associate it with fair use, whereas it's just straightforward infringement of copyright. What we're trying to get a better understanding of is in moving from fair dealing to fair use – and if we were to take example of the ALRC's recommendation of fair use, which was really taking fair dealing and trying to put it into a principles-based system so it can adapt to technology over time – we're trying to identify what today would be remunerated under fair dealing that would then not be remunerated under fair use. We're sort of struggling to get an evidence base around that. So the example that I think you've given us today is an infringement, but I think what we're trying to get an evidence base on, because we know infringement is occurring, is what's the difference between fair dealing and fair use in terms of what will no longer be remunerated going forward? That's where we're struggling to get an evidence base.

MR DAVID: It is an honourable thing. I mean, it's very difficult to grapple with. But I think if the concept is there is that the creator, the copyright creator, must be fairly remunerated as a consequence right at the beginning of the whole process. Then they could work – then those who are responsible for it can work out systems. At the moment they take advantage of the fact that they can in fact do these things and get away with them. They are too big and they're too rich in order to take to court. I think the very idea that creators deserve to be remunerated fairly, whilst providing fair use to academics and critics and people who are studying those works, of course that principle has got to be there.

But I can't see why there shouldn't be that balance there because at the moment – the amount of my income, which is between 12 and 15 per

cent from residuals and royalties, is diminishing by the year. That means I get less than I did 10 years ago or 15 or 20 years ago because of the technological changes. So why is that the case? Is it because my right to make a living has diminished or is it because I have been literally cut out of the system?

MS CHESTER: That raises the issue of enforcement and in our report we look at whether or not – holistically across the intellectual property arrangements. It's one thing to have a right. If you can't enforce it, then the right is less valuable. We focused in our report based on evidence that we got about trying to get down the cost of enforcement as it relates to patents. With respect to copyright, we didn't get a lot of an evidence base given that there is the Australian Copyright Tribunal which is meant to be sort of a more streamlined and lower cost in enforcement option. Is that something that the members of your guild avail themselves to? Is there anything that you can give us there in terms of from their experience of enforcing their rights within Australia?

MR DAVID: I can't help you very much there. I think a lot of writers have problems working out the complexities of the law. It changes often and also, I think in a sense they feel as though they are constantly victims to it. We're always behind the eight ball. And I mean that in a sense that when you're going into negotiations understanding copyright is probably at the other end of the spectrum in terms of the negotiation.

MS CHESTER: We don't have any other questions for you today, Ian. Thanks very much for joining us this morning. I'd like to ask our next participant, Jeremy Dobbin, to join us. Hang on a minute. Jeremy, I'm very sorry to do this to you, but there's caffeine between you and appearing. But we are running over. We should let people stretch their legs, take a break. But if we could reconvene in 10 minutes at 10 to 11 and then we'll hear from Jeremy then. Thank you.

ADJOURNED **[10.44 am]**

RESUMED **[10.59 am]**

MS CHESTER: Folks, we might get back underway again. Jeremy, thanks for coming straight up to the table. Folks, we might try to get underway. Jeremy, thanks very much for joining us and thank you very much for your involvement through both an initial submission, a post-draft report submission, and some meetings that we've had. If you

could just, sort of, state your name and the organisation that you represent for the purpose of our transcript recordings and then please feel free to make some opening remarks.

MR DOBBIN: Okay. My name is Jeremy Dobbin and I'm here in my capacity as president of the Institute of Patent and Trade Mark Attorneys of Australia, known as IPTA. Thank you for the opportunity to speak at the hearing. I'll be as brief as I can. I understand that most of the audience are writers and probably aren't much interested in patents, but anyway. I'll carry on anyway.

So IPTA is a voluntary organisation and we represent registered patent attorneys, trademark attorneys. More than 90 per cent of practising patent attorneys who are in active practice in Australia are members of our institute. We include in our membership attorneys who work in private practise and industry, in universities, in research institutes, and also practise as barristers. We represent a wide range of clients including large local and foreign corporations, small, medium sized enterprises, universities, research institutes, as well as individual inventors. We act both for patentees, people who own patents, and also for people who are trying to validate patents or fear they infringe patents. We act, on the one hand for, sort of, what we call "big pharma", large pharmaceutical companies, and we also act for the other side of the coin, if you like, the generics companies.

I've been allowed five minutes, of which I seem to have used one already. So I couldn't summarise our submission in that time, so I'm going to focus on four specific issues which, I think, are important and two of them are big picture fundamental issues to understand the patent system.

The first thing about a patent system is it's about disclosure. When a new client comes to see me who's invented something, but has no experience in the modern patent system, I explain the patent system to them as being a contract, if you like, or a deal made between the state and the inventor. The deal is the inventor discloses to the general public their invention in sufficient detail for someone to actually implement it and put it into effect, providing they have the sufficient skills to do so. In return, the state grants a monopoly to the inventor if the invention meets certain requirements including that it's novel and involves an inventive or innovative step. If it doesn't meet the requirements, it's not granted.

The idea of the modern patent system is to encourage disclosure and to add to the library, if you like, or the library of human knowledge. It's critical to have a proper understanding of why the patent system exists.

It's what encourages inventors to disclose innovations that might otherwise – they might otherwise keep secret.

Many processes can be kept secret. Even when a product is actually on the market that you can actually buy, I know from experience particularly when a product has used software or custom chips, it's actually really, really hard to actually work out what a product is actually doing without a technical specification. So the first point I make is disclosure is key to understanding the patent system and that's one of the building blocks of the entire system.

There's also a sort of thread, if you like, in the report that Australia grants lots of low quality or low value patents. So the second issue I'd like to address is that many inventions are incremental in nature and there's something of the flavour in the report that while you can – you might be able to get a patent for a ground-breaking invention, patents for incremental inventions are generally undesirable.

This ignores the fact that most inventions are, in fact, incremental or gradual improvements of existing products which sometimes do not seem significant and sometimes they are but which, taken over time, can make a major change to the original invention, the original product. This happens in the pharmaceutical industry, for example, where you might originally come up with a block buster drug and then you can improve the performance of that drug by changing the formulation, changing the dosage regime, using it in conjunction with an existing drug. Each of those changes made produce incremental improvements, but over time those many incremental improvements add up to significantly improve patient outcomes over a period of time when you add them all up together.

So outside of the pharma field you've got things like the light bulb, which was originally invented by Thomas Edison. That was clearly a ground-breaking invention. Interestingly enough, he didn't actually produce the original commercial version of the light bulb. That was produced by someone else. He evacuated the bulb, used a higher resistance filament and used a durable incandescent material to actually make it work. I haven't got a sample of his original product, but that's a sort of drawing of it. Now somewhere in my bag of tricks, I've got a modern incandescent light bulb there. Now, they don't look anything alike and the reason is because there's hundreds of some significant, some tiny, improvements that arose from this original idea to this.

In terms of the way it's evacuated, the fact you might inject halogen in that to increase efficiency, increased efficiency, the filament, new materials, new manufacturing techniques. Edison's original lightbulb

used DC. He was only persuaded, I think, to use AC by Nikola Tesla but that was a superior way of supplying electricity over long distances. So you've got the original invention and then you've got another product here which is probably the accumulation of thousands of little inventions that together over a hundred years of moving this to this.

Then, of course, you get the EU effect and then you get this, which is the compact fluorescent light bulb because the EU decided that incandescent light bulbs were too energy inefficient and the energy efficiency light bulbs had to be changed. So people originally had the idea of changing all those fluorescent light bulbs up there into a compact one that you can plug into your little light socket.

Of course, the challenges, considerable challenges in taking six feet long linear light bulb, incandescent light bulk and turning it into this. All the developments along the way would've given rise to inventions and to patents which resulted in something changing from that elongated, sort of, six feet long light bulb to a compact fluorescent light bulb that you can plug into your light socket, but which still gives off that horrible green light that you get with compact fluorescent bulb.

Then, of course, you've now got the LEDs which are much popular and they're - when I went to school, an LED was a little glowing red thing and these now produce a beautiful white light and part of that is a result of an invention by a Japanese gentleman who invented the blue LED, and that was critical to enabling ultimately the production of these LED-based bulbs that you can just screw into your normal light socket. These are more expensive, obviously, than fluorescent light bulbs at the moment. But as manufacturing efficiency increases, the price virtually comes down. So just because innovation is incremental, it doesn't mean that it's low quality or low value.

There's a couple of minor criticisms of the report. The first thing is that the report treats business methods and software patents as the same thing, okay. They're not. Business methods are not patentable, and that's been established by RPL data and they're not patentable whether they're implemented by software or in any other way.

Software patents that relate to technical tasks are, and should be, made patentable. In many cases a technical task, whether it's implemented by software or circuits or custom chip, is a choice that's based on expediency and cost. Patents shouldn't be denied just because an invention is implemented by software when it could be implemented by some other – by asserting, for example, a custom-based IC chip.

Finally, I'd like to turn to innovation patents. These seem to be treated very harshly in the court. The innovation patent system seems to be performing its function, which is encouraging innovation by Australian SMEs. The majority, which is 66 per cent of the applicants for innovation patents in Australia are Australia. This contrasts with a standard patent system where 89 per cent of the applicants are overseas based. That sort of imbalance doesn't happen in countries like the USA, Europe, for example, where you tend to find that it's more 50/50. Patents filed in America, 50 per cent of them are the US companies and 50 per cent overseas.

I note that there don't seem to be many submissions made which are against the innovation patent system. So it doesn't seem to be that there are – the community's particularly concerned about the innovation patent system. The case against the innovation patent system seems to be based on what I describe as a somewhat discredited report by IP Australia, which was produced by IP Australia the administrator of the patent system anyway and hardly disinterested.

There also seems to be a view in the report, I think, that when it comes to IP, Australia should be doing the minimum it can get away with because the innovation patent system isn't a requirement of TRIPS or any of the other agreements, that we're a party to that we can just get rid of it and that would be fine.

There's one other important aspect which relates to the innovation patent and the important function it performs and that is to allow an Australian inventor or patentee to actually enforce their patent in a timely fashion. Australia has what's called a pre-grant opposition system which means that however quickly you can put your patent application through to the grant stage, it's possible for a third party to oppose the grant of your patent and that prevents your patent from granting, and prevents you from forcing your patent against a potential infringer. The opposition process can take anything from 18 months onwards. Even at the end of the opposition process there's an appeal process. So using the opposition and the appeal through Federal Court, it's possible to delay the grant of a patent by three or four years or more.

During that time, if you're the patentee, the first thing is maybe the person who's opposed your patent maybe getting the market in Australia and destroying the market for you or competing against you and destroying the value of that patent for you. I think, that's probably more than my five minutes, so I'll shut up now and answer some questions.

MS CHESTER: Okay. Thanks very much, Jeremy.

MR DOBBIN: That's okay.

MS CHESTER: I think you've demonstrated today that the Productivity Commission needs to become a bit more technologically adaptive having only an audio transcript we don't get the – anyone not in the room today won't get the benefit of your show and tell of how wonderful the world of patents can be when it comes to light bulb advances. Before we get into the issue of patents, which is your area of expertise, your submission and your commentary do touch on the issue of governance as it relates to policy making for intellectual property, and that was an issue that we did spend some time addressing in our draft report. We know from history, particularly around competition policy, that one of the most enduring changes a government can actually make is around getting the policy making settings right going forward.

So it would be appreciated if you could just elaborate on your views there. We raised three issues in our report, the first being that we have disparate responsibility for intellectual property arrangements across government departments at the moment, whether or not we should be looking to consolidate like they have in the UK and other international jurisdictions?

Secondly, what government agency then should be the policy adviser on intellectual property arrangements given we note that it is a very difficult balancing act across the interests of rights, holders and inventors and creators - I'm going to use the term "creators" a bit more today, I think people prefer that the rights holders – with users and follow innovators and government and all the rest of it? So who in government department land would bring that broader perspective?

Thirdly, the issue of the role of the rights administrator being IP Australia in policy development and policy advice. So to the extent that you feel comfortable, it'd be great if you could elaborate on that.

MR DOBBIN: Okay. If I answer question 2 first, if you like? We're comfortable with the patent system being looked after by the Department of Industry and Science, where it is at the moment. I'm not sure that's actually the correct name, but wherever it is at the moment, I think, is the correct government department for it to be in because it's concerned with industry, innovation, science. We strongly feel that that's the appropriate government department for patents to be in, in particular, and trademarks also, and also registered science.

Whether it's appropriate to have, say, things like copyright in the same – under the control of the same government department, I don't know. We're not experts for copyright. So that will be the answer to question 1 in the sense that we don't really know whether copyright and patents and trademarks and design should be lumped up under the one government department, whether it's necessary – because I think the issues differ really in terms of – the same issues then apply to copyright as apply to patents and registered designs and trademarks.

MR COPPEL: Are you referring there to the lack of formalities with respect to copyright or something else?

MR DOBBIN: Well, just it's a different type of right really in some ways. Although it's an intellectual property right, it's not – there's a different type of right in many ways. One's a more creative, like writing and theatre and arts, that's more of a creative right, whereas patents and trademarks and designs are more of a commercial, industrial right that's created more through hard work than artistic flare, if you like.

MS CHESTER: You're a brave man saying that in this crowd.

MR DOBBIN: There's a lot of hard work as well in writing.

MS CHESTER: Careful, we might have to arrange a police escort for you after this, Jeremy.

MR DOBBIN: But anyway, so whether that's appropriate or not. The other thing is that, your third question in relation to – it's probably inappropriate that IP Australia sets policy and administers it. So, I suppose, the question for the Productivity Commission is what do you recommend instead? I mean, we've had things like ACIP before. We've also had ad hoc committee that, for example, the Pharmaceutical Patents Review. In some ways those haven't been too bad providing you get the right balance of people on them.

So it's hard to say. It's clearly inappropriate for IP Australia to both set policy and administer it and that has to be some – clearly they're the experts, so the government is going to want to listen to IP Australia and it's important that they do and they're the voice and a good – they're the technical experts on the patent system. But there needs to be some sort of other input as well in addition to IP Australia and whether that's – I don't know, whether it's another – you've only (indistinct) so it's a bit – so whether you want to set something up similar to that again or?

MS CHESTER: So I think in our report we articulate a couple of things that would be ideal, certainly to have a policy champion. We know from international jurisdictions when intellectual property arrangements are championed by a particular minister supported by an agency, then you tend to get better policy outcomes and you draw the analogy with Australian competition policy law from the early 90s. The other issue we are, sort of, looking at is what is the experience in terms of the role of IP Australia versus the Department of Industry in terms of advising government on policy?

The way that you described it, and just to make sure I understand it, is that you'd see IP Australia similar to the ACCC or ASIC in terms of having input to treasury advising the government on those policy issues but not taking the lead role in providing that advice. Am I right in - - -

MR DOBBIN: Well, I mean, they're the experts, aren't they? I mean, I think they should have input, but maybe they shouldn't be the one – they shouldn't be the only people having input.

MS CHESTER: Okay, thanks. No, it's just not too many submissions commented on the governance arrangements, so just - - -

MR DOBBIN: It's a hard thing to comment on really and, you know - - -

MR COPPEL: Do you think it matters, for you, a member?

MR DOBBIN: It matters to us in the sense of how it affects IP law. I suppose it would be good to have an organisation that had a, sort of, bigger picture view as to where Australia wants to be on things like IP, patents and trademarks. Well, my members are more – we're more concerned with the day-to-day patent system, the day-to-day operation of it. But policy obviously affects us.

If you get an innovation patent system it probably won't affect us significantly, but it'll certainly adversely affect our findings, for example. So that sort of policy decision would make it – would affect us. I mean, some of the amendments that are made to the law and the changes are obviously of a technical nature base and don't really need a sort of big picture view or a special adviser or special minister in charge, for example, changing procedural rules like extensions of time and things like that. But there are the sort of more big-picture items that we do need input from somebody else but, yes.

We can go away and think about that if you like - you want some input and work out what we recommend, if that's a big issue for you, or a particular one.

MS CHESTER: It is one that we are trying to get views of participants in the industry.

MR DOBBIN: Yes, that's okay.

MS CHESTER: Great. Turning then to the world of patents, you mentioned in your opening remarks and also in your post-draft report submission your concerns around changing the threshold for the inventive step. At the moment we've got, by way of not having the EU arrangements around obviousness, what would be depicted as a lower threshold in the EU, it would be good to get your sense on what impact it would have on – what innovations or inventions would not be eligible for patents if we were to move to what the Productivity Commission is recommending versus the current threshold.

MR DOBBIN: See, I don't actually think that we have a lower threshold than Europe or the US, frankly. We just did the raising the bar in 2013 and it seems to me that a lot of the comments in the report, maybe because they're based on – or maybe because some of the submissions or papers they rely on predate the raising the bar changes.

Our level of inventive step requirements are very similar to those of Europe and US. They are not particularly different. Whether you adopt, if you like, the European problem and solution approach or stick to what we have, I don't think it necessarily makes a huge difference. In fact, problem and solution - I mean, I know because I used to work in Europe as an attorney before I came here. Problem and solution, in fact, is quite an artificial construct anyway and it involves you taking the closest piece of prior art, which may be something the inventor hasn't seen and then saying, "Well, is the invention", you know, "obvious over that?" And it's quite an artificial test.

Often the answers to the test differ, depending on which piece of prior art you decide to impose as prior art. I would question whether or not – we've just raised the bar recently within the last couple of years. The level inventive step has definitely gone up and I think it would be unwise to make any more changes to it until we've actually settled in and worked out where the level inventive step is now. Because the intention, indeed, of the Raising the Bar Act was to bring our level of inventive step, sort of, on par with that of Europe and the USA.

MS CHESTER: So our draft recommendation is just looking to bring us fully up to the European level. So from, and I don't want to put you - - -

MR DOBBIN: Well, actually, I don't quite – I mean, is this the objects clause or - - -

MS CHESTER: No, this is just test around obviousness.

MR DOBBIN: Just adopt the formal problem and solution approach. See, I don't think that would be – I think it's an artificial construct and I don't think that would be – we've got a long history of interpreting inventive step in the – under Australian law and I don't think – I think it would create a, sort of, disjunct in the system if you suddenly incorporate a, sort of, European style problem and solution approach. I don't think it's necessary because we've got a similar – pretty similar level inventive step to Europe anyway.

MS CHESTER: You touched on the issue before of your views of our draft report. We went to some lengths to try to get some measure of the quality of Australian patents that are being issued today and we had access to a new data base from IP Australia and we did some proxy measures around that which did suggest that Australia does have quite a large fat tail of low quality patents. I know that they're proxy measures. Are there other measures or other methodologies that you're familiar with that would give us a better measure of the quality of a patent?

MR DOBBIN: Well, the problem with your measurements, presuming that all (indistinct) patents were under the pre-raising the bar provisions, because the Act only changed in 2014, so currently we're working through – I mean there were some – there were still some patents being examined, that are being examined under the old legislation pre-raising the bar when the inventive step was raised. A lot of the patents that you're measuring and say are low quality, were probably granted under the previous provisions.

MS CHESTER: So it's not an issue with the methodology, it's just the timing factor?

MR DOBBIN: I think it's the timing.

MS CHESTER: Okay.

MR DOBBIN: Yes, really. I mean, I'm not an economist so I'm not one to comment on methodology. But, yes, it's a timing issue just, yes, as I say. When the raising the bar provisions came in there was an enormous

backlog of patents which were filed under the previous provisions, which had to be worked through. So it probably took the patent office about 18 months to actually get through the patents that they were examining under the old system and to actually get started on the patents being examined under the new system, and probably, I don't know, examination reports on those probably only started issuing, sort of, 12 to 6 months ago.

MS CHESTER: Turning then to innovation patents and your submission, and your post-draft report submission in particular, recommends no change to the current innovation patent system.

MR DOBBIN: No, we do recommend a change. We definitely recommend changing it, we just don't want it to be abolished, that's all. We're happy to suggest changes in terms of raising the level of innovative step, making examinations compulsory. There's ACIP recommendations and we've made recommendations. So we're happy to contemplate change to the system, we just think it can be improved and we just don't want the – it to be abolished and it maybe get thrown out in the bath water.

MS CHESTER: So if we're raising the inventive step.

MR DOBBIN: Innovative step.

MS CHESTER: Innovative step, sorry. And we're making examination mandatory, what's the difference then between that and a standard patent?

MR DOBBIN: Well, because you're raised the inventive step, there's obviously scope to have something that's below there but above the innovation patent level where it is now. You could also have a system where you make examination compulsory at renewal rather than on filing. So you can file it, you can – the first renewal is at the end of two years. For example, you could say well you file it and if you want to renew it you have to get it examined, or at least apply for examination, and if you decide you don't want examination and you can't pay the renewal fee and it lapses.

MS CHESTER: So what are the benefits that the folk that you advise getting from an innovation patent? What is it that you'd need to, kind of, keep enshrined within the innovation patent system to accrue those benefits?

MR DOBBIN: Well, low cost. It's generally low cost and it – obviously low cost and a lower level of innovation, but still something worth protecting. I've got quite a lot of clients who use the system and they sell

products that probably wouldn't be worth the expense of going to a standard patent for, but they've innovated, they've put work into a project. They don't want to put it on the market and find someone copying it. For them, the innovation patent is a, sort of, better option than the registered design. It gives them some relatively inexpensive short-term protection for their invention.

MS CHESTER: So you're saying it's a substitute for a registered design as opposed to a standard patent?

MR DOBBIN: Well, it's a, sort of, halfway house between the registered design and the patent. I wouldn't say it's a substitute for one, but it's a, sort of, hallway house. I mention this in my initial submission, but the other important function of the innovation patent is actually the litigation aspect, which is quite important in Australia because we have the – as I said we have the pre-grant opposition and – which means that you can effectively delay – if you want to infringe a patent in Australia you can delay the grant for many, many years using the opposition system in the Federal Court of Appeal, which isn't an option available in many other countries which basically grant patents and then challenge them afterwards. But you have a grant of patent, so you – in the States for example, if your patent is granted, you can sue someone for infringement and they can challenge it but you can actually take action against them. You don't have to wait four or five years for an opposition to complete, and the Federal Court of Appeal to finish either.

MR COPPEL: One of the arguments for reaching the conclusion in the draft report to do away with the innovative patent system is that the purpose of the innovative patent, the intended purpose to support innovation by SMEs isn't being met. There are very few innovation patents compared to standard patents and very few SMEs are actually relying on the innovation patent system. They may be used for these other purposes that attach to how they interact with the standard patent. At the same time, I mean, there is a potential, given the lower threshold innovation patent could lead to what I call patent pickets which may perversely have bigger costs for SMEs. Can you give us a sense as to what SMEs – your SME clients, what advantages they see in the innovation patent over the standard patent?

MR DOBBIN: Well, yes, as I said, it's a, sort of, low cost way of getting – easy to getting patent protection.

MR COPPEL: But is there any reason then why SMEs are taking up innovation patents in a very limited way?

MR DOBBIN: I don't know. I mean, obviously, it's coming – it's a highly successful system in some overseas countries like Germany. Quite a lot of first-world overseas countries have innovation patents. I know American doesn't, but they're quite popular in Europe and they seem to work very well there. So maybe it just needs improving in Australia to encourage their use. I mean, one thing that just comes to mind is that perhaps that up until recently the level of inventive step in Australia for the patent has been a bit lower and there's many cases - the difference between innovative - because the level has been lower, SMEs have been encouraged to go for standard patents rather than innovation patents, but now with the Raising the Bar Act and the raising of the level in the inventive step, maybe there's more difference which will encourage more SMEs to use it.

MR COPPEL: If I'm not mistaken, I think the German utility patent model has the same inventive step as the standard patent.

MR DOBBIN: You could be right there.

MS CHESTER: Yes. We did hear that. So I guess looking at it from the SME perspective if that was what the policy objective was, we've certainly received evidence and submissions and we even heard evidence this morning that an innovation patent is basically un-financeable, so if you are an SME who takes that innovation patent, you're not going to get a venture capitalist or any private financing. It's not a bankable document, whereas a standard patent is. So I guess that then makes us wonder if it's not a protection which would then give comfort around future potential commercialisation for financiers, what role is an innovation patent playing?

MR DOBBIN: Well, not all SMEs are looking for finance. I mean, the SMEs that I use, that I work for that use the innovation patent system, they don't - they're not looking for VC; they are making - they are innovating their same products very successfully, both in Australia and expanding to Europe, for example, and they want low cost innovation patent protection for inventions that probably wouldn't meet the now raised level of inventive step following the Raising of the Bar. They just they shouldn't and they are not looking for venture capital. They are very successful businesses who are making money and the sort of things that are generally suitable for innovation patents are the sort of products that get - they tend to be sort of more low-tech things anyway that aren't necessarily going to attract venture capital. I mean, venture capital tends to be for a lot more - these days it's sort of for software and IT-related inventions, I think, rather than more mundane - I wouldn't say agricultural but more mechanical-type simple inventions or innovations.

MS CHESTER: Yes.

MR DOBBIN: So maybe, you know - and people who use innovation are probably not looking for VC money anyway.

MS CHESTER: While we are in the area of SMEs, we did sort of step back and look at some of the obstacles and impediments that were peculiar to SMEs in the patent space and one is enforcement and the cost of enforcement. So we did look at some other international jurisdictions which have sought to pursue, sort of, a lower cost stream of enforcement rights around patents and to IP enterprise. It would be good to get your views on the relative merits of that model and whether that's something that would be of advantageous to translate across to the Australian experience,

MR DOBBIN: I don't think you'd know, but Colin Birss actually came over here last year and gave a lecture which we actually helped sponsor, ICG, the Francis Gurry lecture about the Intellectual Property Enterprise Court and we think it's a great system, because one of the things that litigants - people who are seeking to litigate patents - don't like is uncertainty and particularly as to costs and the system that they worked at were costs and damages are limited, meaning that you can institute proceedings and you can know what your downside is.

Now, in some cases you can spend a lot more money if you wish, but that's your choice. You can certainly limit a downside in any litigation and the courts are on very strict lines in terms of - strict as to what evidence is allowed to be filed and how long the case is going to go for, and how long you have. It keeps a lid on costs, so we think it's a great system.

The other important aspect of it, is that - and when I started working in the UK, we had something called the Patents County Court, which was - it was (indistinct) Patents County Court. That was the government's first attempt to have a specific sort of court for patent matters, a low-cost court for patent matters, but there were a number of problems with it. One was that it was a County Court and it wasn't the High Court.

It was (inaudible) at the end of the Piccadilly line. It was run by a judge who - the High Court judges didn't think was - they didn't have a great deal of respect for and a lot of the decisions that he made were overturned. So it wasn't successful. The Intellectual Property Enterprise Court has been successful because it's part of the High Court and it's run by - well, it was started by a judge everyone respects and decisions were

therefore not necessarily always approved, but they were given - they were - far fewer of them were overturned that the patents going to court. It was just more credible generally, so - - -

MS CHESTER: We have looked closely at it and Jonathon and I were fortunate enough to actually meet with the current judge of the IP, Judge Hacon, to get a better understanding of how it works, and it's not a sort of separate bricks and mortar, it's just really a dedicated stream with a judge assigned, which then raised the question for us if we were to sort of look at replicating something along those lines in Australia, where would we put it, Federal Court of Circuit Court.

MR DOBBIN: It would have to be the Federal Court. That's our view anyway, because otherwise it wouldn't get the same - it wouldn't have, kind of, the same gravitas and that would be - that's a mistake they made with the Patents County Court.

MS CHESTER: Why not the Federal Circuit Court?

MR DOBBIN: Maybe. I think the Federal Court would be better, but - - -

MS CHESTER: I guess that we were looking for somewhere that has a DNA of a low-cost approach to enforcement.

MR DOBBIN: Yes, but the IPEC is part of the High Court and the High Court in the UK is not a cheap place to litigate in and yet they've managed to contain costs, so I think it's choosing the right venue and then having very strict unbreakable rules as to what - that's why it works. They have the unbreakable rules as to what you are allowed to - the judge controls very carefully what the costs are going to be and there's limits on everything.

MR COPPEL: Yes, they're not a risk, nonetheless, but a decision will be appealed and in that case the uncertainty as to the costs - - -

MR DOBBIN: There is always that risk, yes, but it's about risk (inaudible) I suppose. I mean any decision - whoever makes it, whether it's made in the Federal Court after a three-week hearing and six months of discovery and two QC that have two senior counsel on one side and two on the other; that can certainly be appealed.

MR COPPEL: We've just got one question and it relates to an information request in the draft report on the filing process where we've sought information on the costs and benefits and possible unintended

consequences with a two-part filing system, a bit like in the EU, where the first part is to ask the applicant to explain why the patent invention is not obvious. I am not sure if you have got any views on that particular aspect of the draft report.

MR DOBBIN: I must have missed that actually. So are you're asking when you file a patent application, you've got to explain why it's - - -

MR COPPEL: It's not obvious. Rather than the assessor reaching a judgment, or the assessor would then draw on that information and other information to reach its judgment, but whether there's an obligation on the filer to give their rationale.

MR DOBBIN: You see, it's simple to do in some ways, because - there's two problems; one is when you file your patent application and you don't necessarily know what you're going to get judged against. You may have some idea as to what has gone before. Quite often during the patent process, prior (indistinct) will turn up which you haven't seen before and which you have to establish that the new invention is invented over.

So you don't necessarily know what it is you are up against when you file your patent application in the first place and the second thing is that most patents will tend in the actual patent document to establish what the invention is and what the advantages of it are. So it will define what the patent attorney at the time invention is filed anyway thinks is the invention and it will also typically outline what the advantage of those - the advantages of the invention are.

I think if you - I mean you could require the patentee to make some sort of statement as to what they thought was invented in the first place, but it's a sort of an interesting process and it would almost - there would be a number - they'd examine it, it would come back and they might say, "Well, I disagree", a bit of this, that and the other and the patent attorney might argue this, and you're really just changing the start position and the same process is going to go on behind that. It would be unique to Australia if we could go with that.

MR COPPEL: Thank you.

MS CHESTER: Great, Jeremy. Thanks very much.

MR DOBBIN: Thank you for hearing me.

MS CHESTER: I'd like to call up our next participants James Kellow, Nikki Gemmel and Michael Robotham. We're back to copyright, folks.

Thanks very much for joining us this morning and for some of the initial and post-draft report submissions that we received from you. If you could each just respectably state your name and your organisation or the individual that you are representing for the purposes of the transcript and then if you'd each like to make some opening remarks, but I'm conscious of time. If we can keep them as short as possible, that would be really appreciated.

MR KELLOW: Sure. I am James Kellow. CEO of HarperCollins Australia and New Zealand.

MS GEMMEL: I am Nikki Gemmel. I am a freelance writer.

MR ROBOTHAM: I'm Michael Robotham. I'm an international crime writer and also Chair of the Australian Crime Writers Association.

MS CHESTER: Welcome.

MR KELLOW: Right, I will start.

MS CHESTER: Thank you.

MR KELLOW: Good morning. I'm James Kellow CEO of HarperCollins Australia and New Zealand. HarperCollins is the subsidiary of the second-largest consumer publisher in the world and we are also Australia's oldest publisher. We have been publishing books for 128 years ever since Angus and Robertson's first book in 1888. We publish the first Australian bestseller in 1895, Banjo Paterson's The Man From Snowy River and A and R then went on to publish some of the great names in Australian literature, Henry Lawson, CJ Dennis, May Gibbs, Norman Lindsay, Dorothy Wall.

All of these authors had one thing in common; Angus and Robertson's original inspiration. They wanted to publish stories that would appeal to ordinary Australians, Australian stories that Australian readers could relate to. A and R that Australian writers should not have to rely on the publishing houses of New York and London to tell their stories. – Publisher in London or New York care about and Australian story? We contend that is still true today and that the Australian book industry offers enormous social and consumer benefit through the breadth and diversity of its locally published books which ordinary Australians can relate to.

Today HarperCollins AU turns over approximately $67 million. Roughly 45 per cent of our revenue comes from our local publishing list on which

we publish 150 new titles annually. This is consistent with the Australian market which is made up of 45 per cent local publishing and 55 per cent international publishing.

We invest six and a half million dollars a year in author advances of which roughly 80 per cent is for local authors. In addition we invest approximately $2 million in the marketing and promotion of local authors. In the last five years, HarperCollins has consistently invested more in local author advances than it has reported in company profits and I'm not looking to celebrate our modest success so much as to make clear the marginal nature of Australian publishing in the current climate.

We are deeply concerned that the Productivity Commission's latest report which finds in favour of reducing the term of copyright and recommends repealing parallel import rules and the adopting of a US fair style approach is based on out of date information and has taken a short-sighted view of the consumer benefits relating to PIRs and the Fair Dealing.

The Productivity Commission has relied on price data from its latest report in 2009 which, in itself, was based on data from 2007-2008 to make these recommendations and we would suggest it seems unhelpful to evaluate whether an industry is adequately serving consumer interests by basis one's argument on information that is nearly 10 years out of date. I note Mr Fifield recently commented, "Copyright protection is an essential mechanism for ensuring the visibility and success of creative industries by incentivising and rewarding creators." PIRs are an essential mechanism within territorial copyright and they ensure an equitable return to creatives.

Let me give you an example of how. We estimate a book will sell 10,000 copies at $20 in the Australian market. On a 10 per cent royalty, this means we can advance $20,000 to the author for this work, but if we were without PIRs, an overseas business imports copies - 5000 copies say to Dymocks, our market is effectively halved. Now we have to write off half the advance and if we have already printed the 10,000 copies, half the stock too. The author will also earn less royalties in total, as those imported will only attract export royalties, generally one-third to 50 per cent less than home royalties.

For the author's next book, we would have to calculate the opportunity for that author on 5000 copies at $20, and now we can only advance 10,000 copies. This is how we see the removal of PIRs over time devaluing Australian copyright, reducing certainty and so investment,

ultimately leading to the decline of Australian writing and the Australian publisher.

I would like to stress that ratio was changed in the industry since 2009. Book prices have fallen by 25 per cent. Australian books are now, as a rule, neither more expensive nor cheaper than overseas additions and compare well with prices in the UK and the US, according to analysis conducted by the Australian Publishers Association, using a 12-year effects rate to remove any fatal (indistinct) during that time.

eBooks, an innovation which an industry is acknowledged for handling well now accounts for 20 per cent of the market, a figure that has plateaued in the 18 months. Global online shopping, the Amazon effect, has well and truly arrived in Australia. It has made availability and pricing visible and transparent to consumers the world over. This challenges the assertion of the Productivity Commission that territorial copyright enables IP rights-holders to engage in geographic price discrimination.

We would argue that the Amazon effect has led to a material decrease in the ability of sellers to separate markets on a geographic basis. For instance, HarperCollins Australia published Game of Thrones by George R Martin but Penguin Random House publishes the book in the US. You can imagine the demand for the new book. If we did not make it available on the same day and date as the American market, we will lose sales to overseas suppliers. If we do not set a competitive price against the US edition, we will lose sales to overseas suppliers.

If we do not do the right thing by Australian consumers the Red Wedding will look like a children's tea party in comparison to the way readers will eviscerate us, and by the way, the success of Game of Thrones has allowed us to invest in many, many new Australian writers.

In May 2012, the Australian Publishers Association and the Australian Booksellers Association negotiated a unique and involuntary 14-day speed-to-market agreement. Increasingly though, major releases are published on the same day as overseas publications. There has also been development in new digital print technology that has revolutionised supply in Australia by allowing much smaller quantities to be produced cost effectively locally, on-shoring the supply of most books in the Australian market and reducing waste.

The experience of the New Zealand book industry is a cautionary tale. PIRs were removed in 1998. A collection of impacts, PIRs, then Amazon, then eBooks created a tipping point for the local industry, which has left it

seriously reduced. Perhaps the removal of PIRs was only the beginning of a series of challenges which left publishers - which made publishers question whether they could defend the New Zealand territory. But it definitely influenced the outcome and it is still worthwhile comparing trends in New Zealand since that time, as one market has PIRs in place and the doesn't.

Prices relative to Australia are now more expensive in New Zealand. Prices are not falling as deeply in Australia and the range of books sold has decreased by 35 per cent. There may be many influences, but the Productivity Commission's contention that the removal of PIRs will lead to price reductions is not proven in the New Zealand example.

The Productivity Commission has suggested that PIRs should go because they decrease consumer welfare by imposing an Australian tax on books. The report suggests that prices may decrease by 10 per cent if PIRs are removed. Nielsen BookScan values the Australian trade market at $1 billion at point of sale, so by extension, the saving to Australian consumers might be $100 million.

Whilst we dispute whether the saving would eventuate, we should also evaluate the benefits that flow to consumers from the successful industry PIRs has helped sustain and we should consider therefore what the cost to consumers would be in the transition to an open market. For instance, what value does the Productivity Commission ascribe to the wide range and diversity of titles available in Australia for Australian consumers.

The range of titles decreased by 35 percent in Australia as it has in New Zealand, what loss and value would the Productivity Commission ascribe to this reduction in choice for Australian consumers? PIRs help produce more Australian stories for Australian readers than would otherwise be the case. What value does the Productivity Commission ascribe to this consumer benefit?

PIRs help encourage more Australian nonfiction than you would see without them. What value does the Productivity Commission ascribe to such a benefit. PIRs also allow educational content to be localised for Australian schoolchildren. What value does the Productivity Commission ascribe to this benefit? PIRs help produce books that inform consumers about cultural expression, national identity, political and social contention. What value does to Productivity Commission ascribe to such consumer benefit?

Australia is the envy of every other English-language market, because it has the most diverse book-selling industry of them all, with 30 per cent of the market being made up of independent booksellers. In contrast to the US, there is less than 15 per cent and in contrast to the UK, where it is less than 10 per cent, but in truth in Australia, it's probably closer to 50 per cent when you consider that many of the Dymocks and Collins booksellers are, in fact, owned by independent owner operators working under a franchise model.

What value does the Productivity Commission ascribe to such diversity and proliferation of choice for consumers. Also, what consumer value does the Productivity Commission ascribe to the sale or return model that allows local booksellers to take risks on local authors and which would be lost in a market supplied by overseas retailers? Also, what value does the Productivity Commissioner ascribe to the local marketing and publicity provided by local publishers which helps create demand and make bestsellers and which would be absent if booksellers were serviced by overseas retailers.

Finally, what consumer benefit does the Productivity Commission ascribe to an efficient, effective and currently functioning market solution for the selection of writers, as opposed to a bureaucratic subsidy based solution, subject to political and bureaucratic influence. All up, are these benefits worth more than the unsubstantiated cost of $100 million? We are also concerned that the Productivity Commission's recommendation to adopt a US-style fair use system in Australia will drive investment out of school and tertiary publishing, as has been evidenced in the Canadian market and we would ask again what value does the Productivity Commission ascribe to keep in content an educational text, local and relevant to Australian schoolchildren.

If Australian educational publishers withdraw from the Australian market, what will the cost be to future generations who are educated with British or American texts that do not reflect their lives and experience. In conclusion, it's our contention that the Productivity Commission through price alone has taken too singular an approach to the question of how PIRs and fair dealing influence social welfare and that broader more informed approach would consider the consumers are not being discriminated against no price availability and access, but are in fact the beneficiaries of considerable welfare flowing from effective, competitive consumer-focused unsubsidised industry that delivers value, choice, diversity and accessibility. An industry that continues to challenge itself to deliver even more value, as evidenced by recent trends and we note that the entire industry, booksellers, publishers, authors, agents and printers is united against the Productivity Commission's recommendations. We contend

that the risks to consumers from the implementation of the PC's recommendations far outweigh any theoretical benefits. It is our assertion that adoption of the PC's recommendations will send Australia back in time, reducing investment and innovation, and costing jobs and growth in one of Australia's most successful creative industries. Thank you.

MS CHESTER: Thanks, James. Nikki and Michael, I am still happy for you to make some opening remarks, but James has taken up about 12 minutes of 15 minutes and it is a zero sum game, otherwise we're not going to have time to ask you some questions. So I know you prepared some words, but if you could try to just draw on what you want to say that is your own story that is not repeating what James has already - - -

MS GEMMEL: Can I speak fast?

MS CHESTER: I'm more than happy with that.

MS GEMMEL: All right. Thank you so much to the Commission for allowing me to speak. I understand that the Commission is not looking into the consumer benefits or otherwise of the current importation rules, or a future open market. Why not? Consumer benefits go to the heart of this issue. The long term effect is that these proposals disadvantage consumers as well as writers. Here's a comment from a literary agent who has worked in the Australian book industry for several decades, "Books are now cheap in this country compared to anywhere else. As it is, the drop in prices has had a dramatically adverse impact on writers' income," and that's where I'm coming from.

I have seen my clients' income reduced by factors that would create a huge outcry if it happened in any other industry. The adoption of any of the Commission's recommendations would be the final nail in the coffin. The clincher in the report for me was the claim that the consumer drives creativity, absurd and flawed thinking, with respect. Look at TV ratings. If we left it to consumers, there would be wall-to-wall reality and cooking shows. I must say, it is all getting to me as I see my writer clients struggle more and more, and I myself try to hang in by the skin of my nails as a literary agent.

The Australian writer's income has dropped from $22,000 per annum to $12,900 over the past decade. Income sources are shrinking in an imperfect storm of blows. The reality is in a rapidly changing world of electronic communication, we are expected to write for little or nothing now. With respect, you're proposing to eviscerate our writers world even further. What is at stake most of all is diversity, a diversity of titles, voices, stories and perspectives. Diversity is key here.

I then go on to talk about New Zealand. James has done that very well. I will strike my paragraph. If parallel importation were allowed, there could conceivably be several editions of, for example, my book The Bride Stripped Bare, floating around in the Australian market. An Australian edition published by my local publisher with profits channelled back to that publisher, which would then help emerging writers and help the local publisher in general, but this would be competing with an American and/or a British edition, possibly even an Indian edition, with all profits going back to that host country.

Distinctly Australian words that I use extensively throughout my books like "ute" or "stroller" would be changed to things like "pick-up truck" or "pushchair" by an overseas publisher mindful of their own markets and wanting to pander to their own local readers. This is happened to many of my foreign editions in the past.

We are risking a dilution of our wonderfully local, vivid language that not only we as adults read, but our children read in terms of children's books. I, as a writer, crucially for us who sell internationally as Australian authors, wouldn't be getting as big a royalty. It would be a lower, leaner export royalty as opposed to a much healthier home market royalty that frankly help me make a living. For example, with my book The Bride Stripped Bare, I am an Australian writer, but I was living in London at the time. I sold it through a London publisher and a London agent. I have sold several hundred thousand copies of The Bride Stripped Bare in Australia but I was given an export royalty on that book because the deal had been done in London.

This also happened to Miles Franklin with My Brilliant Career. I was very, very lucky that I had an agent who fought my corner ferociously, and it was a huge fight, but I clawed back about a hundred thousand pounds of royalties that were owed to me as an Australian writer selling into my own territory. I was lucky, but a lot of other writers aren't and in terms of what is happening to our future, it feels devastating. I have no superannuation as a writer. I rely on my royalties from my books to keep me going and to keep me going as I age.

It wasn't until my fourth novel, seven years into my career that I made any kind of money on my books. I was nurtured by a publishing industry that has been nurtured by Game of Thrones, or has been nurtured by a Cloudstreet or a Possum Magic or whatever. We need to sustain a vibrant local industry. I was paid $10,000 for my first novel, Shiver, and publishers need to be there in the long term, investing in authors like me until we come good in our fourth, fifth or sixth book.

Australian writers want to ring fence our literary heritage, enable our creators and publishers to blossom within a vibrant local industry. The Commission, with respect, risks unravelling the very model that rewards our literary creativity in this country. As for our students, topping their English classes and dreaming of one day becoming part of the national conversation or writing that great Australian novel, they're unlikely to make a living out of Australian writing. That's the reality of our world.

And if the Productivity Commission has its way, that figure will be dropping a lot further as vibrant local publishers shut up shop and advances and lists shrink even further. If our government accepts these measures, it would have demonstrated a foolishness that the US and the UK wouldn't dream of. They have not accepted the practice of parallel importation; have not indicated a liking for it, because to them a vibrant literary culture is a source of national pride. To them, their own writers matter. Thank you.

MR ROBOTHAM: I will try to be very brief. I understand what's been lost in the dry (indistinct) economic arguments about protectionism and open markets is that a book is not the same as a pharmaceutical or a used car or a sweatshop T-shirt. I mean, a book is part of our culture. They tell our stories. They connect Australians with the past and with each other and they export Australian ideas and ideals. Yet so much - having read the Commission's draft report, I came away with the distinct impression that the Commission doesn't particularly like books or think Australian writers are probably wasting our time and talent and should be doing something else more productive. I hope that's a misreading of what the report said but it made me very depressed.

I'm going to talk about my own personal experience of PIR. I'm very lucky, I'm not speaking - and I'm very fortunate to be one or two Australian writers that makes a good living out of what I do, and that's mainly because of the international sales and good sales in Australia. For an established author like myself almost certainly my UK and US editions will finish up on Australian bookshelves next to my Australian edition. But I tell you not only the spelling is different, different titles are often used in those markets. I've actually added chapters to American books because they want every "i" dotted and "t" crossed.

I've dumbed down books because American publishers insisted that they weren't going to work in America, that they were too psychological, or, "Can you remove certain references, the only soccer team we know is Manchester United so that's the only one you should mention". I mean, there are books, I appreciate they know their market, my American

publishers, but I don't want to see those books turn up on Australian bookshelves. I want my Australian edition to be there to benefit my Australian publishers who have spent so much money promoting, marketing and helping fostering my career.

And similarly, I earn more - as Nikki pointed out, my royalty for an international edition is a fraction, six per cent. So it will stop - my Life or Death, the award winning book, won the Gold Dagger, and had huge expectations in America and they overprinted in hardback, that book is about to be remaining in America in hardback. If we remove how those books are going to come into Australia they - and I know we have anti-dumping laws, I don't know how successful though anti-dumping laws are, but if we remove PIR, if we become an open market these publishers - foreign publishers are always looking for a new market, they will purposely press the print button to print an extra, five, six, seven, thousand copies of my books and bring them into Australia because they know they can and they know that they will sell here and they will directly compete with my Australian editions.

If they're dumped here I will receive nothing from that royalty, the wholesale - and can I at all stop this? No. Can I put this in a contract to say, no, you cannot print extra copies and bring them to Australia? No. Can I stop a wholesaler doing it? No. Will I earn less money? Certainly. Will my advances shrink? Certainly. Worse than that is, I don't care about myself, as I just said, I make a living. It's that next generation of Australian writers, it's the writers now that are trying to break through that need that advance, that need that help. They're the people that the money is not going to be there for them. Because if my Australian publishers begin losing money on me or not making as much that's less money that they can spend on the next generation of Australian writers.

Will my books be cheaper? Nobody knows. I can tell you now, I did the figures last night, I picked out the title Watching You, the cheapest place in the world to buy that at the moment is Angus & Robertson in paperback at $16.70, and that's cheaper than anywhere in the US, including Amazon, Barnes and Noble, bookstores in the UK, Foyles Waterstones, Amazon UK, Canada, the cheapest place in the world is Angus & Robertson. And all of the prices were ranging between 19 and 16 dollars, and Angus & Robertson is cheaper. So I don't know whether there's any evidence to suggest that it would be cheaper.

I just quickly want to touch upon this idea that somehow we can remove all this and that our culture won't suffer because the government will just increase arts funding and writers will be all be happy with giving them handouts. I've never received a government handout or a

government grant, I've never asked for them. I believe they're vitally important though for our Australian writers. But to suggest that we should go back to being supported by government subsidies, that we're going to finish up going back to a time where we rely on patronage or political favours, going cap in hand to the government to pick and choose what projects they're going to fund depending on their political leanings. I mean, do you we really want to go back to that sort of system?

Books are about our culture, you cannot put them in the same category as the Commission seems to be putting them in, and lumping them with used cars and pharmaceuticals, they're not the same. Thank you.

MS CHESTER: Thank you very much. Before we dive into some questions, and I'm not sure how much earlier this morning you might have been here, I think it might be helpful just to make a few clarifying remarks because we're very conscious of a lot of folk rely on media reporting of our report to get a handle on what we might have recommended or what our findings may have been.

So just three things that I thought might be helpful to mention; firstly that we make no recommendation to change copyright term. Indeed, we spend quite a bit of time acknowledging that given the treaties, both multilateral, plurilateral, and bilateral, that Australia has entered into that the term of copyright is here to stay. Our Terms of Reference, so on the issue of parallel import restrictions, our Terms of Reference asked us to take regard of the government's response to the Harper Competition Policy Review. If you read the government's response to the Harper Competition Policy Review in conjunction with our Terms of Reference, which we have to do, it requires us to look at the government has already made a decision to remove parallel import restrictions and we were asked to consult and advise the government on transitional issues. So that was the focus of our draft reporting. We'll come back to transitional issues in a moment.

With respect to the parallel import restrictions, we do hear what people are saying about the movement in prices since the Commission's 2009 report so we are now looking to update that data to provide that in our final report because it will help inform also the transitional issues. Which kind of leads me to a point that James touched on in his opening remarks, well 12 minutes of them, where you talked about how there has been changes since 2009, prices have come down, the industry here now is incredibly competitive. The Amazon effect means that people are very mindful of prices. The consumer can go online and order, sometimes

without any postage cost, so that's really transformed the local industry and made it far more competitive.

I guess that's one of the issues that is in the melting pot for us of how the industry would transition at this point in time, given it has become very competitive, which would suggest that it might be much better placed today than it was six or seven years ago. The other transitional issues that we touch on around what's happened to prices, secondly, where the Australian dollar is at present, which is advantageous from a transitional perspective, and then thirdly, that we do have internationally relatively robust anti-dumping arrangements, which the Commission has looked at recently as well.

So I guess my first question would really be, apart from making those clarifying remarks, it would be good to get a sense of what other transitional issues, we'll come back to the issue of parallel import restrictions in themselves, but what other transitional issues we perhaps should have identified that we haven't identified in our draft report?

MR KELLOW: Well I think there's - and I refer to a couple of points here in some of the questions that I asked, I mean, I think there are certain things that would be affected by change in an open market in terms of the way the local market operates. Obviously the sale or return model that publishers of my books to Australian retailers currently would likely to go in favour of firm sale from overseas retailers. So the opportunity to try it before you buy it option would be lost. I also think that all of the benefits of local marketing and publicity, and local decision making generally, around the publication of books in Australia would be lost. And booksellers I think would suffer as a consequence. And I think readers would too because in many respects that's where the demand for books is created.

MS CHESTER: But, James, if you say that the publishing industry in Australia today has become lean, mean and competitive?

MR KELLOW: Yes.

MS CHESTER: Why would the business model for HarperCollins change?

MR KELLOW: Well, because I think that if by introducing - by foregoing parallel importation rules, you potentially introduce risk into the current model which wouldn't be there otherwise, both for publishers and for authors. Why introduce that risk? What is the benefit of introducing that risk? If price is comparative and the consumers are not disadvantaged

in any way. I mean, it implies that everything is fine while everybody plays nicely. But as Michael indicated in his comments a mistake happens somewhere else in the world and 15,000 copies of a US edition is suddenly available to be imported into the Australian market.

Obviously if those are brought into the market that diminishes Michael's return, it diminishes the local publisher's investment. And so the risk portfolio of the industry has changed dramatically for what appears to be very little benefit to consumers at the end of the day. And while anti-dumping legislation exists it seems curious to get rid of one form of legislation in favour of another while introducing an element of risk around that at the same time. And I think it's also kind of interesting to consider what constitutes dumping. If there is an edition of Michael's book available in excess stock overseas, well, at what point is it dumping? At what price does it become dumping as opposed to a book that's just imported?

Also, if you take an example of Nikki's work, if prices are competitive on that particular edition around the world at that particular time that's fine. But what happens when one market decides for whatever reason they want to introduce a cheaper edition, maybe on cheaper paper, maybe a smaller edition, and they reduce the price of that book? That then potentially becomes an import risk into this market. And again, there's an uncertainty that creates in terms of the return to the author and an uncertainty in the return to the publisher, which threatens the MOC - - -

MR ROBOTHAM: And just the other thing, the point worth making, and I'm sure others have made it hopefully, is that what incentive is there for an Australian publisher who discovers the next Tim Winton to take that book and to find a wonderful publisher in the UK and in America to publish that great new Australian novel if that book is just going to come - it ships straight back into Australia and competes with the Australian publisher on the same shelves? It's almost you've reached the situation where Australian writers, we rely - often you sell your rights and you're relying on that publisher to find and to get you those international markets.

So as much as we're a really strong market, I don't what size we are in the world in terms of the publishing market, but a best seller in Australia is usually about 10,000 books. If you work out what that earns an author that's not enough to live on. You need to get those international markets or you need to have a moderate book sale over the one year or something to try and make a living out of it. And straightaway if you have a situation where your UK and your US editions can be shipped in

and compete you get less money for them, or potentially no money at all, then that's not going to help writers at all.

MS CHESTER: James, it would be helpful then, so you mentioned before, or someone did, I think, that parallel import restrictions are in place in the US and the UK, as we understand it, it sort of works within the EU for the UK so therefore outside the EU they apply but within you can import from any other within the EU countries, with the US the sale of first right doctrine and how that's been interpreted by the courts means that there's effectively no parallel import restrictions in US. So how does the HarperCollins business model in terms of the advantages and the risks that the authors have talked about, how do the business models work in the US and the UK for HarperCollins with their authors?

MR KELLOW: Well first of all I think in the US I think the case you're referring to is the Kirtsaeng case, which I think was 2012 in the Supreme Court, which I think is a singular case. And I can't remember whether it's the judge or the - the presiding comments talk about that there's still a long way to go in terms of seeing how this actually plays out. And by all accounts I think the market still operates as though it's a market that respects parallel import rules. I'm not aware that it operates in any other way and I think, Michael, you were talking about - - -

MR ROBOTHAM: No, the situation of I was at a major festival in America, was taking place in Madison, and the Canadian booksellers were stopped at the border and told they couldn't bring the UK or Canadian editions of books into the US. And they just had to turn around and go back. And that's happened at two festivals in America that I've been to.

MS CHESTER: Well, obviously we're getting some conflicting evidence on that. But could you just talk us through the business models then for dealing with the authors?

MR KELLOW: I don't think you see importing of commercial quantities from overseas into the US and the UK markets, notwithstanding the Kirtsaeng, the singular example of that.

MS CHESTER: So would you be able to share with us then what other business models in terms of advances and the return of unsold books with booksellers in the UK and - these are some of the advantages that have been attributed to local publishers in Australia, I'm just trying to understand do those advantages exist in the US and the UK?

MR KELLOW: Yes, they do, I think. In the sense that I think the markets operate the same way. We make an advance to an author

predicated on the expectation of the sale, which may or may not work. I think publishing works on a kind of a 80/20 rule, 80 per cent of the books that we publish, unfortunately, don't actually fulfil our expectations and 20 per cent do. And hopefully that 20 per cent pays for the other 80 per cent. So effectively there's a huge risk in publishing. But by and large, we're looking to make informed decisions based on the local market conditions that help us make a return for those authors.

You mentioned the sale or return and how that works. In essence, we basically take Mickey's new book, we sell it to Australian booksellers, and I think this is the same in the US and in the UK, and we ask them to have a go. And they have an option to return that book between three months after publication and 12 months after publication if for whatever reason the book doesn't sell. So we give them an option to try that book and see whether it works. And that model is the same in the US and the UK.

MR COPPEL: What do you do when the book doesn't work?

MR KELLOW: Then the books are returned, the booksellers are credited, and often the books are pulped. Some are recycled if they can be but they are often pulped. As sad as that makes us.

MR COPPEL: You represent HarperCollins Australia and New Zealand?

MR KELLOW: Yes.

MR COPPEL: Australia has parallel import restrictions.

MR KELLOW: Yes.

MR COPPEL: You mentioned you invest in Australian writers.

MR KELLOW: Yes.

MR COPPEL: Do you do the same for New Zealand writers?

MR KELLOW: We still do, but at a much reduced level. So a few years ago HarperCollins New Zealand employed about 40, 45 people, we had a distribution centre and a full publishing team. We've basically scaled that back, we now employ nine people, we distribute out of Australia into New Zealand. And where we used to publish 40 books a year we no publish 15 to 20 books a year. And, in particular, we stopped publishing children's books in New Zealand because we find it too risky.

MS CHESTER: And when did those changes occur in terms of the - - -

MR KELLOW: Those changes occurred in 2013.

MS CHESTER: Okay. And parallel import restrictions were removed in New Zealand in 1998?

MR KELLOW: Yes.

MS CHESTER: So obviously there were some other factors that were at play in the structural changes to your operations in New Zealand?

MR KELLOW: Absolutely. So, and I think I referred to that in my extremely long 12 minute opening comments, clearly PIRs were removed in 1998. But the Amazon effect I think has absolutely buffeted New Zealand and I think the advent of eBooks has buffeted New Zealand. But it seems to me that the difference between the reducing New Zealand market and the Australian market is that PIRs exist in one market and not the other. And maybe that's been enough, as it were, to safeguard publishers' investment in the Australian market in a way that it is felt too risky to invest in the New Zealand market.

MS CHESTER: And just so I understand the numbers that you mentioned before for the movement in the price of New Zealand books, that was stripping out currency movements?

MR KELLOW: What we compared, how prices had fallen in the Australian market since 2009, and prices have reduced by 25 per cent, we then looked at how prices had reduced in New Zealand there with that same timeframe, factoring in CPI, and they'd reduced by 14 per cent. But then we also did a calculation to look at how prices had changed when you considered FX rates and what you saw was in 2009 New Zealand prices and Australian prices were roughly the same. But when you factor in FX rates over that time you see that New Zealand prices have actually increased and Australian prices have decreased.

MS CHESTER: Okay, thanks.

MR COPPEL: And you did that analysis for all titles published by HarperCollins, or across the - - -

MR KELLOW: No, we basically used the ASP provided by Nielson BookScan for the New Zealand market and the Australian market and then made a calculation using the FX rates.

MR COPPEL: Yesterday in the hearings in Brisbane we heard similar anticipation that removal or PIR would have potentially doom and gloom consequences.

MR KELLOW: Yes.

MR COPPEL: And I made the point that PIR has existed in Australia for decades, as also in other Anglophone jurisdictions. And we've also heard yesterday that in the period that I was growing up and there were very few Australian writers, and that's something particularly for children's books that has changed, and yet there's no change in PIR over that period. It seems to suggest that something else is going on that has sort of raised the prominence of Australian writers in the Australian market. And if that's the case I'm trying to understand why it is that the PIR removal over this period where we've always had PIR, why the removal of the parallel import restriction, especially in the context where as an individual you can parallel import, would lead to these sorts of consequences?

MR KELLOW: Well, I suppose my view on that would be the industry has benefited from the certainty of investment over a long period of time and we've developed as an industry. When I say developed as an industry, publishers have developed and booksellers have developed and we've created an industry which is pretty self-sustaining. I think we also created a culture and an environment that nourishes and nurtures Australian writing. And we also have a very high consumption of books by Australian consumers and so I think in many respects we've nourished an audience to appreciate books for what they are and appreciate the value that they bring. And that's one of the reasons why I think we've seeing the industry do well since the 50s and the 60s when it was not in a great shape.

MR ROBOTHAM: There seems to be a suggestion in from my reading in the draft report was an expectation by the Commission that the publishing industry would shrink the Australian publishing, if you know - I mean, by the very nature it's a case of - I mean, I agree with you, I don't think - we can judge it doom and gloom, and we'll still be - regardless of what happens over the next few years, there will always be Australian readers and Australian writers and Australian books published but there will be fewer of them, and fewer opportunities for Australian writers, and fewer Australian books published. And that's where the idea that suddenly there won't be any published, that's ridiculous, of course there will be, it's just that there will be fewer of them. And few opportunities.

MS GEMMELL: Less diversity.

MR ROBOTHAM: Yes.

MS CHESTER: Perhaps if we move to the issue of fair use and fair dealing, because I am also very conscious of time and there's a couple of other issues we did want to cover with you this afternoon. It would be good to get a sense of what creative works today that are remunerated under fair dealing you think would not be remunerated under fair use. And particularly if we were to look at the ALRC recommendations on fair use which we're really trying to just enshrine fair dealing into an adaptable principles based law similar to what we've done with the Australian Consumer Law.

MR KELLOW: So I think the biggest risks that exist to educational and tertiary publishers, obviously the fair dealing provisions prescribe certain uses that are acceptable, the problem as we see it with the US fair use is that it's too broad, it's too ill-defined and it's open to interpretation which has led to a lot of litigation in the US and the litigation that continues, there's still uncertainty about really what constitutes fair use. So my take, and leaning on the expertise of the education publishers that I know, is that is a significant risk to them.

I'm sure you're all familiar of course with the Canadian example in that respect, and in particular, Oxford University Press' decision to remove itself from the Canadian market when the US style fair use was introduced into the Canadian market. So I think my sense is that all authors and publishers are potentially under some risk in the introduction of US fair use, but particularly education and tertiary markets.

MR COPPEL: I will just clarify, the Canadian change was not to adopt fair use, it was an extension of the fair dealing exemption. And one of the things that they introduced was removing the statutory education licence, as I understand it. And that's not something which we are proposing in the draft report and I think it was more the latter that had the biggest impacts on the Canadian market for educational books.

MR KELLOW: I'm not an education publisher so all I know is that - and talking to my colleagues OUP, they felt very strongly that it was the introduction of US style fair use that really undermined the potential for them in that market and so they withdrew their investment.

MS CHESTER: Yes, I sometimes think that fair use isn't getting a fair deal so I think a lot of the issues are being conflated in looking at the Canadian example. Indeed, we've had round tables and had evidence from folk that, because we haven't recommended any change to the statutory

licensing and the educational licensing arrangements, that what's remunerated from the perspective of a text book under fair dealing should be very similar under fair use. So we're just really trying to understand when people say doom and gloom with moving to fair use, what is it that's being remunerated today under fair dealing that is not going to be remunerated under fair use, and struggling to find the evidence but - - -

MR KELLOW: Well, I think it may be that one is not quite sure, one is currently operating in under a system which seems to be quite clearly defined and fair use doesn't appear to be well defined, and so there is anxiety about how one is going to manage that. And I think that's not an unreasonable concern.

MS CHESTER: So we're dealing with an issue of uncertainty and in our report we go to some lengths to talk about how issues of uncertainty have been addressed in the US with guidance and jurisprudence that we can also draw upon. I guess the issue is, what we're struggling with, is technology keeps changing and fair dealing can't keep up with it. Fair use, because it's a principles based law, similar to what we've done in competition law and Australian Consumer Law, is principles based so it can adapt over time. And that's the biggest advantage from our perspective. I'm sorry, preaching a little bit here.

One other issue that was raised, James, in your submission was around section 51(3), which is to do with the Competition and Consumer Act and whether or not it should apply to affording rights and licensing under intellectual property arrangements. I guess we're kind of wanting to get a better understanding on, as you also say in your submission, that copyright licences are inherently not anticompetitive?

MR KELLOW: Yes.

MS CHESTER: That was certainly the view that was formed in the Harper Review, which also recommended the section 51(3) exclusion be removed. What's the concern then with applying competition laws to licensing arrangements as they apply to intellectual property arrangements?

MR KELLOW: Well, I think our view is that licensing and assigning copyright is inherent to the copyright holder's proprietary rights and those rights can be licensed and assigned similar to any other property right. So IP is an asset that should be traded like any other asset, it doesn't prevent others from writing about the same topic, there can be numerous explorations of the same subject but licensing arrangements are inherent to the copyright system. So we see that there is no evidence to suggest that

licensing or assigning arrangements in the context of copyright are inherently anticompetitive.

MS CHESTER: So then why would there be an issue with competition laws apply to them if they're not anticompetitive? I guess where we're coming from is we can see where licensing systems can be misused in certain sectors where cross licensing, digital content, pharmaceuticals, so why wouldn't we allow the competition laws to apply to - - -

MR KELLOW: Well, I think there's a question about whether it introduces a cost and a bureaucracy that doesn't need to exist. Publishers have to apply for authorisation or approvals that will lead to substantial increase in transaction costs which would perhaps need to be recovered by higher prices and at the same time this is at odds with how these things are dealt with in other market sectors, Australian copyright in that respect become more expensive than it is overseas.

MS CHESTER: So we addressed the issue around transaction costs by saying that the ACCC, like they would in any new areas of endeavour, would issue very detailed guidance as to how they would interpret and what authorisations would be required, does that - - -

MR KELLOW: Yes, but why do you think it's necessary for it to be exempt?

MS CHESTER: Sorry, I'm saying it shouldn't be exempt from the competition laws.

MR KELLOW: No, okay. But why?

MS CHESTER: Because there is scope for anticompetitive misuse in some licensing arrangements, and we have received evidence to that effect.

MR KELLOW: Right.

MS CHESTER: I'm not suggesting its licensing arrangements or copyright to do with booksellers and the like, but we've heard about it in - so this was raised in the Harper Competition Policy Review. So there are some areas where there are concerns about misuse and anticompetitive use of licensing arrangements, and you don't have - - -

MR KELLOW: I would love to know more about those examples to understand them but my perspective would - it's not something we see or

experience so we can only see cost and administration issues coming in to the situation - - -

MS CHESTER: So it's purely from regulatory burden perspective that - - -

MR KELLOW: Absolutely, but also I think inherently, licensing arrangements are part of the way in which copyright is traded.

MS CHESTER: Okay, that's it. Thank you, very much for coming and joining us today. We appreciate to hear, especially directly from the authors as well, thank you.

MR KELLOW: Thank you.

MS GEMMELL: Thank you.

MS CHESTER: I would like to call our next participant, Kimberlee Weatherall, to join us. Kim, thanks very much for joining us today and thank you also for your initial submission and your post draft report submission, meeting with us earlier on, and helping us out with the round tables last week. So for the purposes of the transcript if you could just state your name and the organisation that you represent, and then please feel free to make some opening remarks.

MS WEATHERALL: My name is Kimberlee Weatherall, I'm an Associate Professor at the Sydney Law School, but I'm not representing the University of Sydney or the Sydney Law School, I'm here in an independent academic capacity as an expert in copyright, and IP law generally.

Thank you for the opportunity to be here. It's fun to be here. I should say, as you have noted, I am an author on post-draft submissions. I'm actually an author on three post-draft submissions with various academics covering various things, and I should say herding academics like herding cats, I'm not here to speak for all of the various academics who I have worked with I am here to answer questions and give evidence on my own behalf, though I can certainly answer questions about the submissions as a whole.

One thing, sitting here through some of the hearing, I think it is important that areas of the report other than copyright not be lost in all of the discussion. There's a lot of important stuff here across a range of issues including some areas of intellectual property that haven't been as much the subject of as much attention, and those include trademark and

they include policy in Australia's international intellectual property position. So I will emphasise those points as very important.

I do want to make a couple of comments about fair use because that recommendation has stirred some controversy. And in my view there are some problems with the way that the debate around this has been framed around certainty or uncertainty. The outcome of legal - the application of legal principles to specific facts is always by definition uncertain. Our goal, in my view, should be that we are looking for a predictable legal framework not a certain one. As human beings we don't demand certainty as we move through life. And as people and actors in the market and in public life we stake our fortunes daily on our ability to predict outcomes with some level of accuracy.

A driver in a car, a doctor performing surgery, can't be certain about how the principle of negligence will apply, nor can a business be certain whether the ACCC will think their merger substantially lessens competition. And you've raised a number of these in your comments already so I know you're aware of these things. In all of these various legal contexts where principles are applied we seem to be able to live and work with laws that provide a sufficiently predictable framework so that we can decide how to pave. And I don't think copyright should be any different.

And in areas like negligence the law is made predictable in part through reliance on community standards, so too can fair use operate. In Israel and the US creator and user communities have been taking it into their own hands to settle what they consider appropriate behaviour under fair use by creating various codes of practice, or codes of best practice. And the existence of the fair use defence in this context has provided the catalyst and the space for communities, media scholars, documentary filmmakers, visual artists, to come up with an understanding of what ought to be allowed. As far as I know, in the decade or so since these kinds of codes have started to be developed no one operating within their needs and bounds has been sued. And those codes are not charters for open slather, they are charters for reasonable behaviour including respect for creators. And if people don't believe me they should certainly go and read the codes.

On the other side of the equation, the argument that the current Australian model of copyright exceptions provides clarity for users and copyright owners is entirely at odds with the reported experiences of people who deal with copyright law. I refer you to material put before the ALRC, including submissions to that body made by myself and other colleagues. I am aware that opponents of fair use are sometimes

dismissive of mere academic views and scholars are accused of tilting at shadows, of being concerned about teenagers in bedrooms, and people who are never going to be sued. I respectfully refer the Commission to submissions colleagues and I made to the ALRC based on extensive empirical research, including in the libraries, galleries and archives sector, particularly research conducted by Dr Emily Hudson.

More importantly, this too easy dismissal entirely fails to recognise that as both authors and teachers we too are stakeholders in the copyright system and we too constantly rub up against a permissions culture which actively prevents or distorts our research, forces us to waste scarce public research resources in fruitless battles for access or permission, or requires us to distort our publications by taking out images, charts and the like where no conceivable market harm could occur from the publication. We constantly have to tell our students, colleagues and institutions, and almost anyone else who cares to ask, no, you can't do that. And we are witness to the negative impact on innovation and creativity that that causes.

Finally, I have seen claims that fair use creates some kind of free for all, which again flies in the face of evidence that the goal of making out a fair use case has obviously incentivised innovative companies to design technologies in ways that protect rights holders' interests. So technology has been designed to produce useful services or technologies in ways that do not substitute for sales of works and do not destroy markets but open up new uses of works and expressions as well as new markets for the originals. I think I will leave it there. I had more but I'm conscious of time. I'm happy to respond to any questions across the various submissions.

MS CHESTER: Thanks, very much, Kim. Before we get into the area of copyright, perhaps if we could just touch on the area of Australia's international agreements and treaties?

MS WEATHERALL: Yes.

MS CHESTER: You touched on that earlier in your opening remarks.

MS WEATHERALL: Yes.

MS CHESTER: It's an area of our report where we did spend a little bit of time trying to come up with a way forward in terms of some enduring changes around transparency and accountability when those agreements are entered into. We also raised the issue of is it better to agree to changes to intellectual property arrangements multilaterally versus through regional or bilateral agreements. So it would be helpful if you could

elaborate on your views around what we've recommended and whether or not there's anything else that could be done to improve our approach to incorporating intellectual property arrangements in agreements going forward?

MS WEATHERALL: Sure. I suppose I would have - I mean, we have made submissions on that in the Alexander et al submission. It is obviously better to conclude what we can multilaterally rather than bilaterally just because it tends to lead to a more balanced outcome, which is useful in the context of intellectual property. It also tends to lead to a higher level principles agreements rather than the detailed monstrosity of something like the TPP. So I think it is better to be multilateral versus bilateral, on the other hand I'm very aware that it is difficult to negotiate multilaterally. That is kind of the point, though. It's difficult because if you're trying to reach an accommodation of a range of competing interests, all of which are legitimate, you are going - it is going to take a long time. And it should. And the process of trying to reach an accommodation of competing interests is actually again part of the point, because it does lead to a discussion amongst a range of different stakeholders.

In terms of a way forward, particularly for Australia, I suppose there are two questions which arise there. One is processes and transparency that you've highlighted. And another is what do you put in the agreements and what sorts of things should be put into the agreements. Obviously those two are interrelated. It is clear from the dissatisfaction across a whole range of stakeholders, not just user groups, not just academics, but a whole range of the submissions that you've received and the conversations that I've had across the board, that there is a widespread dissatisfaction with the level of "transparency" around DFAT's processes in determining Australia's IP negotiating positions.

I've participated in numerous of the consultations which more or less amount to a very general level presentation and then do you have any questions. Those processes are not conducive to having a real discussion about the issues that are raised for Australia. Most of the assessment tends - will occur once we actually see the detail, which is either through leaks, which in itself is problematic, or afterwards, and even then the discussion - well, I mean, by then the discussion is too late. You can't reopen an agreement once it's been negotiated.

So I note that in your draft report you've suggested perhaps a model agreement could be reached. I think there are concerns around the attempt to actually draft texts model agreement style like the India Bilateral Investment Treaty sort of model agreement. I suspect that the attempt to

get down to that level of detail is likely almost to lead to exactly the kind of problem we have now. I mean, it's almost what we've been doing for the last few years in Australia, it's almost like we took the Australia-US Free Trade Agreement as our model agreement and then just sort of took a few bits out and put a few bits in and then promulgated that in the next negotiations. And that actually hasn't been helpful because it doesn't get down to the issues that actually arise in a particular trading relationship that you're talking about.

MR COPPEL: Is that an issue that's linked to the actual what's considered to be the model agreement, you've referred to the Australia-US Free Trade Agreement, or to the approach itself?

MS WEATHERALL: I think it is likely to be associated with the approach of having - I mean, it depends, right, because obviously there's a whole range of different sorts of model agreements you could have. You could have a model agreement which is a detailed text like the Australian-US Free Trade Agreement, you go into a negotiation with Korea and you go, well we should take that out or we should add this in because we've got to protect broadcast, or, you know, so there's that kind of approach. Or you could have a model agreement that was at a much higher principles based level so that you're then going into a negotiation with some idea of where Australia's interests might lie but without getting down to text. I suppose the comments that we made in our submission were something at that principle level, might actually be quite useful.

Having a discussion around where Australia's interests do lie in copyright, or where Australia's interests lie in patent, or where Australia's interests lie in trademark and whether we do want to - how far we want to down the route of protecting famous marks or going down the dilution route, how we want to deal with GIs and the concerns of the dairy industry having that discussion openly and reaching in front of principles level, all could potentially be useful. Trying to write text as in this is the ideal IP chapter that Australia should have, I don't think would be useful, because as we commented in the submission the agreement with Fiji is going to be different from the agreement with Europe and should address entirely different things.

MS CHESTER: Returning to the issue of fair use, that you made some comments on in your opening remarks and you touched on in both your pre-draft and post draft report submissions, Kim?

MS WEATHERALL: Yes.

MS CHESTER: I guess if we're looking to the world of a potential transition if fair use were introduced into Australia, and we're certainly not the first to make that recommendation, you talked about examples in the US of guidance notes, codes of behaviour agreed between the different parties within the system, they've obviously evolved over time as new business models have emerged and different technology adaptations have occurred to how copyright is used, Israel gives us an example of where fair use has been more recently introduced, have those sorts of codes of behaviour and guidance notes, have they sprung up in Israel, is that a market we can look to to see what we might expect to occur if Australia were to introduce fair use?

MS WEATHERALL: The short answer to that would be yes. Yes, in the sense that Israel - I can't remember the exact year they introduced it, was it 2009, 2007? 2007, I think, they introduced fair use, and they have had one code of practice that I'm aware of, or sort of a statement of best practices within the higher education - amongst the higher education institutions, got together to discuss that. And the process of discussing that has been outlined in Niva Elkin-Koren's work, who is a professor at Haifa University, and she was involved in that process. So that has happened reasonably rapidly.

Israel is interesting because they also had a power to make regulations included in their legislation, which would allow the government to actually set out things that might be considered to be fair use or default positions. That has not happened. It's not been seen either necessary or useful to do that.

One thing I think is worth highlighting about the codes of some best practice, as they have evolved, firstly, that is actually a relatively recent phenomenon in the US, the code of - I think the statement by the document for filmmakers dates from about 2005 and it was actually, in part, a response to the concerns in the early 2000s around the uncertainty about fees.

A second thing to notes is that accurately stated, the codes of best practice that have been discussed in the US are not - they're not negotiations between the various parties, they're not industry to industry negotiations where users get together with right holders. They're actually mostly about communities of professional practice, getting together and talking about what they think is acceptable. In many cases it's gone a little bit beyond what they're actually doing because a lot of industries had been operating on very much a permissions culture, but when they sit down and they think about it and they say, "Okay, what would be acceptable in terms of reuse of artwork in other visual art? What ought to

be acceptable for a documentary filmmaker to do, without having to go and seek permission if they're using pre-existing material?" Through a process of discussion, amongst people practicing in that space, they kind of try to define what they consider acceptable.

I think people sometimes get the impression that there's some sort of big industry negotiation, almost like, perhaps, the industry negotiations that have demonstrably not succeeded in the online infringement context, where you have opposing parties and they try to reach some sort of highly negotiated, highly detailed, probably quite restrictive system. It's not about that. It's about kind of defining a set of community norms and trying to give people the level of assurance that if they're working within those norms, then they are doing what people in the industry consider acceptable.

MR COPPEL: Can I just ask, it relates to fair use and it's a point you made in your submission on the draft report, concerning copyright of Crown material. Do you see, and I think you're arguing that there's scope for that to be made more readily accessible and my question is, do you see that as something that would be done through a fair use arrangement or is it something that requires something more specific or different?

MS WEATHERALL: Well, the recommendation of the Copyright Law Review Committee that looked at this, admittedly some time ago now, 10 years ago, was actually that some Crown material just oughtn't to be protected by copyright. Some Crown material ought to be open access, free for anyone to use and re-use, and that includes things like the law. People should be able to publish and access the law, for free, without going and having to ask permission. I was in support of that recommendation at the time and remain in support of that recommendation. The governments of Australia have not, notably, taken that up. In fact, there hasn't been an official response, as far as I know, instead preferring to use various open access licencing type models.

I think a first preference would be to take some of that out, probably not everything. The CLIC did go through this and what should and shouldn't perhaps fall in and out. I think fair use would certainly operate well in that context, in the sense that if you go through a kind of fairness full factor analysis, the nature of the work, if it is government work, if it is something that ought to be generally available so that people can inform their activity, then that tends in favour of fair use. Impact on the market and incentives for creation are likely to be limited. Governments don't seem to need much incentive to make new law or issue reports. I imagine fair use would work quite well, but I would continue to be supportive of

going and seriously thinking about the CLIC suggestions that some material just doesn't belong in the copyright system.

MS CHESTER: Kim, given that you're far more familiar with the ALRC draft and final reports and the process around that, one issue that did come up recently, and it's not an insignificant issue, was the draft report did recommend putting public administration in as an illustrative example then the final report didn't seem to include that. Just in terms of trying to connect the dots and understanding, was there some reason not to have continued through with that, in the final report?

MS WEATHERALL: You are unfortunately testing my memory a little there. Is that a question I could take on notice and I can maybe get back to you on that?

MS CHESTER: That would be good. We just want to try to get a bit more context and understanding around that.

MS WEATHERALL: Yes, sure. I'm sorry I can't immediately bring to mind the reasons, and I don't want to mislead you, so - - -

MS CHESTER: That's okay, and if we need to get it on the record we'll get something from you in writing, because you're very good at doing that.

MS WEATHERALL: No problem. Yes, sorry about that.

MS CHESTER: I think the other thing around fair use in Australia is that it would still be running in parallel to statutory licencing, especially for the education sector. That raises the issue then of the collection agencies with which the users have to engage with to arrive at those licencing agreements. Parts of our report touch on governance arrangements and it was raised with us this morning, and I'm not sure if this is an area that you've looked at or thought about but, if you have, it would be good to get your views. It was raised with us this morning, some concerns around the governance arrangements for the collection agencies, both in terms of their transparency and accountability and the basis upon which they negotiate licencing agreements. Is that something that's come across your -

MS WEATHERALL: Yes, but I'm not quite sure what the question is.

MS CHESTER: So the question would be, at the moment there's a code of conduct policy that applies to the collection agencies.

MS WEATHERALL: Yes, from the code reviewer.

MS CHESTER: We're hearing that there's still concerns around transparency and accountability and how they negotiate. We look at the EU determination that applies to collection management agencies in the EU and we've been told that's a higher bar and perhaps a more appropriate bar. So we're thinking of, in the context of fair use, let's make sure that we get the governance arrangements appropriate around the collection agencies as well.

MS WEATHERALL: Governance arrangements around collecting, they should be as good as they can be, regardless of fair use of not fair use. Look, I haven't made a submission on that point, as you'd be aware. I am aware of the EU model, but I haven't given it serious thought. Again, is that something I could - - -

MS CHESTER: Yes, if you've got the time, effort and inclination, but that would be really helpful. We're just looking at the model that's currently working in Australia, the model that's been referred to us in the EU and is there a material difference between the two. First blush there looks like there is, but it would be good to get your thoughts on the efficacy.

MS WEATHERALL: I'd like the opportunity to go back to my various co-submitters on that point.

MS CHESTER: Thank you, that would be great.

MS WEATHERALL: I'm not going to promise right now that I will come back with something intelligent.

MS CHESTER: The other thing that would be good to raise with you today is that the Productivity Commission, perhaps bravely so, strayed from the ALRC recommended wording for fair use and I know we've touched on this, in the round table context, but it's important, given today's evidence gathering exercise, if you're able to elaborate on any unintended consequences of us straying from the ALRC wording.

MS WEATHERALL: Look, we have, in the Alexander et al submission, did touch on this. I have concerns, we had concerns about departing from the ALRC model. There are a number of things that were unclear about the suggestions. Certainly we don't agree that we need an objectives clause in order to make sense of fair use and we certainly don't agree that the purpose of copyright law is only to protect against uses that undermine commercial exploitation. There's a whole range of interests that are

protected by copyright, including various other legitimate interests of authors, including their concerns that are reflected in the moral right system. Authors also have a legitimate interest in deciding when and how things get published. So the fact that something is not immediately accessible to the Australian public is relevant, of course, to any fair use analysis, but ought not to be determinative, in our view.

One of the things that a number of us argued, when we were talking to the ALRC, in particular about fair use, was that there were significant benefits to trying to write the legislation in such a way that it was going to clearly draw on jurisprudence from other countries. That includes the US. These days it also includes countries like Israel and potentially others.

There are benefits to that, particularly in a relatively small jurisdiction. Intellectual isolation, including intellectual isolation of judges, is not a good thing, in terms of developing law in this space, and our judges will benefit from being able to draw on, though of course not being bound by, overseas jurisprudence.

Another thing that concerned us about the proposals of the Commission were around the idea of talking about both commercial availability and impact on the market. Our concern there was that by having two commercial factors and knowing the relatively literalist tendencies of the Australian courts when interpreting intellectual property legislation, including, particularly, the Copyright Act, because so much is specified in there.

We were concerned that the courts would look it, "It doesn't appear to be an impact on the market, but there's this other commercial factor so this must mean something else." So it would sort of generate its own momentum and also generate uncertainty for users who were trying to work out, "Well, does that mean something different? Is that separate from impact on the market?" It seemed to us that issues around availability, access, all of the like, were perfectly well able to be taken into account through the four factors that already exist in the US style model, both the nature of the work and, in particular, the impact on the copyright owner's market.

MR COPPEL: Can I just come back to the point you made about jurisprudence from other jurisdictions? We've heard from some that even though this is possible from Australian governments, it would be very rare to draw on international jurisprudence to inform those judgments.

MS WEATHERALL: Really?

MR COPPEL: I wanted to ask your expert view as to how frequent or how much is actually - - -

MS WEATHERALL: Reference there is to international jurisprudence. It probably varies across areas of law, but I think in intellectual property the fact that there is this relatively highly harmonised system around the world has actually encouraged judges to be aware of and follow developments elsewhere. Certainly we've seen very ready access to and discussion of and engagement with international jurisprudence in the area of patent. You only have to read any of the patentable subject matter cases to know that the courts in that space have drawn upon, sometimes rejected, sometimes accepted, reasoning that's been seen over there.

The other thing is, I think being - look at what would confront a court trying to decide the first fair use case in Australia. You've got a legislative history, let's say ALRC proposal, backed up by you, potentially, backed up by other people, gets adopted. You have a very fulsome ALRC report that has clearly said that one of the benefits is drawing on this international jurisprudence. It all forms part of the legislative history that informs that process. The mere fact of introducing, I think, a fair use, call it flexible fair dealing, but basically fair use, with the four-factors is, in itself, a legislative statement to the courts that we want you to take a different approach from the approach that has been taken in the past.

In fact, in many ways, that was something that - and, again, some colleagues and I discuss this in our submission to the original ALRC process, that's actually what we need. We need a break from some of our old case law where fairness hasn't predominated, we focused in a really narrow way on purposes. I think one of the clearer signals that the legislative could send to the courts that says, "Yes, we have a history of fair dealing. Yes, we have a history of fairness and taking all of these issues into account but we do want you to draw on all of this international jurisprudence" would be to adopt something that is consistent with the model seen elsewhere in the world.

MR COPPEL: I've just got one other question I wanted to ask, which gets back to the international arrangements. In our draft report we have a recommendation that urges the government to reinvigorate international cooperation. With so much of intellectual property law being defined by international obligations and drawing on leading practices of reviews or periodical review of policy, it's been noted that there's very rarely been a review of these international obligations. Take, for example, TRIPS, I think it's been around about almost 20 years now.

MS WEATHERALL: Over 20 years actually, 1995.

MR COPPEL: There was a provision for a periodic review, and a regular periodic review, within the TRIPS, that's never been, to our knowledge, applied. I'm interested in your views in how can you make such a recommendation have stronger teeth?

MS WEATHERALL: Do you mean review at the international level, in the multi-level context, or do you mean like a local Australian review of how the agreements are going for us?

MR COPPEL: No, it would be within the international context. So if you take the example of TRIPS, there's an article in TRIPS, I think it's article 71, that allows for a review after the first two years and, subsequently, every two years. I'm not sure whether that is on a specific matter that may have become an issue or whether it's a more general. But it's yet to be used, at least in the sense of taking stock of TRIPS, it was quite a radical agreement.

MS WEATHERALL: It's probably not entirely a fair characterisation of what's happening at the WTO level, in the sense that you have a regular TRIPS council that is constantly meeting to talk about various issues that are arising under TRIPS. To be fair, TRIPS is one of the few areas, in the WTO suite of agreements, where there's actually been a proposed amendment, in the context of the DOHA access to medicines issues, so that issue, which very clearly came to the fore as being seriously problematic in the TRIPS agreement around 2001 through 2003 actually led, first, to a ministerial declaration and then later an actual proposed amendment.

So I'm not sure it's entirely fair to characterise, in the context too of the developing and the least developed countries, there's that constant issue around, "When is their deadline being extended to?" So it's probably not fair to characterise TRIPS as unreviewed. In terms of a broader taking stock, there have certainly been a range of ways that that has been done, at an academic level. Perhaps at a political level, given the current state of the WTO, that's easier said than done. So I'm actually not sure how you would make a proposal that would bite more readily at an international level. I think there are political processes that do that. There is the TRIPS council, the WTO has its own secretariat in IP, but I would be happy to forward that question on to the people to do IT at the WTO, who I know and ask if I have just given you a fair characterisation of what's going on.

I would be more interested, actually, in what you could propose at a domestic level, in terms of seriously reviewing the impact of, say, the Australia-US Free Trade Agreement, although I know there are some processes ongoing on that. But also our other trade agreements and perhaps in the context of going back to our discussion around transparency and kind of deciding an Australian intellectual property position, an actual serious evaluation of whether the current repetition of TRIPS Plus, TRIPS Plus Plus, TRIPS Plus Plus Plus, is actually the best way to do trade agreements. I think a serious review undertaken, whether by DFAT or with DFAT's active cooperation, would be worthwhile in that space because, as I've outlined in a new publication that's currently under review but that I can supply to you at a presentation I gave in Melbourne in May, there are other models for how you do international intellectual property harmonisation that might actually address the real costs that face business when they're doing international trade. It's not clear that a TRIPS Plus Plus Plus model is actually serving those interests these days. I think we need a serious review.

MR COPPEL: Thank you.

MS CHESTER: That's great, Kim. Thanks very much and thanks for taking some homework away with you today. I will look forward to hearing from you.

MS WEATHERALL: Can I just briefly commend to you as well the patent and trademark sections of the submission. They've been written by serious scholars in both areas and there is some very worthwhile material in those parts of the submission too that we haven't got to today.

MS CHESTER: Thanks, Kim. So we're going to take a bit of a break now, and we are running a tad behind so we were due to resume at 1.25 pm. I'm going to bravely suggest that we resume at 1.40 pm, so no one suffers indigestion. So if you're joining us again this afternoon, if we could resume back here at 1.40 pm. Thank you.

LUNCHEON ADJOURNMENT **[1.06 pm]**

RESUMED **[1.44 pm]**

MR COPPEL: Welcome back. We will reconvene the hearing by inviting Robyn Ronai and Professor Luigi Palombi to first of all for the purpose of the transcript to introduce yourselves and who you represent

and then if you'd care to give a short introductory statement and then we will ask some questions, thank you. Go ahead.

MS RONAI: I'm Robyn Ronai, head of Corporate and Government Affairs for Alphapharm.

PROF PALOMBI: Luigi Palombi, Professor of Law Murdoch University.

MS RONAI: So Alphapharm appreciates the opportunity to participate in this public hearing today to further the Commission's consideration of the important issue of Australia's IP arrangements. We agree with the Commission's findings that, and I quote, "Australia's patent system grants protection too easily around the proliferation of low quality patents frustrating the efforts of follow-on innovators, stymieing the competition, and raising costs to the community". That has certainly been our experience but there is more to it than low quality patents.

We contend the patent system is out of balance, skewed fundamentally in favour of patent owners at every level, starting with the legislation itself, to the manner in which IP operates without any accountability to any independent authority, through to the way the Federal court, which includes judges appointed from the Patent and Intellectual Property Bar, interprets and applies the law. We believe Australia's patent system is out of balance. The absence of an objects clause is part of the problem. Another is the low inventive step standard.

Alphapharm does not believe that the amendments known as Raising the Bar are adequate. In our two submissions to this inquiry we have demonstrated through clear and persuasive evidence that six out of the seven major reforms to Australia's patent system since Alphapharm began operating in 1982 have favoured patent owners, especially pharmaceutical and biotechnology patent owners. Each of these seven reforms has been undertaken in the complete absence of empirical evidence. Only faith that more patents means more innovation underpins these reforms. Unfortunately it is a faith that appears to have influenced the IP system and needs remedy.

For the past 80 years the branded pharmaceutical sector has on a global scale sought greater and greater levels of patent protection for medicines. They have argued that without patent protection they will lack the incentive to develop new and better medicines, yet not only was the most important medicine in the 20th Century, penicillin, the world's first antibiotic, developed by a team led by an Australian, Professor Florey, but

it was never patented, and neither was the polio vaccine developed by Dr Salk.

On the flip side there is evidence that not all patented medicines have done good. Some, in fact many, have done more harm than good. An example, thalidomide was a patented medicine yet thousands of babies were unfortunately born without limbs as a result of the prescribing of Debendox to pregnant women. While the faithful continue to believe and expect others to blindly accept that more patent protection means more medicines, the latest evidence from the World Intellectual Property Organisation suggests the opposite is true.

In spite of the branded pharmaceutical industry having achieved the most harmonious patent laws since the turn of the 20th Century, there has never been a greater paucity of new drugs in the drug development pipeline as there is today. The evidence is well documented. The pharmaceutical patent cliff of 2012 exposes the lie that in spite of the evidence the faithful refuse to accept the patent cliff exists because of an absence of new pharmaceutical patents. And at a time when the world is vulnerable to antibiotic resistant bacteria and with an absolute need for new kinds of antibiotics, the brand pharmaceutical industry is failing to deliver the goods.

Quite clearly more and more patent protection does not result in more and more medicines. Nor invention. For invention to thrive there must be competition. Maximising competition is not consistent with maximising the scope and length of patent monopolies. The historical evidence shows this to be true. The greatest period of pharmaceutical innovation or invention occurred in Germany from the late 19th Century when German patent law prevented the patenting of pharmaceutical and chemical substances. And the maximum term of patent protection was 15 years. There was no patent term extension for pharmaceuticals. In fact medicines were expressly excluded as patentable subject matter.

Aspirin, one of the great wonder drugs, was one result. Salvarsan, the world's first anti-syphilis drug, was another. Under German patent law only the processes for their production could be patented. This was a deliberate policy designed to create competition between German chemical firms encouraging them to focus their attention on the production of better, cheaper and purer chemicals and medicines. This patentable subject matter exclusion was only rescinded in 1973 when Germany signed the European Patent Convention thereby permitting the patenting of chemical and pharmaceutical substances.

It is the case the European Patent Convention has as a result encouraged brand pharmaceutical companies to gain the European patent system. This gaining, which the European Competition Commission confirmed when it found evidence of ever-greening patent practices, has produced anti-competitive effects and resulted in much higher health care budgets. According to the European Competition Commission's report, and I quote, "Individual medicines are protected by up to nearly 100 product specific patent families which can lead to up to 1,300 patents and/or pending patent applications across the member state".

What is the case in Europe, sadly, is also the case in Australia. Patents are only one aspect of the disequilibrium, data protection is another. Free trade agreements are yet another. Under TRIPS the patent term was increased from 16 years to 20 years. Under Oxford the pharmaceutical industry has been irrevocably guaranteed patent term extensions. And under the TPPA it is still unclear whether or not biologics are to be given eight years of data protection. Each of these measures has been achieved through the lobbying efforts of a very powerful pharmaceutical lobby and without any supporting empirical evidence.

The time has come for Australian policy makers and law makers to stop blindly following a faith and to make policy and laws based on the evidence. To strengthen the patent system by closing loopholes that enable the gaining of the system. We are encouraged by the Commission's findings and recommendations, although we contend they must go further. We refer you to our submissions which detail our proposals and are happy to take any questions.

MR COPPEL: Thank you. Are you planning on making any introductory remarks?

PROF PALOMBI: No.

MR COPPEL: In our draft report in the context of patents, not the specific area of pharmaceutical patents, we make a number of recommendations that are aimed at shifting the balance to favour more users and we have three recommendations. One is the introduction of an objects clause in the Patents Act. The second is through a change in the inventive step, adopting specifically language from the EU Patent Law that would correspond to a higher inventive step. And the third is in relation to the structure of fees used for the granting of patents, or for the application of patents. They are all measures that are consistent with our international obligations. We would be interested in getting your perspective on whether you think those measures would go towards

remedying the point that you made that the system as it is today is imbalanced.

PROF PALOMBI: It's a step in the right direction but in our view it does not go - those recommendations don't go far enough. There definitely is a need for an objects clause. And if I can give an example, let's say, in terms of the tax legislation, at the time of - if we go back 30 years when the bottom of the harbour schemes were rife, there was no objects clause in the tax legislation and effectively that kind of rorting of the system is what encouraged politicians to do something about it. And so the tax legislation was tightened up, objects clauses were introduced, and it changed the philosophy of the approach of the entire administration of the tax system from one of seeing gaining as something that was just de rigueur to something that was considered to be un-Australian and illegal.

The intellectual property system, particularly the patent system is, if I can put it mildly, at about the same stage as the tax system was in the 1980s. There is no accountability whatsoever in terms of what IP Australia do or don't do. They are completely immune from any accountability in terms of civil suit. You cannot sue IP Australia at all. IP Australia is an organisation that is a world unto its own. It generates fees from patent fees, patent prosecution, patent renewal fees, trademark fees, it actually is a self-funding organisation. Consequently it doesn't need to go to the government asking for a grant from consolidated revenue. So it is independent. And consequently it has an incentive in itself to encourage more and more patents because the more and more patents it gets the more money it makes.

So overall the thrust of our submission is that you need to seriously look at patent law from the same perspective as one looks at tax. Tax is involved in revenue raising. The patent system is actually involved in expenditure minimising. It should be, at least in relation to pharmaceuticals. And what we want to do is improve efficiencies, get better drugs, cheaper drugs. We don't want to encourage companies to simply get patents for very, very small incremental inventions only to see that their patent period monopoly extended beyond 20 years. I mean, in a sense patent term extensions, if I can put it mildly, are - I mean, they're important but in the overall context in which one can extend patent protection through ever-greening, it's not that, it's not as serious as it could be.

MR COPPEL: So when you mentioned IP Australia which was one of the institutions that sit around Australia intellectual property arrangements and you also mentioned that the measures that we have in the draft report, which also include the removal of the innovation patent system?

PROF PALOMBI: Yes.

MR COPPEL: Which are used in the pharma sector, don't go far enough and recognising that a lot of the law is framed within international agreements or plurilateral agreements, bilateral agreements, what are you suggesting is needed to go further in your quest to make a better balance between the rights holder and the rights user?

PROF PALOMBI: Well, if I give you an example and go to the United States because the United States is generally perceived to be the leading IP country in terms of having a strong IP system. What we need is balance. If you have a one-sided approach so that patent law is essentially based on this faith that more patents means more innovation and therefore we need to make it easier to get a patent and make it harder to challenge a patent, well you will get more patents but whether those patents are actually performing a public good or whether they're actually involved in creating problems in developing innovation, is another matter.

Now, the Supreme Court of the United States, you can't go much higher than that, has said that too much patent protection actually impedes the process of innovation. We saw that in the Myriad cases. The Myriad cases were about the patenting of isolated nucleic acids relating to breast cancer. The Federal Court at single judge instance and the Full Federal Court unanimously said these things were patentable subject matter in Australia. In the United States the Court of Appeals for the Federal Circuit said that twice. It took the US Supreme Court and the High Courts of Australia to finally say, no, you can't get patents on those sorts of things.

Patents were granted by both the US Patent Office and by IP Australia based on some idea that you should be able to get patents on anything that was derived from nature if it was isolated. Now taking that one step further, who challenged those patents? Who actually brought it to the point where the Supreme Court and the High Courts were able to rule on the issue? Well in the United States it was the American Civil Liberties Union, a not for profit organisation. In Australia it ended up being Cancer Voices Australia, Mrs Yvonne D'Arcy, and a bunch of lawyers, who gave their time free to do it.

Is that an appropriate way to provide a check and balance in the system? I don't believe it is. It was just sheer luck and tenacity on the parts of civic minded individuals that that issue finally got sorted out. And even the US Government in its Amicus Brief to the Supreme Court said, "The US Patent Office pursued a policy for 30 years that was

wrong". But if it hadn't of been for the American Civil Liberties Union do you think the US Government would have finally have had a venue for saying that? No.

Now, in the instances of generic medicines, it's a similar situation. If a generic company sues to invalidate a patent that it considers to be invalid the end result is that the generic medicine invalidates the patent. But it receives no other additional incentive. Sure it can't be sued and yes it's open to enter the market with its drug, but so is every other generic company. Now in the United States the Hatch-Waxman Legislation foresaw this and created a more balanced position. What it said was, "Look, we want to encourage new medicines, we see that the patent system has a role to play in that, but at the same time we know that there's an element of gaining. So we're going to give an incentive to the generics in order to sift out the good patents from the bad patents".

The way they did that was they created a market based incentive of 180 days exclusivity to the first generic company that successfully challenged the patent. It also created an administrative process around that so that in a sense a flag would be raised to the patent owner the moment the generic filed an application to register a generic in relation to a pharmaceutical product over which a patent existed. So two things were done, the flag went up, the pharmaceutical patent owner knew and could bring immediately infringement proceedings to stop this. The generic company had flagged its position by applying for the FDA approval and then it was on and the courts would sort it all out.

If the patent was invalidated the generic company would be able to enter the market and for six months no other generic company would be able to compete with it. The effect of it is that the generic company would be able to sell its drug at or near the price of the patented medicine for six months before it would face generic competition. The idea being that that would be a sufficient monetary incentive to pay for the risks involved in litigation, drug development, drug applications, et cetera, et cetera. There is no equivalent in Australia. Now there are a number of reasons for that. Well, we have a very different system here, we have the PBS. So the incentive if there is any is really with the government in Australia. But again there is no incentive for the pharmaceutical industry to do it.

One would think the obvious solution is to have an IP regulator, a statutory authority that has the public interests at heart. And just like we have ASIC and the ACCC looking after - or various consumer protection agencies looking after and regulating various industry sectors, it seems to me that it would be appropriate for that to be something that should happen in Australia. That means that IP Australia would be able to

continue its role of granting and assessing, prosecuting patents, and running the administration of the patent system, but at the same time there would be third party independent staying above all this whose role would be to police the system to make sure that we don't get inappropriate gaining, to relieve the burden on the generic industry and other companies from actually taking the risks.

So, for instance, it shouldn't be a matter for Mrs D'Arcy running a case before the Federal Court all the way to the High Court over gene patents, just as it shouldn't be necessarily Alphapharm or ApaTech, or whatever generic company it might be, to challenge the validity of patents. And I think that's something that's very strong in our submission, that we need a better level of scrutiny, independent scrutiny, to ensure that there is a proper balance. Now whether it's a market based system or whether you go to a point where you say, well, look the government doesn't want to get involved in this, we'd rather leave it to the market, well then what should that look like? Well, I don't think a 180 day market exclusivity in the terms of the Australian market would be sufficient, it's too small a market. It's not like the American market.

MS CHESTER: So professor, in our draft report we did identify a couple of areas where we saw the regulators having additional roles with respect to targeting some of the misuse of the current IP arrangements, in particularly looking at repealing the section 51(3) exemption from the CCA, the Competition Consumer Act, and also the ACCC adopting a monitoring arrangement similar to that in the US with respect to pay for delay in the pharmaceutical space. I guess we're trying to target known misuse of the current arrangements with existing regulatory and legislative provisions. With those two in mind, what else would we not be picking up in terms of the strategic or the misuse of the patent system as it currently stands in Australia?

PROF PALOMBI: Well, I mean, it's not necessarily pay for delay that's the problem. In Australia there is very little probably incentive for pay for delay, in fact I would suspect that most of those sorts of agreements would be done with the United States or the European market in mind and we'd just be one of the countries listed amongst them where it would be part of the deal. But in Australia I suppose one of the things that was missed, and although the ACCC did investigate, I mean, it was all too little too late, but the Pfizer, Ranbaxy deal which basically decimated the generic market entry of a generic Lipitor, the most expensive costly drug on the PBS for a long time, because of that deal is one example of where the system has failed.

Now, I'm not criticising the ACCC, it's just that the ACCC is not really the organisation that can - it's just too - there's too much happening generally, you need something more focused. And that's why I think, and why I suggest strongly, that there needs to be established an independent intellectual property regulator to look at these things and investigate how the sins of the marketplace are being conducted. Did I answer your question? Have I missed something?

MS CHESTER: I guess I'm still trying to work out what it is that we wouldn't be capturing, what strategic misuse of the system we wouldn't be capturing if we were to make sure that arrangements were fully covered by the competition laws, because given that most of the strategic misuse of the arrangements tend to be motivated by anti-competitive conduct.

PROF PALOMBI: Well, some of the conduct isn't necessarily anti-competitive in the sense that one might think of competition law. It's just a misuse of the patent system. Applying for 1300 patents around a molecule, for instance, is going to make it very, very difficult for generic companies to enter that space. For a start, you've got to find where the patents are, and that's not necessarily that obvious. Under the Australian Patent Register there's no flagging of patents around a particular molecule or around a particular product, you've got to go and search the register physically and find them. You may get them or you may not, it just depends on how the terminology is used and how you search the system. And that's actually very, very complicated and it's fraught with uncertainty.

Then there's the question of, well, you have to pay someone to analyse each of those patents to determine whether they're valid or not. This is going to take a lot of time and money. And then you've got to consider, well, if even if you were to identify some patents that are invalid, you've got to think about well, how am I going to challenge that patent, is it worth the millions of dollars? You're looking at somewhere between five to 10 million dollars in legal costs every time you bring that serious patent challenge in terms of the pharmaceutical space, well that's a lot of money.

For generic companies the margins have dropped to very, very tight levels. So who is going to bring that litigation, where's the incentive? So there are plenty of ways in which you can gain the system so that you're not technically breaking competition law but you're still effectively undermining the efficacy of the system.

MS CHESTER: So I guess we seek in our draft report to approach that sort of strategic use of the system generically, if you pardon the pun, by

raising the inventive step, by looking at the patent fees and renewal fees, and by narrowing eligibility for extension of term to where there's unreasonable delay because of the TGA. So we're sort of dealing with it in the way that the system is structured. Does that go some way to addressing the sort of the misuse, the strategic misuse that you see of the patent system as it relates to pharmaceuticals?

PROF PALOMBI: It does. You're going in the right direction and - yes, you are moving in the right direction. But we don't believe it's going to be enough. I mean, changing the inventive step threshold, yes, that would be useful. Having an objects clause would be useful, yes. All of the things that you've mentioned would be useful. But not enough.

MR COPPEL: It costs quite a bit of money to file for a patent and you've made reference to 1300 patents on a molecule?

PROF PALOMBI: Yes.

MR COPPEL: Is that rhetoric or is that something which is - - -

PROF PALOMBI: No, it's not rhetoric, it's a fact.

MR COPPEL: And is it average or is it something which is an extreme scenario, or extreme case?

PROF PALOMBI: That's probably an extreme case, yes, but that's something that the European Competition Commission discovered when they inquired into the system in Europe. Now, they had to raid, I think, 45 head offices simultaneously in order to get the information they were after. And they went in there and they dragged the information out of the companies, it wasn't exactly volunteered. They spent years trying to put the pieces of the jigsaw puzzle together and come to the conclusions that they did.

So we know that this goes on, the extent of it is another issue. But in the submission that Alphapharm did we just took a case sample of 15 case studies and we found, for instance, that just around omeprazole and esomeprazole there were a number of key patents, the totality of which provided 48 years of patent protection going all the way down to the super statin, Crestor, 27.83 years. I think you can take it as pretty much standard practice that if there's a valuable drug there there's going to be more than one patent in with that drug. And more likely there will be at least 10 to 15 patents and those patents will extend patent protection beyond 20 years.

MR COPPEL: The pharmaceutical patents I guess are the quintessential area for patenting, the upfront research and development costs are large and once there is a molecule that's discovered that has beneficial effects it's quite easy to reverse engineer a copy and cheap to manufacture. This is the basis on which the patent system is designed to be able to provide, on the one hand, a reward for that initial investment and, on the other, to then ultimately bring into the public domain the actual discovery. The argument is put that the balance shifts too far in one direction that can act as a deterrent for originators to undertake the research in the jurisdiction of the intellectual property arrangement. Do you see? You made the point about the balance as being too far in favour of the holder. How do you evaluate those risks associated with tilting the balance too far in the other direction?

PROF PALOMBI: How do I associate those risks? Well, perhaps I can answer the question in this way: there's no doubt that research and development in new drugs is time consuming, it's risky, and even identifying a molecule that has promise doesn't necessarily guarantee a safe and effective drug at the end of it. But I should say this: that a patent over the molecule is the broadest type of patent you can get for a start. It's a patent that covers not only the molecule, because we do permit patents on chemical substances, it's a patent over anything you can do with that molecule.

So effectively, once there is a patent over the API that signifies to the market we own the space and basically it means that there will be less researching on that molecule because that space is owned by the patentee. The importance of that patent is that you then have the exclusive right to exclude all others from doing anything with that molecule. So the idea that a patent on an API is valueless is utter nonsense. You've got 20 years possibly, 25 years, of patent protection over everything to do with that molecule, how it's made, any process, anything. That's why the German system didn't permit patents on chemical substances, because at least you could invent a different way of making the substance, which is something that they wanted to do, which is why the pharmaceutical industry is able to develop drugs.

So if you have too much patent protection you actually hinder the process of inventing something useful. And this is something that the pharmaceutical industry seems not to understand. That's why we take you back to history. If you really want to encourage an invention you don't write patents over everything and anything to do with an API. You grant patents over the process of manufacturing it, one way of making it, and you allow space for someone else to come up with an alternative process of manufacturing the same API. That doesn't prevent someone also

getting a patent on the use of that API in a pharmaceutical capacity because if a third party comes along and says great well I can now get that API cheaper from Company B and now I've also worked out a way of making it into a useful medicine.

They're going to do the research and development to turn it into a useful medicine, why shouldn't they be able to get the patent? Under the current system they can't because the patent monopoly covers everything and anything. You actually create a system that hinders third parties from spring boarding off that original innovation, that invention of the drug. And I think it's important that you understand - that that message isn't missed.

MR COPPEL: Thank you.

MS CHESTER: I just have one more question, and it might be best for Robyn both from the perspective of Alphapharm and your parent company which operates across many international jurisdictions. You touched on in your opening remarks the cost barrier by way of data protection, I guess perhaps one way for us to get a handle on what cost barrier data protection might be, would Alphapharm or your parent company ever contemplate replicating trials during that period of time where the data is protected? Or have they ever?

MS RONAI: I'd have to take that on notice. I can't respond to it now.

MS CHESTER: It would be good if you could let us know, that would be helpful, thanks.

MS RONAI: Yes.

MR COPPEL: Look, I'm conscious that we're falling behind time so I think we've also benefited from your participation in the roundtable on pharma last week so I think unless you've got further questions?

MS CHESTER: No.

MR COPPEL: We'll stop here and move on, thank you, thank you both for your participation in the hearing today.

PROF PALOMBI: Thank you. Before I go though I have two copies of my book here which I would like to give to the inquiry for reference. The first half of the book really deals with the history of the patent system, particularly in the field of pharmaceuticals. The second half, well, it's a bit out of date now because the Myriad decisions vindicate the position

taken in this book. But it's still a very useful reference book, and they're hard to get. So if you wish, I have brought two copies and I'm happy to give them to the Commission for its use through the inquiries.

MR COPPEL: Thank you, I think one may be sufficient if you want to keep the second one.

PROF PALOMBI: Well, I thought perhaps one for your staff and one for the Commissioners but if you're - - -

MS CHESTER: Thank you, that's very generous. I think Adam will make sure that we get those safely back to - thank you.

MR COPPEL: I call Paul Muller, our next participant. Take a seat, make yourself comfortable. When you're ready, if you could for the purpose of the transcript give your name and who you represent and then if you'd care to make a brief opening statement, thank you?

MR MULLER: First of all, I'd like to thank the Commissioners for holding these public hearings and allowing me to say a few words in opening before taking any questions you may have. My name is Paul Muller, I'm the Executive Chairman of the Australian Screen Association.

The ASA represents the Australian interests of the major film studios and have had long term and large local interests in Australia. Intellectual property, and more importantly copyright, are fundamental pillars of the creative and innovation sector to which we proudly belong. The creative content sector represents employment of 47,700 full time equivalents and contributes $5.8 billion to the Australian economy. It is well-established under Australian law that copyright's primary purpose is to reward creators and by reason of that reward encourage them to create.

We are in the business of investing, creating and protecting audio visual content. Our members invest in high risk creative products whose aim is to get them seen and distributed as widely as possible so as to maximise their return on investment. In Australia alone last year 16 international films injected around $420 million into the Australia economy. For every profitable film that we release, many more lose money highlighting the challenges that investors face in achieving return on investment. Essential to the ability to recoup our investments is, of course, strong copyright. We believe that Australia currently has a copyright system in place that is working, that is responsive to demands, adaptable and flexible.

As content producers and distributors, the film industry has shown time and time again that it is responsive to changes. We are, after all, in the business of maximising our return on investment. When TV arrived, we licensed content to that new format. When the VCR was invented, again we did the same thing. Whilst the rate of innovation is increasing, we still do exactly the same today.

We have our content licensed to reach a variety of transactional video demand, electronic sale through and subscription video on demand services. We've also shortened release windows globally, as well as between format releases and we have adapted pricing structure. Yet, the Commission finds fault in copyright at every turn. We believe your bias is best reflected in the marketing spin of "copy not right", which gives an immediate appearance of bias and all that follows. I don't have enough time to talk about all the issues that we are very concerned with, but let me pick out a few.

First of all, fair use. Only a tiny fraction of the Berne Convention signatories have adopted fair use. Why do you think that's the case? We believe fair use is uncertainty by another name. It's hard to find another area of policy where the leadership of 158 countries counts for so little in Australian policy development.

So we believe it would be reasonable for those relying on copyright to earn a living to expect very solid and substantive evidence that the current fair dealing system isn't working, or that the proposed fair use system will have sizable benefits. Yet, in the draft report we find no credible, comprehensive, or convincing evidence presented for either of those two cases. Rather, there are theoretical arguments that justify these changes.

What seems to permeate the report is that copyright stops innovation. Yet nothing could be further from the truth. As the Hargreaves Report so clearly demonstrated, it is the investment culture in the United States and their appetite for risk that was the driver for innovation. It was not fair use. The reward for creation and innovation is the incentive to create more and undermining this will mean less creation.

I will go into one other area and that is the proposed expansion of safe harbour provisions. We believe the draft report shows a failure to link safe harbours and authorisation. We believe this is a significant oversight. A correct interpretation of the current wording would make that clear. Again, there is no evidence presented that online activity is in any way limited as a result of the current safe harbour's regime. As an example, Google submission that went into the first report does not

identify a single disadvantage because of the existing regime. Furthermore, the suggestion that safe harbour expansion has to be introduced to fulfil our obligations under the Australian Free Trade Agreement is also misleading.

We believe that expansion of safe harbour is a solution to a problem that has not been identified yet. But despite this lack of evidence, the Commission wants to recommend an expansion of the safe harbour scheme. We believe that consultation is needed to determine exactly under what conditions it can be accessed. The authorisation link has to be there.

As a general statement, I urge the Commission to ensure its final report reflects its mandate to grow jobs, employment, revenue, and make evidence based, not theoretical, recommendations. Thank you for your time. I look forward to answering any questions you may have.

MR COPPEL: Thank you. Maybe we can deal with the point of certainty/uncertainty.

MR MULLER: Sure.

MR COPPEL: It's a point that's come up frequently in the hearings yesterday and we've also had a round table dedicated specifically to fair use. But before we sort of get into that one of the motivations for the thinking behind a shift to fair use approach for copyright exception is based moving away from a prescriptive piece of legislation that is specific to technology in many instances. You've made the point that the copyright regime has adjusted to technological innovations.

MR MULLER: Yes.

MR COPPEL: You gave the specific example of the VCR. That took many years before the actual legislative amendment came into force. In fact, it took so long that the VCRs no longer really effectively existed by that time. There were other examples, the format shifting and caching. It is an area which is evolving very, very quickly in the technological field. One of the big advantages of having a principle based approach is that it can be separated or technologically neutral and therefore much more adaptable to evolving context.

So that was one of the motivations behind the thinking for the recommendation of fair use. It's not based on theoretics. It is based on some of the issues that have been associated with a lack of adaptability which, in many instances, created uncertainty because it wasn't clear

whether a particular use would be legal or not. So I wanted to make that point.

Now, it is fair to say that a move to fair use creates a different world and there would be an adjustment to that different world. We've recognised that there are issues that could be associated with that transition. In the draft report, we've tried to provide a way in which that level of uncertainty can be limited through an objects clause, through a definition of "illustrative uses" that would provide guidance. So I'm interested in getting perspective from you as to whether those devices are ones that limit the degree of uncertainty or, to put it a different way, make the system in its transition more predictable in terms of what uses would be fair and what uses wouldn't be fair.

MR MULLER: Well, I believe that ultimately it would have to be litigation to provide that clarity. The truth is that the descriptors, as they exist, for instance work in the United States to a degree just because of the extensive case law that's associated with that. But even in that environment, many respect the judges have spoken clearly about how unclear it is and how much confusion there is to its own interpretation even among judges in their country. So I don't believe that that would achieve enough certainty or enough clarity.

On the flipside, the current regime, I think, is one that is clear. It has responded. You can argue that it should've responded quicker. But the truth is it has responded. Australia is an early adaptor of many of these technologies. I think you mentioned cloud computing, in the draft report. Australia has one of the highest take-ups of cloud computing. So it doesn't seem that it actually, in a practical sense, restricts the adoption of these new technologies. So therefore, not quite sure what it would solve.

The other point I would like to make is there is no specific evidence that there will be a benefit. For instance, the Hargreaves Report in the UK came to that same conclusion, that there was no clear benefit to introducing fair use.

MR COPPEL: We had the privilege of talking with Professor Hargreaves and the main argument for the report not to favour a fair use was the constraint through European Union Law. It was not so much in terms of the inherent greater flexibility in a fair use exemption that was being not considered as important, it was really other constraints and the constraints that are not present in the Australian context. I mean, there have been a number of other jurisdictions that have also adopted fair use and there's been very little litigation. Some have even said it's been

an issue because there's been no litigation that had then established the boundaries of fair use in jurisprudence.

MR MULLER: Yes. It's obviously hard for me to respond to conversations that you've had with Hargreaves. We respond to what was in the report and that was certainly mentioned as one of the reasons.

I think that case law will take time to develop. Some markets, some countries are smaller and maybe economic principles prohibit some of the rights holders to take action. I think it's too early to assess whether they're negative benefits. If you look at just the report, the Singapore Report, for instance, on fair use and since discredited. That was used as an argument as to why fair use was good in Singapore. That report does draw the correct conclusion that the average growth rate of the copyright industries went from 14.8 per cent to about 6.8 per cent after the introduction of fair use. So there was clearly a direct correlation between the two.

MR COPPEL: One of the questions we've asked is to get a sense from participants as to what works that are currently remunerable under fair dealing would no longer be remunerable under the model of fair use that we proposed in the draft report. If you have any perspective on what types of work that you think are currently remunerable that under the option that we're proposing would no longer be remunerable, if you can give us some examples that would be helpful?

MR MULLER: I don't have any specific examples. By its very definition, we believe that the only way that clarity can be established is through litigation. Until someone would use a fair use defence and you'd have to litigate it, only at that point will there be clarity as to what the specific impact will be.

MS CHESTER: Just before lunch we had some evidence. We heard from an academic in the area, Kim Weatherall. She was able to share with us some insights, both with the US system and what jurisprudence – so if we were to go back to the ALRC wording therefore we'd be able to benefit from some of the jurisprudence from the US, but also that in Israel where the system was effectively transplanted across along with the jurisprudence. But there's also developed around that a large number of codes of behaviour and guidance that can be used by participants within the system.

So these are some of the things that we've been learning of, post our draft report, that would be of benefit to address. I liked her wording better than the issue of uncertainty, there's never any certainty in business nor in

legislation but predictability of moving from a fair dealing to a fair use system. So are you familiar with what's happened with Israel with the rolling out of fair use there, and the codes of behaviour and guidance, and the use of the US jurisprudence? Because I think we're trying to look at, from international experience as our Terms of Reference require us, to try to address this primary concern that people tend to have around what sort of level of predictability you'd have with the change to the new system.

MR MULLER: Look, I don't have specific details about the Israel situation. The advisor that we use for IP matters, Michael Williams from Gilbert and Tobin very respected IP lawyers, has advised us that there is great difficulty in transplanting any of that case law and making it valid or relevant under the Australian constitutional system, which is different from, obviously, those other countries that you mentioned.

MS CHESTER: We might a situation of lawyers agreeing to disagree then.

MR MULLER: Yes.

MR COPPEL: I just pick on one point that you make in the post-draft submission which relates to having the minister that is a champion of intellectual property and, I think, you've mentioned this in the context of some of the copyright policy. But you've made reference to the UK model which is a minister that's responsible for all the intellectual property. Do you have any views as to if such an idea were to get up in Australia where that – which portfolio would be the best or most suited for such a role recognising that the current arrangements are a bit fragmented in Australia, copyright now sits under the Minister for Communications, and most other intellectual property is in the Industry portfolio?

MR MULLER: We don't have a strong view on where it should sit. The most important thing for us is the fact that it doesn't exist is more a reflection of the lack of relevant - or focus on all intellectual property including copyright as a key driver for innovation. For instance, I'm not an expert to speak on patent or trademarks or other things, but in the situation of copyright, we've got communications and arts. You've got a Minister for Arts. It's part of the portfolio but it's not the central focus, and our potential conflict is with the other part of that same portfolio. So we think it's just vital to have an opportunity for someone to champion intellectual property as such.

MR COPPEL: So would that champion be someone that has oversight on policy or intellectual property, or someone which is a, sort of an advocate for the role that intellectual property plays?

MR MULLER: I'd have to take that on notice. Yes.

MS CHESTER: Paul, your submission also touched on the issue of whether or not the exemption from the Competition and Consumer Act was section 51(3) which we have a draft recommendation and we're certainly not the first to make that recommendation that provisions of the competition law should be extended to intellectual property arrangement, particularly if they relate to licensing.

We did benefit from the work of Professor Harper in the Competition Policy Review and speaking to some of the jurists and senior legal folk that supported that review process to better understand the issues there. Just trying to understand why it is that you don't think that those sort of – the way the IP rights are afforded and licensing provisions why, like most other sectors of the Australia markets, that they wouldn't be subject to our competition laws?

MR MULLER: Yes. The Harper Review, if I'm not mistaken, draws its conclusions on the basis that intellectual property can basically quarantine or protect an idea for someone, therefore then that idea can't be exploited and therefore it stops the dissemination of knowledge. Copyright is a very special category in the sense that copyright does not protect an idea, it only protects the expression of that idea. If I make a movie – well, the June Book, someone else can make a movie, I think because that's in the public domain, on exactly the same basic story. So therefore there is no restriction.

So, by its very definition, we believe that there should not be a case – well the economic principle is that a single product can never be a market and for that reason we believe that it becomes then largely theoretical to have the oversight. We are still subject to the ACCC Regulations or misuse of micro-power. We don't see any reason why it would go further than that principle.

MS CHESTER: So I think the main thing that they were really focussing on there was – particularly with – in the pharmaceutical sector and with cross-licensing provisions in digital content that those licensing arrangements, like any licensing arrangements in any other sector, weren't subject to the competition laws in terms of substantially lessen the competition. So it wasn't about the fundamental rights of being afforded copyright protection, it was more cross-licensing and licensing arrangements that could have an anti-competitive effect.

MR MULLER: Well, the only beneficiary, we believe, for that recommendation would be the ACCC itself. There's talk about that something may occur yet there's not a single shred of evidence that anything uncompetitive has ever happened. So, again, the problem hasn't been identified, it's more a theoretical issue again rather than a practical issue.

MR COPPEL: Another point that you've made in your submission is surrounding enforcement where you said enforcement is too lax. Can you elaborate on how you see a stronger role for enforcement playing out? Who would be responsible in terms of the pursuit of alleged infringements in terms of the costs associated with pursuing justice through the legal system?

MR MULLER: Well, let me first, sort of, take one step back from there. What we say in our submission is that we believe that an effective response to the issues that we have with copyright infringement is going to be served by a combination of supply site changes, i.e. things that we change as an industry. In my opening statement I made numerous examples of things that have happened, as well as effective enforcement.

The research also clearly indicates that the recommendation that the Commission makes which is that access and availability and affordability are the solutions to reducing infringement and are best incomplete and at worst completely incorrect. There's just a few examples that can be named to back that up. The first one is in the music industry, Spotify and many other services have every content licence to it, I think 16 million tracks available on an advertising supported free model. So, according to the logic, piracy would not exist anymore, yet it does.

Another example is a study that was conducted by Carnegie Mellon University in the US, which basically tested the effect of Hulu, which is a free TV network or platform, online platform in the US, getting the ABC content to come on to its platform. So it was established. CBS, Fox, all the other main players were there. ABC came to it later. So they had, basically, a test group where they could say well the changes in piracy are just reflective of those other companies whose content was on Hulu before and after that moment. ABC was the test case which wasn't available before and after, so they could isolate the specific effect of that. The amount of piracy that reduced that decision on ABC's content was 25 per cent.

Now, for clarity, Carnegie Mellon University also researched the impact and the effectiveness of site blocking via peer review Difference-in-Differences model and they came to the conclusion that the impact of

that was 22 per cent. So it shows you that one enforcement guide that we have at the moment through site blocking that we're using in the courts this week was materially just as effective as making content available for free in the next day.

So to us it has to be clear that it's a simplified view to say that if you make it cheaper and more readily available that you can actually reduce piracy in any meaningful way. It doesn't. So it has to be a combination of both enforcement as well as supply site changes. The starting point for us is that we – legislation was passed last year that allowed us to pursue the blockage of sites whose primary purpose was infringing copyright. We're using that law now.

I think, over time, there will be other things that will come up as technology evolves. You talk about fair use. One of your reasons to recommend that was that it sort of helps evolve. Well, we don't believe we should specify to you now what we need, because we don't know what's going to be developed. We know that we're going to be behind the eight ball when it does happen, but there are other things that can be done.

One such example that I can talk about now is an initiative that's happening in the UK for instance, which is what they call the follow the money approach, which basically means that you try to cut off the advertising on pirate websites. So the top 30 pirate websites last year made $230 million in advertising revenue. Not doing anything whatsoever to offer employment, to support a content, to pay tax, yet they make this much money. So one thing that could be done in addition to what's being done now is access - cut off the access to advertising revenue.

MR COPPEL: Did I hear you correctly - - -

MR MULLER: Sorry, but the key thing, the key point to make, is that it will evolve over time and I think the Hargreaves Report that we mentioned before, one of its 10 recommendations was also that no effective - no legislation is effective if it doesn't at the same time have a way to enforce those rights, and not just the absence of that recommendation but actually taking the complete opposite position that the only thing that we need to do is make it cheaper and more quickly available, I think is extremely flawed.

MR COPPEL: You mentioned Spotify and you were referring to those that use Spotify without a - using the advertising-based model of accessing music, and you referred to - did I hear you correctly saying that you refer to that as piracy?

MR MULLER: No, that's not piracy. I was saying that it's free but it's legal free, but despite of that there's still rampant piracy of music. So my point was free access on a timely basis because 99 per cent of all music released is released on Spotify on its global release date, did not materially stop the piracy.

MR COPPEL: Through other media?

MR MULLER: Through infringing media, yes.

MR COPPEL: Yes, through infringing media. Thank you.

MR MULLER: You're welcome, thank you for your time.

MR COPPEL: Our next participant is the Copyright Agency. So I have Libby Baulch and Adam Suckling.

MR SUCKLING: Do I need to state my name? Adam Suckling, CEO of the Copyright Agency.

MS BAULCH: Libby Baulch, Copyright Agency.

MR COPPEL: Thank you, welcome. If you would like to make an opening statement, please do.

MR SUCKLING: I do have, I'm not sure if it's short, only five hours - no, it's an eight-minute statement. So look, thank you for the opportunity to participate in this public hearing.

MS CHESTER: Adam, we are running late and we did say to folk that five minutes, so if you could try to keep it to five minutes it would be really appreciated because we've got a lot more people to get through this afternoon.

MR SUCKLING: Right, well, I will try. The inquiry is important, it goes to the big questions around creativity, consumers' access to goods and services and incentives to innovate. We welcome aspects of the draft report, we are pleased to see the Commission recognise the value of statutory licensing and licensing initiatives such as the Copyright Hub. But there are four major issues that we wanted to highlight which were of concern to us.

These are as follows: first, the report and its recommendations, in our view, are hostile to the rights and livelihoods of Australian writers and

what are called intermediaries, media, film, publishing companies that invest and take risks and products to market; secondly, in our view, the report starting point appears to be based on the mischaracterisation that the copyright system has expanded over time and that therefore radical recommendations are needed to hack it back; thirdly, in our view the report overplays the costs and understates the benefits of the current system; finally, the position that the report adopts represents, in our view, and the view of many of our members, a clear danger to creativity and if implemented would undermine the rights and ability of companies to invest.

So taking the first point, and I am trying to cut this down, Commissioners, as I go through so I can meet your time requirement. Taking the first point of the report, the first point that I made, which goes to the report's attitude to Australian creativity. Our start point is that where a writer or a publisher, or a film maker, or a distributor, create something their copyright in that work should be respected, I'm not saying you dispute that, and they should be able to get a reasonable return on it. But the report's view that a more reasonable estimate for copyright term should be closer to 15 to 25 years is an example of what I mean when I talk about this hostile attitude towards creators.

We know that the government cannot change the term because of our international treaties, as both the draft report and the minister have made clear. But in our view this preferred position in the report speaks volumes about the general attitude towards creators contained throughout the report. As we have said in our response, this approach seeks to reverse an international standard that was set by the Berne Convention in 1886. So if this were ever to come to pass it would mean that an author like Anna Funder, who had Stasiland published in 2001, would lose copyright protection next year. Next year. The recommendation on fair use would also see writers and publishers not receiving money for the use of their work by large institutions such as business, government, and educational institutions.

The second issue we have with the report is the position that the copyright system has expanded over time and that the scope of protections have only ever gone the way of rights holders. We don't accept that characterisation. As we outlined in our initial response to the inquiry, changes to the scope of protection have been accompanied by or followed by new exceptions. For example, in 2000 the new right to make content available, which I know you supported, was accompanied by extensions of access provisions for education and libraries to digital. Also the extension of the term of protection in 2005, which you have commented

extensively on, was followed in 2006 by new exceptions to parity, satire, private copying.

The third matter of concern to us in the report and in some of the public comments by commissioners is that the report overplays the problems in the current system and understates the benefits. The Commission has said publicly that you only need to see the problems that schools have getting access to copyright material to realise there's a problem, it's frankly really unclear what you mean by that. Today's schools get access to everything ever published under the statutory licences so everything ever published they can access.

Australia's copyright system enables teachers to copy and share content more extensively than anywhere else in the developed world. And the price of this access is just $17 per student per year for schools. And to put that in context, the copyright fees for the school sector is less than 0.15 per cent of the costs of each student, and for universities the cost is, taking this overall of their revenue, is 0.2 per cent. Costs paid by departments and not students. In fact the system is supported by many teachers precisely because it supports the creation of new teaching material and provides access to huge amounts of copyright content, as was made clear in their submissions to the Law Reform Commission.

Now, I've skipped the fourth point. Finally, the report's recommendations in regards to introducing fair use represent, in our view, a profound danger to Australian writing and publishing. There are multiple problems with fair use. It is not, as the report appears to believe, a clear doctrine that will be settled by the courts and then we'll be able to get on with our lives. As, for example, Stanford University's library online guide for fair use makes clear, "Unfortunately the only way to get a definitive answer on whether a particular use is fair is to have it resolved in Federal Court."

So that goes to some of your questions, Commissioner, about guidelines. This uncertainty remains after more than 120 years of case law. The truth is that fair use is a lawyers' picnic, or perhaps a rolling unending banquet. But most concerning to us is the simple fact that the introduction of fair use runs the very serious risk that people and companies that create work used by large organisations won't receive a fair reward for that use and won't have an incentive or ability to keep producing.

Canada is instructive in this regard, the fact is that the Canadian education industry stopped paying licence fees to Canadian writers and publishers following a change in their law, not absolutely comparable to

what you're proposing but a change in their law, resulting in the estimated loss of 30 million a year for content creators and the closure of publishing operations in Canada. The fact also is that education bodies in that country before the change in law said that the change would not lead them to stop paying licence fees. But it did.

Now, I know that there's a lot of dispute about what should or shouldn't be paid for and whether the Copyright Tribunal can make decisions in regard to certain content. In our view, where there's a dispute over whether content should be paid for there's clearly a clear mechanism to resolve that if the parties can't agree and you go to the tribunal for a ruling. And in our view, it's completely open to the tribunal to come to a view that certain uses of content should be rated as zero. Now I have some other things but in the interests of time I will end there.

MR COPPEL: Thank you very much. Can I begin by putting on the record that the draft report does not make any recommendation to shorten the term of copyright, we have made recommendations that take into consideration our international obligations, obligations that are enshrined in plurilateral or bilateral trade agreements. So I would like to make that point and I think that point has already been made but - - -

MR SUCKLING: Commissioner, of course I accept that. I've read the report. But I think it goes to this question which is why there's this level of agitation to anger amongst people who create content, it goes to a view about the perspective that the Commission took right from the outset and in that you say you think a more ideal term would be between 15 to 25 years. I completely accept that you didn't recommend that and you're absolutely live to our international obligations, I accept that, but my point just is in our view it takes - it sort of talks to a particular view of content and the creation of content.

MS CHESTER: So that the finding that you referred to, Adam, was that if an optimal term of copyright was informed by what the actual commercial life of a piece of work was it would be 15 to 25 years. So that's a finding based on evidence that we drew upon by the ABS. So I think people choose to read things - everyone brings their own lens to these issues, but it was simply an evidence based observation that we made a finding upon.

MR SUCKLING: Well, of course, but I mean, we have very, very large numbers of people who have written books who say, well, what does that practically mean for me? And that practically means that for someone like Tim Winton and Cloudstreet, when I worked at Foxtel, we could have waited one year under that recommendation and taken the book that he

had done in 1992, and made a movie or a series out of it without asking his permission. Anna Funder, who wrote Stasiland, which was published in 2001, someone could come and take that book and make a play or a film out of it without asking her permission or without remunerating her. So there are too many examples where we can point to of works that fall completely outside of what you've just said, which explains why there's such a level of concern about that, not recommendation, but that period that you put down.

MR COPPEL: Yes. I think there can be almost endless debates when you frame a question in terms of what would be an optimal copyright term. I think you would find very few people that would come to a landing of life plus 70 years. You would probably find very few people that might come to a landing of publication plus 15 or 25 years. I think the message that we're putting in the draft report is, like all other forms of intellectual property, there is a balance that needs to be struck and that a judgement and the assessment of that balance is probably not in the right place under the current arrangements. We've heard many participants to date that are putting the view that the current arrangements are working well, they're adaptable, they're flexible. Our report is challenging some of those and putting a bit more scrutiny onto some of those points that are being made in that context. So maybe we can move on to some other questions?

MR SUCKLING: Of course.

MR COPPEL: A second point relates to some of the experiences in other jurisdictions, and Canada is one of those examples where they have not adopted fair use, they've changed their fair dealing exception, and there were particular changes that related to the educational licence in Canada. Again, our report does not have any recommendations that relate to the educational licence, per se, in Australia. But I did want to ask you, like we've asked others, in the event of a move from fair dealing to fair use what types of work would you see as being currently remunerable that would not be remunerable under the fair use provisions?

MR SUCKLING: Well, Commissioner, I think it really is very hard to say. I mean, we've got an example in Canada of one thing that happened, I accept it wasn't exactly fair use. We have examples of representatives of the education sector saying we believe that this amount of content shouldn't be covered. And we have the circumstance where you're saying, as I understand it just from sitting here now, well we put up a set of guidelines on fair use and now we're thinking perhaps it's - or principles before, now we're thinking perhaps it's not those ones that we worked out but the American ones might be useful. And the first I heard today about

was about the - I mean, I just think it's very difficult for us to say precisely here and now what it would be for the - but what we do know - - -

MS CHESTER: Well, Adam, why don't we go with the ALRC, because I think everyone is very familiar with those, and they were subject to - I mean, we've done an entire report on intellectual property arrangements, the ALRC work was just very much focused on that, so would you be able to answer Jonathan's question if you were looking at what was proposed by the ALRC for fair use?

MR SUCKLING: I would have to go back and look at those. I wasn't in this sector when the ALRC did their report. And I would want to refresh my memory on precisely what they said. I do know it's the thing that some people have said in these hearings here we should go back to, but I wouldn't want to go, well, in my view it's 10 per cent, or it's 20 per cent, and I just don't know.

MS BAULCH: Maybe I can also say that what's happened in the US is that the fair use provision has been there for 120-something years, it was codified in 1976, and it was part of their particular ecosystem. But it's also true to say that in the last 10 years or so there has been a massive expansion of the application of the fair use provision, I don't think that that's in doubt, by the courts largely through this concept of transformative use, which was initially about transforming the content itself, so making a new form of expression built on somebody else's expression, was the original form, and then that evolved into making no change to the content itself but rather a new type of use of that content that hadn't been made before.

So that makes it difficult to predict, and I should say that there are different views in different courts in the US, it's by no means a view and outcome what the result of a particular case will be and you can get a different answer if you bring your case in the second or ninth circuit rather than the seventh circuit, for example. But it does make it very difficult to predict what the outcome would be here and how that provision would be applied in practice. And to what extent people would be interested in sort of pushing the boundaries of the provision.

MR COPPEL: Maybe the US is more of a special case, there have been other jurisdictions that have established in fairly recent years a fair use exception. And their level of testing in the courts has been limited, in some instances non-existent. On the other hand, no system is perfectly certain.

MR SUCKLING: That's true, although the US is where the doctrine would be imported from. Commissioner, you said before, well, one of the arguments in favour of it is it sets down these principles and it gives people some certainty about what's covered and what's not covered. As you were saying that I was sitting there thinking, well, but what about the case of Google Books? I mean, this is a thing which went for more than 10 years to get to an outcome.

So I really, really think it's a stretch to say, well, if we put down these sort of broad principles it can just seamlessly and quickly evolve as the technology changes, because the doctrine is uncertain, it's interpreted quite differently in different courts and there's - I mean, the Google Books case says it took a very, very, very long time to get what some have described to me as a used case that sucks. That actually at the end of all of that you get access to an eighth of a book that you search, and I think there's an interesting question about whether if you'd come to a licensing arrangement whether you couldn't have got actually a better outcome for consumers.

MR COPPEL: I'm not familiar with the intricacies of the Google case, my understanding was that it was the ability to bring together, or to scan all of the books, was one thing, and then subsequently then to use it would have been another, and that fair use - - -

MR SUCKLING: To search and find parts of it, is the next bit, yes.

MS BAULCH: But maybe what's interesting about the case is that there was a point at which there was a settlement between Google and the authors or the publishers that would have resulted in payments back to the authors and publishers. But what was lacking in the US was a mechanism to enable that settlement to proceed. So what happened was that it went back to litigation and another five years in litigation, so 10 years overall. And that is why we've referred you to the report of the US Copyright Office, which is really saying that fair use is an inadequate solution for mass digitisation projects of that kind and really there should be a better mechanism that both enables the projects to proceed but also enables some compensation for the content inputs into that process because, really, that's a long time and not a very good outcome.

MR COPPEL: One of the points that's been raised in our hearings to date relates to collecting agencies and the voluntary code of conduct as being one which is less transparent than other models and the EU model is the one that's been often put forward as an alternative.

MR SUCKLING: Yes.

MR COPPEL: Do you have any views on this topic?

MR SUCKLING: Well, look, I think we are subject to a lot of scrutiny, we have to report to parliament, we have to comply with the current code of conduct which I understand is renewed each year, so that's a code which is reviewed and independent of us, clearly, and we have a board of eminent people who are used to running big corporations and lots of stakeholder - sorry, community groups, a broad board, so each of those things I think are things which make sure that we have to be transparent and open and comply with our obligations. Now on the code, if it comes around for the review next time, I'm sure there will be parties who will say, look, there's a model in Europe, why don't we pick that up and apply it, and that will be considered and if it's adopted we'd obviously comply with it.

MS CHESTER: I think where governance is becoming a very strong emerging theme in our report in several areas, firstly in terms of the intellectual property policy setting arrangements at the Commonwealth Government level, but also around intermediaries, including collection agencies, so I guess now is an opportunity for you to give us your thoughts and feedback. Our Terms of Reference do require us to look at other international jurisdictions and to seek out contemporary best practice, it's been put to us with some very substantive meetings that we had with experts in Europe recently that the EU determination of 2014 is kind of contemporary best practice for code of conduct.

MR SUCKLING: It is contemporary best practice.

MS CHESTER: It is contemporary best practice for the code of conduct behaviour for collection management organisations. And indeed, having a look at it, it's a very comprehensive document. And at first blush it would address some of the concerns that have been raised with us in submissions to date. Do you have a view on that EU determination and what is the difference between it and the code of conduct that you are under at the moment?

MS BAULCH: I'm happy to look at it again. But I didn't think that there were requirements there that we don't have already in one form or another, but I'm happy to review that and come back to you on it.

MS CHESTER: Okay.

MS BAULCH: Because in addition to reporting in connection with the code of conduct we are of course, as Adam said, answerable to the

minister and to parliament. And there's a whole range of issues that we report on to the minister and that has increased over time as there have been particular requests that have come from various ministers and departments, and we are very keen to be as - to explain as best we can what our processes are, and we do respond to those requests and there are a number of issues that we included in the most recent annual report that were on request and we've referred to those in the submission.

MS CHESTER: Okay, that would be great, Libby, if you could come back to us on that because it is an area that we'd like to follow up on in our final report. And in particular I guess we're looking at it from the perspective of users of the system and getting that sort of transparency and accountability in addressing some of the issues that may have been raised in submissions with us. And you might be able to point us to where your current code of conduct policy would already address those. But that would be helpful.

MS BAULCH: Sure.

MR SUCKLING: Yes.

MS CHESTER: You touched on earlier the issue of under the educational licensing arrangements some items are rated as zero, is that the way that you deal with items that - - -

MR SUCKLING: No, I think - sorry, Commissioner, I said it was in our legal - or the legal advice we have is that it is open to the Competition Tribunal to - I'm sorry, I'm so used to doing this at the ACCC, open to the Copyright Tribunal to make, well, a range of determinations that go to value, including saying, look, some material should be just rated at zero.

MS CHESTER: Yes. No, that's what I'm sort of getting to with my question.

MR SUCKLING: Sorry, okay.

MS CHESTER: So with the way the licensing arrangements are set up at the moment, say, for education, if there are things that they're copying or using that would otherwise be freely available, i.e. non-remunerable, and excepted under fair dealing, how is that then treated under the licensing, are they rated as zero so then there's no pricing mechanism around them in the licensing agreement? I'm just trying to work out how do we - what's the mechanism for something that would be excluded or excepted under fair dealing being captured in the licensing arrangements that you have for education?

MS BAULCH: Look, I will attempt to answer that question. So there are quite complex commercial negotiations about the fees that are paid with the education sector. They are, as you know, flat fees for the period of the licence agreement that are irrespective of the content used during that period but they are renegotiated periodically. So they are looking to set equitable remuneration that reflects the extent of use of material in reliance on statutory licence, so uses that would otherwise require licences from copyright owners. So in that process you're looking to exclude any uses which are made outside the statutory licence, so where there's a direct permission from the content owner or whether there's a pre exception, or other bases on which a use might occur outside the statutory licence. So the fee negotiation is centred on the extent of use of content which is made in reliance on the licence that would otherwise require permission.

MS CHESTER: I'm not quite sure of the answer to my question. So how then, and this is just based on submissions that we've read, how then for something that would be not remunerable under fair dealing then be catered for under the licence, how would that be sort of zero price, for want of a better description?

MS BAULCH: Well, fair dealing is something that's done by students on an ad hoc basis and the systemic large scale use by the education sector is what's covered under the statutory licence. If that's your question? But having said that, there are activities that are done in the education sector which are treated as non-remunerable. So there's a provision, for example, that enables two pages or one per cent of a publication to be used without remuneration and so that is factored in to the fee negotiations.

MS CHESTER: Has the Copyright Tribunal rated anything at zero in any determinations?

MS BAULCH: It hasn't exactly but the issue came up in a recent tribunal proceedings to do with the sale of survey plans by the New South Wales Government where the surveyors were seeking a royalty from the revenue that the New South Wales Government was getting, and in the course of that it was agreed that administrative uses of the survey plans would not be paid for and that was a part of the - that that was reported to the tribunal and there was no suggestion that that wasn't something that it could have determined had it not been agreed.

MS CHESTER: As part of the commercial negotiations that you have do you assume in informing what pricing is acceptable for you on behalf of the rights holders that you represent something that would be zero priced

if it were excluded from fair dealing or freely available? I'm just trying to work out how your licensing arrangements cater for it.

MS BAULCH: Well, there may be some technical uses that have no value on either side for which there is immunity under the statutory licence but nobody is seeking - - -

MS CHESTER: Sorry, I won't labour the point any longer, I was just trying to understand how it worked.

MR SUCKLING: Yes. I mean, look, we're just in the process of thinking through the approach to opening discussions with the universities on the contract. You take into account a large number of things: what is the fair use content, what are the total number of the students, what's the amount of copying, and then what are the - we're looking at what are the additional things that universities may find useful in a licence. And clearly, I mean, in any commercial negotiations there's a kind of a range of values that you can ascribe to particular forms of use, and we're going through that. I think that the point really we were just making was we'd heard a lot from people that it's not open to the tribunal to set things at zero and we're just seeing our legal advice says it is and Libby has given you an example of where it's occurred before.

MR COPPEL: A lot has been said about the education statutory licence, there's also a statutory licence vis-à-vis the government.

MR SUCKLING: Yes.

MR COPPEL: Very little has been said. I'm interested if you've got any views on how that statutory licence works. It is also an area that was brought up at least in the draft of the ALRC report on copyright where they had suggested as an administrative use, I think it was public administration, the administrative use in a fair use copyright exemption set of arrangements. So I would be interested in your perspectives as to whether how well the current arrangements are working and your views on at least that draft recommendation in the ALRC report?

MR SUCKLING: Well, maybe I'll just talk to the current arrangements. Look, I think I would say in relation to the - just broadly, we have, I think it would be fair to say, productive and good relations with most state governments and have agreements on foot with them in which they are paying a settled fee for the copying of public servants in each of those states. With the Commonwealth we have an agreement on foot which expires this year and we're in the process of discussing with them renewing that agreement.

It isn't a secret that we've had differences with the New South Wales Government over, one, the amount of copying that is occurring, and then how much of that should be remunerable. But we are hopeful of negotiating that through commercially, I think, really, the best way of dealing with these things is clearly there's an Act and we have a statutory licence but you need to be able to demonstrate to the clients that there's a value that is inherent in the licence and it provides a convenient way to public servants to use a very large amount of material, which is what we're endeavouring to do with New South Wales now.

MS BAULCH: I was going to say two things. So firstly on the public administration point, we don't think there's a need for that because of the example I gave before about the surveyors where it's quite open to agree that certain activities are not remunerable under the licence and they think that that is sufficient and the tribunal has oversight over that. And the other thing to say, which you've noted in your report, is that we do think that there's scope for simplification of the government licence in using a similar process, following a similar process that was successfully done for the education state licence, so we do think that that is worth looking at.

MS CHESTER: And Libby, given your history in the area, do you know why there was a change from the draft of the final report of the ALRC on the issue of public administration, do you recall?

MS BAULCH: I don't, I'm sorry.

MS CHESTER: No, that's fine.

MR COPPEL: Thank you, very much.

MR SUCKLING: Thank you, Commissioners.

MS CHESTER: Thank you.

MR COPPEL: Our next participant is Anthony Alder. If you could make your way to the table. When you're comfortable and relaxed, for the purpose of the transcript if you could give your name and who you represent, and then if you wish to give an opening statement, please go ahead.

MR ALDER: Dear Commissioners, my name is Anthony Alder, I represent a small law firm. It's a small to medium sized patent attorney firm based in Sydney. I've got about 15 years of experience with IP law and Alder IP has been running for about five years. We've won several

international awards for client choice, including two from the UK, and we've been nominated in the top 1000 patent attorneys in the world. Alder IP represents a range of clients. Ninety per cent of our clients are in Australia and I would say well over half of those are small micro entities of businesses of about one to two people, and usually in the IT space or medical advice space. My medical experience, I was previously the legal counsel for ResMed, Cochlear, Ainsworth, and a company called Ventracor as well. Over the past 10 years I've raised over $500 million for start-up companies so I have some idea of the commerciality that goes on behind them.

I want to make a submission in relation to three key areas which I see that are sort of overlooked a little bit in the report. And these relate to the innovation patents, the effectiveness of the patent system, the enforcement of the patent system, and possible pirate operators as patent attorneys. The first area I want to have a look at was innovation patents and what I want to really explain to you is the fact that these are necessary. And they are key to helping start-up businesses, particularly in the IT space. The key advantage with the innovation patent is that they do, they're not required to have an inventive step but an innovative step.

It's a very small step. But these companies don't have the money or the resources to file hundreds of thousands of dollars to push out a patent portfolio around the world. Most of these companies are looking at just protecting in Australia, they have a small IT based product, and they would just like to get it out without the cost of examination. And the cost of examination really doubles the cost of patenting in Australia. So that means innovation patents are really key for start-up businesses. If the Australian Government wants to support start-up businesses they really should keep the innovation patent.

We know first-hand about the value of - how valuable it is to get patents and that it's vital to protect these patents. To get investment funding these companies need to file patents. And that's where they start. I think one of the key problems with the report is the fact that the report seems to focus on the fact that there are a lot of large companies that are using the innovation patent system. But what I think it's important to note is that they're not the only users of the system. And in fact the majority of the people that use the innovation patent system are Australian based, which seems to indicate that a lot of them are small operators or potentially are - they've got a lot of potential with their business. Our recommendation is simply put, not to discard the innovation system just because a few large companies are using it. It's important to small business as well. And it's important to these small start-ups that the Australian Government is pushing forward.

The second area that we'd like to have a look at is the effectiveness of the patent enforcement system for small start-up businesses. At the moment Australia lacks an effective system for patent enforcement in Australia. The only real patent enforcement forum, if you like, is Federal Court. It's horrendously expensive for a start-up business. No start-up business is going to be going there. The costs of running a patent dispute is in the vicinity of $500, 000 to a million dollars and it's just not economical for a start-up business who is in their first two to three years of operation to go and take someone to Federal Court. And it basically means that other big multinational companies can act with impunity in terms of ripping off their technology. Yes, it is just basically non-existent.

I would like to draw your attention to two examples of where a low cost patenting system is being implemented, particularly there's one example in the UK where the UK Government instituted a system called the UK Intellectual Property Enterprise Corps, which manages matters up to £500,000 and it's a low cost court regime. The idea was also floated with ASIP about two, three years ago and ASIP recommended to the government that they institute a low cost tribunal. The government didn't proceed with that at that time.

There's also the IP Australia's present system of patent oppositions which could be extended to enforcement or infringement review of small matters. I think the main recommendation that we would like to make is the fact we should institute some kind of low cost patent enforcement procedure that allows backyard inventors to essentially take on the big guys.

The third area that I really briefly wanted to talk about was the illegal operation of unregistered patent attorneys and trademark attorneys in Australia. In particular this has arisen mainly because of IP Australia's push for eServices through their eServices portal and the lack of verification that goes on with that service. We're aware of in particular two instances where this has happened, there's been a median operator working on Elance and Upwork who filed a couple of patents and - or allegedly filed a couple of patents, he didn't actually do anything, and basically took a wrecking ball to our client, one of our client's patent portfolios.

This also happened with a Chinese company. A Chinese patent firm has been filing in Australia through the eServices portal and using fake names and addresses to avoid using local agents. And this leads to problems of enforcement and rectification. It means that these people don't exist, we can't serve evidence on them, and they're just non entities.

Australia is effectively tolerating this when no other country in the world would even dare to do this. EP and USA both require patent and trademark attorneys to be qualified, have a registered number, and have a real verified address, before you can actually use their eServices portals. I, for example, could not go onto the US system and try and use the US system.

Previously we've made submissions to IPTA, PSB and IP Australia, and these all - all these submissions have been effectively ignored. Each one of these organisations passes on to the next organisation and then we went back to the circle, back to IPTA again. We then, in frustration, contacted Christopher Pyne, and that was my previous submission that you actually got a copy of, and Christopher Pyne referred us on to this Commission. I think it's important to note also that under the Patents Act there is a provision for effectively dealing with illegal patent operators, or patent agents or attorneys, and it does have a penalty regime however this penalty regime is not effectively enforced by any organisation.

Under the Trade Marks Act there's no equivalent provision of the patents, and also under the designs there is no equivalent provision. But we recommend at a fundamental level there should be a simple implementation over the eFiling or eServices portal to allow IP Australia to verify that agents are actually agents in Australia and qualified. They have the numbers, they have the list of agents, they should be able to just cross reference it. Thank you, for your time and if you've got any questions - - -

MR COPPEL: Thank you, Anthony. I'd like just to pick up on the second point first and then I will get on to the first point. The draft report has looked closely at the UK model of the Intellectual Property Enterprise Corps, we've had also the opportunity to speak with the current judge on the IPEC and it's not a dedicated tribunal, it's more a listing within the UK High Court, the equivalent of our Federal Court.

MR ALDER: Yes.

MR COPPEL: But it does have set rules and procedures that provide greater certainty and a limit on the costs that are involved. In our draft report we have got an information request that tries to get further evidence on if such a model were to be adopted in Australia whether that should be within the Federal Circuit Court or whether it should be more a listing within the Federal Court. I'm interested in your views on that?

MR ALDER: Well, in actual fact there was a move a number of years ago to open it up to the Federal Magistrates Court, however, that was only

limited to, I think, copyright matters. There was the intention to roll it out to trademark and patent matters but that rollout never occurred. We'd be supporting that rollout, but also even if you go even further to make almost like an NCAT type proceedings where patent matters could be heard by a dedicated patent tribunal, court, or something similar. For low cost matters, we're not talking about the multimillion dollar pharmaceutical matters, we're talking about the ones that really, you know, it's a guy that needs an injunction against someone to stop them from ripping off his idea.

MR COPPEL: So in many respects the way in which the costs can be made lower relates to the way in which the rules of the process for litigation to conduct - - -

MR ALDER: Absolutely. At the moment, well, if you look at the patent opposition proceedings as a good example, under the patent opposition proceedings they're actually capped at each stage and that's exactly what we're recommending. Capping the costs of the actual legal damage that could be claimed as well as the overall damage as well, it's probably a good initiative.

MS CHESTER: So in terms of the balance of which court stream we should be looking to to put - if we were to try to transplant something like that to the Australian system, some folk have suggested to us that it should be the Federal Court because that's where we have the judges that have developed expertise in intellectual property matters, others have suggested no, the Federal Circuit Court, lower costs is in their DNA, and they can - - -

MR ALDER: Well, I think what I'm trying to stress here is the fact that low cost is the main goal. Because if you put a pharmaceutical patent or if you've got a major blockbuster patent, you're not going to go to this small court anyway, you're going to go to the Federal Court anyway. Federal Court, just to file Federal Court proceedings, costs about $10,000 to the applicant. And that's just to initiate the process. And they're probably not going to - they're probably going to get 50 per cent of that money back even if they win. And it's incredibly expensive. And I see time and time again with a whole lot of little guys, though, just their technology has just got knocked off by a big company. And they've got nothing, they can't do anything about it.

MR COPPEL: Well, I guess the critical question is with a system like this the arrangements provide greater access to the judicial systems, it's not replacing those that are high value cases, it's actually just providing access in circumstances which under the high cost procedures simply

wouldn't be availed of and there is a choice as to whether that's a listing within the Federal Court, IPEC in the UK is under the High Court, the High Court can hear these high value cases but if the plaintiff opts to move through IPEC they can. And I guess the question we're really trying to get from you is which of the two in Australia would be most appropriate?

MR ALDER: We would probably prefer keeping it in the Federal Court jurisdiction but moving it to a magistrate or something like that and trying to keep the cost under control as much as possible, particularly for these small matters. I think also where it gets really strung out is when you're requiring to get expert witnesses. This is particularly with patent matters where if that could be done ex parte or something like that where it was just done on paper rather than having endless cross-examination of expert witnesses I think that would speed it up, particularly for small matters, I'm not talking about big matters.

MR COPPEL: Can I come to the points you made on the innovation patent?

MR ALDER: Sure.

MR COPPEL: You made a comment that innovation patents are also cheaper for the filer?

MR ALDER: Yes.

MR COPPEL: Can you give us a sense as to where the lower costs are involved?

MR ALDER: Through examination, because there's no examination, it just goes straight through so therefore the - most of the costs of a patent, which is sort of a hidden cost, is you've got three or four stages with a patent, the first stage is the patent filing, and that's the drafting of the patent and filing it, that's a big cost. The second cost is the patent examiner writes to us and says, "Well, this is not inventive or this lacks novelty for X, Y, Z reasons," and we have to respond to that. With the innovation patent you don't have that, it just goes straight through to grant, there is no second or third steps, and the third step is registration fees. So it just basically goes straight through to grant, the applicant gets a granted patent straight away and they can walk into their investors and say we've got a granted patent.

MR COPPEL: So what's the relative size of these different forms of costs, vis-à-vis the IP attorney, vis-à-vis the fees?

MR ALDER: It's half the overall cost. So because basically when we're drafting - I can only really speak for my firm, when we draft a patent you're talking about probably about five to ten thousand dollars to draft a patent. And then when it goes through to examination you're talking about at least $3000 to push a thing through in terms of arguing the differences between the examination. And this is part of the problem when you change - when you tinker around with thresholds of patentability it increases the cost for the patent owner, all these applicants at the end of the day, that's what it's effectively doing.

The other thing is also it becomes a bit of a furphy with patent searching and that sort of thing because even lifting the inventive step in Australia the drawback is that IP Australia does not have the experience to search some of these things, they do not have the patent examiners to actually conduct these searches. It's all well and good to say that US or UK has a higher level of searching and a higher level of reliability with their patents, that's fine, but they have 5000 patent examiners. Australia has less than 500. They don't have specialist training in each one of these areas. And it's a different ballgame.

The other thing is also with Europe, the patent examiners take about five to ten years to examine a patent where in Australia they try to turn it around in a year because they've instituted this procedure where they're trying to turn it around in a year. It makes it very difficult, and I think IP Australia would have some problems with trying to raise the bar up to a mythical standard, which probably is not possible for it.

MR COPPEL: So vis-à-vis a standard patent and an innovation patent, the full cost that's involved for a filer to apply for an innovation patent, I think you mentioned was five to ten thousand for the IP attorney - - -

MR ALDER: For the actual drafting part of it, that's the drafting side of it. And then when you go to examination you would always look to see that the person would spend that again on a standard patent. If they were an innovation patent you would only pay it once and that's it and it's registered. There is no registration fee. So the registration fees and the acceptance fees, which are under the schedule of IP Australia, they don't apply to innovation patents either. So that reduces the cost too. Less steps means less cost for the applicant. If you take a three step process and make it a one step process it's at least half the cost to a third of the cost.

MS CHESTER: Anthony, you mentioned before that you'd been involved in the commercial, the financing side for some of the folk that you've advised in terms of securing innovation and other patents?

MR ALDER: Sure.

MS CHESTER: We have received some evidence from submissions, and indeed from a participant at the hearing this morning, suggesting that the innovation patent wasn't kind of bankable, for want of a better description - - -

MR ALDER: Sorry?

MS CHESTER: That an innovation patent wouldn't be such - seen as such a robust form of protection - - -

MR ALDER: It's not seen as a completely robust protection, however you have innovation patents and then you have innovation patents. It depends on the quality of the actual patent that was filed and quite - - -

MS CHESTER: So good for you to share your experience in terms of from the clients that you've advised with innovation patents?

MR ALDER: Yes.

MS CHESTER: On the back of the innovation patent, have they been able to secure financing?

MR ALDER: Yes, definitely. It depends on what the technology is. Most of the people that we file innovation patents for are mostly in the IT industry. Most of them have got websites or apps, that sort of thing, where the life expectancy of the product is less than five years, okay? And that's ideal for innovation patents. If you've got a pharmaceutical you would be silly to look at an innovation patent because it takes you 10 years to get through clinical trials where if you've got an IT product, usually the IT product from the time that the person has invented it to the time of market is about 12 months.

MS CHESTER: So is the benefit of the innovation patent then for your clients is it the lower cost by taking examination out of the quotient?

MR ALDER: Yes.

MS CHESTER: Or is it going down from the inventive step in the standard patent to the innovative step in the innovation patent?

MR ALDER: It's both. Because some of these applicants - well, the other thing is also I think you'll find that five to seven, I think it's five to seven, thousand patents are filed every year by self-filers, not by attorneys, these are filed by people that file themselves. And the majority of those are actually innovation patents. The problem is that their patents won't stand up to the level - if you lift the bars, they won't be able to stand up to it.

MR COPPEL: So what do they need to prove to pass the innovative step in their application?

MR ALDER: To prove the innovative, the innovative step is not much different to the novelty hurdle. The novelty hurdle is very cut and dried. If you basically find in a disclosure where - you're looking, in a perfect world you would find one document that has features A, B and C and you've claimed A, B and C, and therefore it's not novel. But if you added a feature D and it's not disclosed in prior document then your invention is novel and arguably would include an inventive step - an innovative step. An inventive step is slightly different, if you've got two documents and you've got document A which includes A, B and C, and a document 2 which includes document - features D, and yours includes A, B and C, it's how obvious it is to combine those two documents together. And it's a very difficult argument to run. It's difficult for the examiners to interpret and it's also difficult for patent attorneys to advise their clients.

MR COPPEL: Is it very common that an application would be rejected because it doesn't pass an innovative-step step?

MR ALDER: No. Not very common, but that's because they don't get examined, and we typically advise our clients against examining innovation patents unless there's a real need and it saves them money. It's just a purely economic thing, if they're requesting an examination it's going to cost them double. And if they were going to request an examination they may as well get a standard one because we have to do the same amount of work.

MS CHESTER: Anthony, just touching briefly on the third issue that you raised with us?

MR ALDER: Sure.

MS CHESTER: Because I'm conscious of time and we're running a bit late. You mentioned before this issue about unregistered patent and trademark attorneys through the IP portal?

MR ALDER: Yes.

MS CHESTER: And you've done a full circle and now you're with us, so that's even further, another circle. Who do you see as the responsible entity that should be fixing this?

MR ALDER: IP Australia.

MS CHESTER: Okay.

MR ALDER: IP Australia needs to update the website so it can verify. In the US if I was a patent agent in the US and I wanted to get US agent access to their system I would have to provide my US patent attorney number, my US real street address for service, they mail out something to me and then I have to sign a stat dec that's witnessed by a notary. If I can't provide those they don't give me an account. It's the same in the UK and it's the same in Europe as well.

MS CHESTER: Okay, thank you.

MR ALDER: Australia is about the only country you don't need it for and that's why we're being inundated with this stuff, particularly through Elance and Upwork where we've got Indian patent attorneys and Chinese patent attorneys pretending they're Australian and just filing in Australia.

MS CHESTER: Thank you, very much.

MR COPPEL: Thank you, very much. So we'll have a short coffee break now, it will be a bit shorter than scheduled. It's now just after 3.40 and we'll reconvene at 3.50 where the next participant will be from Screenrights.

ADJOURNED **[3.43 pm]**

RESUMED **[3.52 pm]**

MR COPPEL: So our next participant is Screenrights, they're already at the table, very good. Thank you Simon and James. If you could, for the record, give your name and who you represent and then if you wish to give a brief opening statement, please go ahead.

MR LAKE: My name is Simon Lake and I'm the CEO of Screenrights and I do want to have an opening statement.

MR DICKINSON: James Dickinson, also of Screenrights.

MR LAKE: Thank you very much for inviting Screenrights to address this inquiry. The inquiry has a wide scope but, at its core, it addresses the issues of the importance of having laws which encourage the creation and distribution of Australian creative content. If the inquiry's aim is to establish a fair copyright architecture for the innovation economy, we believe that the proposed approach of the draft report doesn't achieve this goal. Most importantly, Screenrights opposes the recommendation to introduce fair use.

In responding to the draft report, we'd like to make five points. First, in its analysis of fair use costs we suggest that the Commission has downplayed the complications of introducing US law, which is based on their Constitution and the transactional cost of establishing case law. As a comprehensive Columbia Law School Review, which we provided with the Commission with, stated, "Far from creating certainty for users and rights holders, fair use is a moving target." This is because fair use is vigorously contested at every point. We think that the Productivity Commission's draft report has an opportunity to test the arguments both for and against fair use and we hope that this consultation tests the claimed benefits for fair use.

Secondly, Screenrights is concerned that the draft report develops a false rationale to justify its recommendations that reduce copyright protections. The draft report claims that the copyright term is too long and suggests consideration of radical reduction of copyright terms to 15 to 25 years. I think that we covered that issue comprehensively with our colleagues from Copyright Agency. The report does accept that the scope of copyright has not grown significantly in the past 32 years but proposes to reduce the scope of copyright in order to offset the perceived problems of duration.

Third, Screenrights is concerned that the draft report demonstrates critical misunderstandings of the operation of copyright in Australia. In particular, the operation of the exceptions to copyright, which balances both scope and duration. A proper understanding of Australia's copyright arrangements must recognise the role of remunerated exceptions and the statutory licences, as well as free exceptions, such as fair dealings. The draft report fails to recognise the balance and role of statutory licences and, in our view, misunderstands their operation.

When the statutory licences are included in the comparison on Australia and US copyright exceptions it is apparent that Australia has a far wider range of exceptions than the US, especially for education. We provided analysis of a sample of the wide-ranging uses available to Australian educational institutions compared to uses available in the US, under fair use. From that comparison it's clear that Australian educational institutions have more certainty and, we would argue, more flexibility. There is no reason why the statutory licences cannot accommodate the creation of massive open online courses and the flexible sharing of content.

In Australia all a school teacher or a university lecturer has to do is push the record button to use our broadcast licence. In contrast, a US lecturer would have to comply with complicated and untested guidelines, for example, a US lecturer, according to the Stamford University Guidelines, would have no idea if they could copy a program from the public broadcaster, PBS, without approaching the program maker. They cannot copy from subscription television. They cannot edit the program to create a compilation and they can only keep a copy of it for classroom use for 10 days and they couldn't distribute the copies, according to those guidelines.

In contrast, Australian educators have certainty in all these areas. They can copy, they can share, they can edit, they can make their own libraries of all broadcast television and radio content and they can do this under the statutory licence. So I move to fair use. In the education sphere we'd be swapping certainty of use for uncertainty.

Fourth, Screenrights is concerned that the recommendation of the draft report would, if implemented by parliament, undermine the Australian creative industries and negatively impact Australian society's ability to consume copyright material, particularly educators and students' use of domestically produced content.

We don't think that the report adequately looks at the concerns about the impact on the Australian creative industries, on the basis that Australia is a net importer and the overseas created copyright works will not be significantly impacted.

In Screenrights' experience locally produced documentaries are the most used television programs for education. These documentaries have a limited overseas market and no foreign substitute. The proposed introduction of fair use would harm the production of these important works and, in our view, would be a net harm to Australian society.

Fifth, Screenrights agrees that copyright laws do need to change and adapt, but the question of how that change occurs, which considers the full impact of these changes, needs to be more adequately addressed. Screenrights strongly endorses the consensus driven consultative reform approach which led to the proposals to simplify the statutory licences and we note that the Productivity Commission also endorsed that and recommends that a similar approach be applied more generally.

So, in conclusion, this inquiry is important for Australia's economic and cultural future. It has focused all of us on the question of the creative economy that we would like Australia to have and how we're going to get there. We would urge the Commission to reject the one size fits all approach of fair use and to build what we believe should be a more nuanced approached, which builds on the strength of our current system and positions Australia to adapt to the future. Thank you very much.

MR COPPEL: Thank you. Can I ask you whether you see an education statutory licence co-existing with fair use?

MR LAKE: If fair use was to exist?

MR COPPEL: Yes. Do you see them as mutually exclusive?

MR LAKE: Are they mutually exclusive?

MR COPPEL: If I could draw you on the comments you made, with respect to the United States.

MR LAKE: The US, as we've said, doesn't have the scope and the reach in terms of use of the statutory licences and in terms of whether or not it could co-exist, it's not a question which we have addressed directly but we think that the statutory licence does much of the work which educators need. James, would you like to expand upon that?

MR DICKINSON: I suppose in the ALRC report they initially recommended to abolish the statutory licences in the draft report and in the final report they recommended to retain them. One of the things in the draft report of the Productivity Commission is that it says that that was in response to concerns raised by copyright owners. But I think it's also worth noting that it was also the recognition of some copyright user groups that they needed the statutory licences too and in the absence of them they might have some question of what they're currently doing.

So I don't think that there's an expectation that they're mutually exclusive, the question is, if fair use was introduced and the statutory

licences existed, firstly, we've had, unlike the situation in the United States, we would have a sort of belts and braces approach where the education sector, for example, was able to have their cake and eat it too. They could seek to rely on fair use, potentially, and if that didn't work they could rely on the statutory licence.

Secondly, you have the possibility of the scope of fair use expanding over time, as it has in the United States, and a hollowing out of the statutory licences whereby they might still exist on the statute books but they may no longer have any relevance because their value has been entirely taken by fair use.

MR COPPEL: So in our report, I mean we do have the recommendation for a shift to fair use, but it would co-exist with the statutory licence for education. The question then is, what would be the impact on the payments, within the context of the education statutory licence, as the result of the adoption of fair use? So to put it more precisely, what areas that are currently remunerated, under the current system, would no longer be remunerated - uses that would no longer be remunerated under the fair use proposal that is in the draft report? A specific example that you could - - -

MR LAKE: I mean it's a question which you also asked our colleagues at Copyright Agency and if it was a fair dealing that there is no remuneration, clearly, for that. In terms of the scope of it, that would have to be something which is sorted through either negotiation or, unfortunately, through litigation. So it's very difficult to answer that. I mean, Commissioner, are you seeking a sort of percentage type answer to that question?

MR COPPEL: Is there a percentage, or just some specific examples of the types of uses that you would see as within the scope of fair use.

MR DICKINSON: Again, it's hard to answer because we don't know exactly what is the fair use that will be enacted. One of the questions is, for example, how would a court consider the fact of the existence of the statutory licences in considering the commercial harm test, in the operation of fair use? One of the recommendations of the ALRC, recommendation, I think, 8.1, was that the statutory licences shouldn't be considered for that purpose, effectively, and that you can rely on fair use, despite the existence of the statutory licence covering that.

Now, that's intensely problematic because the fact of the statutory licences has created a de facto market for those sorts of services in Australia. In the absence of the statutory licences a natural market might

have been created, in which case the commercial harm test would have found that that natural market was impacted by fair use, so the scope of fair use would be, necessarily, reduced.

MS CHESTER: Sorry, just to make sure I understand that. So, in saying that, does that, by default, then mean that fair dealing and stat licence don't co-exist?

MR DICKINSON: Fair dealing and statutory licences co-exist but don't intersect.

MS CHESTER: So, at the moment, the education sector is currently paying, under licence, for materials that they would not have otherwise paid for under fair dealing?

MR DICKINSON: No, they don't intersect, they describe different activities all together. For example, looking at education a student copying something for their private study or research is a fair dealing and there's no remuneration. A teacher copying something to distribute to the class would be done under a statutory licence.

MS CHESTER: That's what I sort of getting at. There sort of is like a Venn diagram where they overlap, i.e. - - -

MR DICKINSON: I don't think there is.

MS CHESTER: - - - the statutory licence and the negotiation is informed by exceptions under fair dealing, aren't they?

MR DICKINSON: Well, informed only in the sense that everyone acknowledges that those fair dealing uses are not relevant, for the purpose of calculating the remuneration payable on a statutory licence.
They are separate.

MS CHESTER: So the education sector is not paying for any materials under their statutory licences that would have been excluded, i.e. not subject to remuneration under fair dealing?

MR DICKINSON: Absolutely not. If they are, then it's a mistake.

MS CHESTER: So how does that work in the licence then? Are those things zero rated or are they just not included in the licencing numbers?

MR DICKINSON: They're just excluded. For example, in Screenrights case, when we have a negotiation to calculate or reach agreement on a

new deal it's not some - we shouldn't give an illusion that it's some strict mathematical exercise where we calculate this amount of copyright, blah, blah, blah. Those sort of data go in to inform the discussion but in looking at those data we exclude anything that would be a fair deal, any usage by students, for example, or, say, uses made, under section 28, which is a different free exception for performance per classroom, classroom performance or audio-visual works, those are entirely excluded so they don't form part of the consideration whatsoever.

MS CHESTER: So then if we move to a fair use system, where we've heard lots of evidence that there's guidance and codes of behaviour both in the US, Israel, South Korea, places that have a fair use system, that would then operate in the same way, in terms of informing what would and would not be included, under the educational licencing.

MR DICKINSON: I think that's exactly the point, is that the education sector would hope that the amount of usage covered by fair use would expand and expand and expand over time and effectively, as I said before, hollow out the remunerable activities under the statutory licence. So that would be their goal, I'm assuming.

MS CHESTER: So that's kind of the nub of the question that Jonathon was getting at, what do you think are the expanses, so what currently is not remunerable and therefore not part of the educational, sorry, the other way around. So what is currently not covered by fair dealing and therefore remunerable under the statutory licencing, move to fair use, it's not covered by fair use so it comes out of the statutory licencing equation, from what you're saying? So it's kind of understanding what that is.

MR DICKINSON: We can only answer the question by taking a series of assumptions. But if we assume that fair use was enacted and interpreted by the courts and guidelines were applied, exactly as in the US, and I think that's a pretty heroic assumption, all right, but if we start at that point then what Simon described and what - is where someone, a teacher, copies a program from a freeware broadcast, where it's not commercially available and uses it over 10 consecutive days. That's currently remunerable activity, a pretty small proportion of the current licence, but currently a remunerable activity. If those assumptions were true and were applied then that would cease to be remunerable and would become non-remunerable.

MR COPPEL: You've painted a scenario where fair use would gradually encroach on the area that's covered by an education statutory licence and eventually move all towards fair use. We've heard that many would be attracted to the system of an education statutory licence, I mean

it provides certainty what's within your scope to use materials. The point is made that there is going to be a natural inclination to still work within the framework that a statutory licence provides. So I'm trying to get a sense as to why you are so confident that that would slowly erode in a world of fair use exception?

MR DICKINSON: I don't think confident is the word, I think concerned would be an adequate and more accurate description. What we don't know is how a court will interpret it in Australia, under Australian conditions, enacted as it is uniquely in Australia and then determined by an Australian court. We can't transplant the US jurisprudence into Australia. The Australian system is entirely different. For one reason, there is a statutory licence here which doesn't exist in the United States so we don't know what the outcome would be. We know that it would be, in the sort of dollar sense, in the interests of the education sector for fair use to be as broad as possible, that would be their objective, must be their objective. But we don't know how a court will interpret it.

So you're asking us to say, try to work out exactly what it is that copyright owners would be using when we don't know how it is a court will interpret it. What we do know is that it will be heavily contested and it might end up having to be the subject of litigation. We do know, because, by its nature, fair use is not fixed in time, that that scope will change.

MR LAKE: Certainly the report which we provided to the Commission, from Professor Ginsburg and Beswick, from Columbia Law School, I think that paints a very complex picture of the contestability of fair use, at each and every point and there isn't the through line, which has been suggested, and certainty. So the costs of actually having to establish the rights is not an invisible factor for rights owners, it's expensive to be able to go through that process.

MS CHESTER: Simon, you comment, I think in your opening remarks, around not a one size fits all with fair use. I guess the big attraction for fair use is the adaptability and it's not dissimilar for what many governments have done, say, around Australian Consumer Law, where they've gone for a principles based legislative arrangement, so it can adapt to new emerging whether it be business practices, under the corporations law, whether it be different forms of breaches of consumer law. So I guess you said that we need adaptability but not fair use adaptability. How do we get adaptability then with fair dealing when we already know, from the evidence base, that, take for example the VCR, by the time that fair dealing was adapted, through legislation, for VCRs they were all mothballed in the attic. So what's the Holy Grail solution for us here?

MR LAKE: I wish I had Holy Grail solutions in all aspects of things. But he also used the term "predictability" as well, which - that is certainly one thing which the statutory licence does have. The statutory licences have proven to be very adaptable on one of the many uses of the statutory licence is through learning management systems where education institutions can copy broadcast radio, television broadcasts, put them onto learning management systems, such as Click View and Enhance TV, and be able to communicate that broadly, because the legislation is written in a technologically neutral fashion. So I think that that is a really good example of how we're changing patterns of use, that the legislation has kept up.

In terms of principle based versus specific legislation, which is technologically specific, I can see where you're coming from. I think the way in which certainly the Part 5A licence is written has actually kept up and has been flexible and we would encourage that to continue.

MR DICKINSON: To add to that as well, I think it's a false dichotomy to say it's a choice between fair dealing and fair use, because there's actually a huge range of other options which don't fall into either of those three exceptions, because there are a million and one remunerated exceptions. There are statutory licences, which are just remunerated exceptions, that Simon described and, in Screenrights case, have proven to be incredibly adaptable because they've been neatly written in a technologically neutral fashion, which has been good.

But more than that, there is just straight commercial licencing outcomes, which are infinitely adaptable. If we want a system which is going to provide adaptability and encourage innovation then what we should be doing is encouraging licencing outcomes, whether they're statutory licences or voluntary licences.

An example of that might be cloud-based personal video recorders, which were both sought to be introduced in the US and Australia and, in both cases, different companies sought to rely on, in the US fair use and in Australia a different free exception, in order to be able to offer their cloud-based PVR. In both jurisdictions it was found to fall outside those three exceptions. But what the providers never sought to do was get a licence for it. It would have been open to them to go to copyright owners and say, "What we want to do is provide this and provide some sort of a licence." That could have offered the service that they wanted to offer.

So I think the problem with the way that the Commission has approached the question of innovation and adaptability and flexibility and

so forth is by assuming that the only outcomes are either fair dealing or fair use. The really flexible outcome, which can encompass every innovation, is a licence whether it's a statutory licence or a voluntary licence.

MR LAKE: I think that that's a point well made, in terms of we've always looked at the question to sort of say, "What is it that you would like to do that you can't currently do now and why?" So are the barriers a legal barrier or are they a technological barrier or are they a commercial licencing barrier and, if so, let's separate those questions out and work our way through it. I suppose that's where I was suggesting that perhaps a more nuanced approach, building upon what we currently have, with other agreed changes, might well be a way to navigate that, because, as per our submission, we think that there's been quite a dichotomy in the way in which the views have - a lot of either/or approaches throughout the whole debate and we think that we can do much better than that.

MS CHESTER: So when you say "nuanced changes" what are those changes to, the fair dealing or the statutory licencing or both?

MR LAKE: I think to the statutory licence is a good start and certainly that's what we've tried to do, in concert with the universities and the schools and Copyright Agency, to actually look at where we can change things to have, for example, there were very detailed reporting requirements, we've tried to simplify those. Looking at it from the consumer angle we've tried to look at ways in which the licence can continue to adapt. So now, within our licencing, for example for schools and universities, we will be relying on those learning management systems to provide better data for us to be able to distribute, rather than the current sampling regime.

MR COPPEL: We certainly, in the report, recognise that licencing the use of intellectual property has value in itself and there are many areas where potential transactions won't take place because of the cost of meeting the meeting the buyer and the seller. It may be because in the area of copyright there are no formalities it's sometimes hard to identify the actual holder of the intellectual property. That's, in that context, also where we see value in mechanisms like a statutory licence that can harness many other transactions in simpler way overall. It may be a bit blunt at the edges and there are ways of improving the way in which material used is assessed.

The other side of that, which is a question we asked earlier this afternoon, relates to the code of conduct that is used, in the Australian context, for collecting agencies. I would like to put the same question to

you, it's a voluntary code, it's no mandatory, doesn't need, necessarily, to be followed, it's considered to have limited transparency.

MR LAKE: The code is itself?

MR COPPEL: Yes. Well, the adoption of the code, when it is adopted, is one that provides less transparency than the equivalent that is being used in the EU context.

MR LAKE: Thank you for that question. My understanding, and this may well be an imperfect understanding, is that with the EU directive that a lot of the things that are covered in the code are similar, such as training, such as dealing with good faith with licensees, with hopefully an effectively and timely and complaints procedure for licensees and member and for disputes to be settled by an impartial and independent way.

So I'd be very interested to actually line up what our current code does, compared to the EU directive, which I also understand spends a fair bit of time looking at multi-territory licencing as well. But if we could get back to the Commission and basically just, and I'm interested in this as well, just to do a comparison of the standard in the EU directive, compared to the code, plus all of the other governance arrangements, which are, in our case, they're actually in the legislation, as well as in the corporate law. So we might put a table together and do a comparison. I think, in terms of a general approach, it might be instructive and we'd like to build on that.

MS CHESTER: In that context, Simon, I think this is the same that we suggested to your counter-parties at CAL, there are some specific issues that have been raised with in in the submissions, concerns around transparency, and being able to follow the money, for want of a better description. So if you could point us to how they're addressed under your code of conduct that would be really appreciated too. But we'll steer - - -

MR DICKINSON: In our submission to the draft report there is a section in that which discusses that in a bit of detail, but we might pull that out and reiterate it or expand on it.

MS CHESTER: Yes, it didn't fully cover some of the examples that have been raised with us, but we can cover that later. Thank you.

MR LAKE: Just in terms of the response times, what would be helpful in terms of your timing?

MR COPPEL: In the next week, is that feasible?

MR LAKE: Yes, that is. If it's possible we'd like to perhaps show you the format of what we're proposing to do, without filling it out, and then say, "Would this be helpful?" Or you might want to suggest another format.

MS CHESTER: By all means our colleague Allan Shepherd, who's up the back today, will probably give you a better steer on timelines, otherwise he'll kill us later. Thank you.

MR LAKE: Okay. Thank you very much.

MR COPPEL: Our next participant is Jill Bruce. Come to the table when you're comfortable. Do we have Jill Bruce? No. Do we have Ruth Skillbeck?

DR SKILLBECK: Yes.

MR COPPEL: So we'll move through. So if you could come to the table, make yourself comfortable and when you're ready if you could, for the transcript, provide your name, who you represent and if you have an opening statement please go ahead, a brief opening statement.

DR SKILLBECK: Should I sit down or stand up?

MS CHESTER: Yes, make yourself comfortable.

DR SKILLBECK: My name is Dr Ruth Skillbeck and I'm an author and publisher. I have a small author/publisher business called Post Mistress Press and I have so far published three books, two novels by myself, a book of critical studies that I wrote and I'm just in the process of publishing an anthology with 33 contributions or contributors from around Australia and around the world. In that anthology there are new pieces and there are also pieces which they're written quite a long time ago, which is relevant to this inquiry, because at least one of them was written more than 15 years ago.

I'm an author, as I said, I started my career as a writer as a freelance journalist and I've published many articles are a journalist, a writer, as well as stories and poetry, and also as an academic, in a wide-range of journals and magazines and newspapers, as many authors have.

I own the copyright to all of them, except for one, which was originally published here in the communication, Critical Cultural Studies Journal, and has since been republished by Routledge Taylor & Francis in

a hard cover, but the same collection. This was a special issue called Cultural Studies of Rights: Critical Articulations and I wrote, as a very new academic then, I'd just got my PhD, casual academic, I was trying to get a full-time university lecturing position, and I was a lecturer and researcher at the university I was at and I was told that I needed to publish in order to get a full-time position, so that's what I was doing, researching and publishing.

As part of that process I did what I was asked, which was I gave this journal my copyright the right to publish and I didn't realise that I was basically giving away all my rights to my article. As I said, it's now been republished in the same collection and my article was about probably the most contentious in academia in Australia and also in public affairs, which was exiled writers. Of course many of these were - the ones that I was writing about were refugees, come to Australia and then stuck in detention centres.

Well, I was quite a new academic then and didn't really know anything about the great background to this and by writing such an article and it being published in this prestigious A-listed journal, along with my colleagues who are in this, most of whom are professors and I was just a casual academic trying to climb up the ladder in Australia and didn't manage to do that.

But what happened was my article has now been published in the same collection, in a hard cover book, by Routledge, which is being sold for about $200 Australian dollars. A paperback edition, which is being sold for almost $100, a Kindle edition, which is being sold for more than the paperback edition and my own article is being sold as a pdf, which can be downloaded from the Taylor & Francis site, for $56, and it's been downloaded many times, as you can see, there are the statistics on the page, which is twice as much as I charge for my own novels and I haven't received a cent, nothing. No royalties, no payment, nothing at all. I wasn't given an upfront fee for doing this article, which was the result of two years of research, over a year long process for it to be accepted. Supposedly it's really prestigious being published like this and there were many people who sent in their articles, or first of all an abstract, to this special issue, a few were selected from that to put in their full articles and from that pool a few were selected, mine was one of those.

What the result was for me was that my article was taken and has been published many times, I've got nothing. What happened was that the university stopped employing me, I haven't been able to get jobs and it's really quite a sad story. I ended up losing my contract at the university and that's why, being supposedly unemployed, still a writer, on Newstart,

I started up Post Mistress Press as a form of resistance against this, really, to publish my PhD myself, to continue to publish as an academic and researcher and author, but not to have my work stolen from me and to be able to make money from it.

So that's what I've been doing and I'm giving other people that opportunity as well, by starting up this anthology and in the future Phillip and I might actually publish other people's work as well. But this is all quite a long introduction to say how very important it is for the individual authors that we have to have our copyright. If copyright is taken away, after 15 years, from authors we will lose all the rights to our work. This will be happening to all writers who publish their works because what the big publishers will do is they'll just wait until that 15 years is up then they'll take the work.

So I'm extremely concerned about this. For a start, as I said - well, just to also to put it into perspective, it wouldn't personally affect me because I have dual nationality; I'm Australian and British. British law is not going to change, copyright law is not going to change. In Britain authors will retain that copyright protection until 70 years after death, which is how it exists now and how it exists in Australia and in the US and in Europe. It's only in Australia that there's a proposal to slash copyright for authors to 15 years after first publication.

MS CHESTER: Ruth, it might be helpful, and I'm just conscious of time and we would like to get to some questions and we've got other participants to hear from this afternoon. I'm not sure if you were here a little bit earlier today, there's been a bit of misreporting about our draft report. We don't make any recommendation to reduce the term of copyright. Indeed, we go to lengths to explain that given all the international treaties that we're including with the UK and the US and other multi-lateral agreements, that there isn't scope to change the term of copyright. We had a finding in our report that when you look at the statistics underpinning the commercial life of most works it's around 15 to 25 years. So if that's helpful just to make that point of clarification, we don't have any recommendation to reduce the term of copyright.

DR SKILLBECK: Okay. Well, that's very good news, I must say. In relation to what you just said about the commercial length being 15 to 25 years, that doesn't apply so much to this new form of author publishing, which is where there might be a difference. In traditional publishing, big commercial house publishing, there's usually like the first year in which a book is published and there'll be a big push to publicise it and after that year is up the book will go into what's called the back list. That doesn't happen if a new author publishing, where authors are publishers, and they

don't have a back list, as such, they all just keep on publicising their books. So there isn't that shorter commercial length of time for a book.

MR COPPEL: When you're an academic is it the university that owns the copyright of the material or of the work of an academic or does it sit with the academic?

DR SKILLBECK: It depends on the situation. Generally it would only be owned by the university if it was maybe in science or somewhere. In my area, which is like humanities or arts, it's owned by the creator, the writer. My area is like literature, creative writing, media. Particularly for people who are employed by the university because of their backgrounds as writers, they continue to write and that is then considered their research or – what I was doing was a different kind of writing to the writing I did as a journalist or as a creative writer. It was specifically, kind of, critical studies and academic writing. But I still owned the copyright.

MS CHESTER: Ruth, with the business that you've gone on to run, your self-publishing, are you publishing the works of other authors as well or is it just purely for self-publishing so you've got control over the commercialisation of your copyright?

DR SKILLBECK: Yes. Well, I'm doing both. So with the first three books that I published, they're mine. The books that I am about to publish and launching a crowd funder for it, like, today or tomorrow if possible. If anyone is interested in having a look at it, it will be there. It's called "Escape Artists Anthology, First PostMistress Press Anthology". There are 33 extremely – some extremely well known contributors, like, from promising to very prominent authors and artists in it. So there are 30 – basically 32 authors who I'm publishing there, apart from myself. So I'm immediately jumping to having, you know, from publishing just myself to publishing dozens of other authors.

MS CHESTER: Is it from an eBook platform or is it hardcopy publication that you're doing?

DR SKILLBECK: Well, it's going to be – well, how I've been publishing my books, I suppose, I've published them as eBooks and as paperbacks and hard copy, hard cover books. So it will be the same with the anthology. In fact, we're publishing it as an interactive PDF because it includes songs that can be played and music tracks. So it'll be published as an interactive PDF and as a paperback.

MS CHESTER: Okay. Do you have anything else? No. Thank you very much, Ruth.

MR COPPEL: Thank you very much.

DR SKILLBECK: Thank you.

MR COPPEL: There have been a few people that have entered in the last 15 minutes. Do we have Jill Bruth in the room? No. So we'll move on. Do we have Carol O'Donnell in the room?

MS O'DONNELL: Yes.

MR COPPEL: So, take a seat. When you feel comfortable you can give for the record your name, who you represent, and a brief opening statement. I do emphasise "brief" because we are running successfully behind.

MS O'DONNELL: Absolutely. Yes.

MS CHESTER: So we can take this evidence.

MS O'DONNELL: Yes. Please.

MS CHESTER: So if you just want to make some, yes, opening remarks. Thanks.

MS O'DONNELL: Yes. Can I just say I found this afternoon very interesting and informative. I speak as a person who was in academia before I got a job in New South Wales Government in the mid-80s to provide information in supply of the newly introduced Occupational Health and Safety Act and I went on from there to work in Workers Compensation Insurance in the WorkCover Authority. Then, after I did that I was in academia at Sydney University in the Health Faculty and the – for 11 years and now I'm retired. So basically now, I'm free.

The basic point that I want to make is that when, in 1985 in State government, there was almost no information about industrial relations matters or occupational health and safety matters available to the public. It was only available to lawyers more or less in secret. So lawyers, from the point of view of information to the public, were basically running and driving the department and the public got no information.

Since that time I've seen a total transformation in which I've become increasingly proud of the job that Australian governments have done in actually providing the end users, the real people, with reliable information. I contrast this to the situation in America where increasingly

one only finds that comparatively unreliable information is available because it's driven by a commercial approach.

The point that my submission makes to the Commission is that, in my view, the Commission has played an increasingly valuable role in Australian society by at least pointing out the propositions which drive Australian government. In the most important, i.e. the economic areas of Australian government, they're driving by support for the private sector which is entirely unwarranted by the information which the Commission has actually shown in its report, which is that copyright and patents generally act against the interests of Australia and act against the interests of producers.

Now, speaking as an ex-public servant and speaking as an ex-academic, that is entirely congruent with my experience because academic copyright and patents basically come from a feudal background which predates the development of the welfare state and the role that the welfare state has increasingly developed in Australia, as distinct from the US, in providing people with clear, reliable information for quality management as an alternative and a much better, cheaper, more informed and practical alternative to the Courts where basically everything is driven by the lawyers control over information for his client and where everybody is operating in secret basically which forces the matter to the Court.

I've seen this in New South Wales very clearly over a long period of time, because what was happening was we, under the Occupational Health and Safety Act, saw the importance of the development of codes of practice to basically create a situation where, instead of prescriptive law driving everything where prescriptive lawyers make decisions without really understanding the holistic matter on the particular ground, the code of practice was supposed to say, "Well, here's a good way of doing something, but if you know of a better way do it".

But what has increasingly happened over time in the construction industry and elsewhere is that the system drives towards the Court because everybody – it is the lawyers' interest in maintaining the concept of commercial in-confidence property.

Now, the state, if you go to the IP Report – please stop me whenever you like – the IP Report has basically shown that patents and copyright are working not for the interests of Australia or Australian rights holders, but they're going overseas and the value is basically going overseas. Now Australian government recognised that a long while ago in the 80s in the industrial relations area and in the insurance area with workers'

compensation insurance. What has developed since has been an embryonic regional health and information quality management framework which is constantly being undermined by the kind of debate, that was very interesting for me, that you were having earlier about this fair use system and whether it will undermine something which is much broader and clearer and not related to a particular technology.

MS CHESTER: Carol, I might take you up on your kind offer there.

MS O'DONNELL: Certainly.

MS CHESTER: So we have a change to ask a question of you. We have read your materials before today. You are taking quite a holistic and a broader lens to the issues in our report.

MS O'DONNELL: New South government and international and world health organisations.

MS CHESTER: Yes. It's a pretty broad scope that we've been given to look at. We have gone towards principle based laws in the area of fair use. So, I guess, from your perspective, are there any areas where we haven't fully identified the costs to consumers and looked appropriately at the Australian wellbeing, which we're required to do under our Terms of Reference?

MS O'DONNELL: I don't think you can identify the cost to consumers effectively, because the premise is that the report starts with a wrong, which is that - in chapter 2, which is that all value is created in the market. Now, when worldwide there's peasant populations having kids every day and rooting up the trees every day in India and Africa and South East Asia, and I've seen it since the early 1970s, and where we've developed an effective welfare state in Australia, it's absolutely ludicrous to take the position that all value is created in the market, because it isn't. It's created by the welfare state and it's created by the family. Every time a woman knocks out a baby, she's created a unit to either rip up the trees or work in a mine or produce value in some way.

MS CHESTER: Carol, we'd agree with you completely that the market doesn't value everything appropriately. But I didn't have any other questions. Jonathan, did you have any other questions?

MR COPPEL: No.

MS CHESTER: No. Thank you very much, Carol.

MR COPPEL: Thank you. The next participant comes from the Designers Association; that correct? Designs Association Authentic Designer Lines? We also have the Goods Design Australia and Design Institute Australia. I'm hoping we have enough seats at the table. Yes.

MS SARGEANT: Good afternoon.

MR COPPEL: Good afternoon. So, for the purposes of the transcript if you could each give - - -

MS SARGEANT: What has happened, we spoke with Canberra yesterday and we decided to separate two of those to make it easier for the transcription. So I'll speak first on behalf of the Authentic Design Alliance. Second, Bradley Schott, our colleague, will speak on behalf of the DIA, the Design Institute of Australia and Good Design Australia. When you hear the two different points of view that we come with, that was decided that that was a better way to separate it and that was done with your colleagues in Canberra.

MR COPPEL: Before you begin with your opening statement, if you could, for the purpose of the transcript, give your name and who you represent again.

MS SARGEANT: Absolutely. My name is Anne-Maree Sargeant. I represent an industry body called the Authentic Design Alliance. The Authentic Design Alliance is made up from a voluntary team. It was established in 2010 and it came over to my governance 12 months ago. Since then we undertook some research to understand exactly what the problem was in terms of intellectual property when it comes specifically to furniture and lighting design.

Now, as an education platform, we advocate that basically we think that the Australian laws should fall in with the UK, purely for the basis that everyone in our industry is operating on a global level. We're wanting to operate out of Australia but we compete on a global level. Therefore what we've seen is designers are enjoying at the moment copyright that's arguably flimsy which is five years plus five years in design protection.

Now Australia is regarded as one of the – it's been quoted by designer David Trubridge on ABC radio, it's "Universally Australia is regarded as the wild west when it comes to copy design". So, as opposed to when you get other territories like Northern Europe that have very well protected areas, which is what the UK has just adopted falling in line with the EU.

Now the UK laws were intended to come into place in 2020, i.e. in four years' time.

But on April the 14th it was announced that the UK laws were brought forward four years, i.e. they're now in place. They were brought forward and they were enforced from April 28. The reason for that was the UK Parliament deemed that the damage to their creative industries by not adopting the strict laws that the EU have already had in place, e.g. Denmark, would create such an economic downward spiral with creative industries, so they brought it forward. So the UK now have enforced up to 10 years jail and up to £50,000 for the manufacturing, sale or importation of replica or copied furniture. I don't know the exact terms, but there's about – a brief quit phase, I think, of around six months for those resellers.

There are several cases where the Danish Court has had to take, just prior to these laws coming into place, the Danish Court has had to take the UK to task. For example, when you get online resellers then they go and target unprotected areas which is what Australia, we believe, is in danger of happening because of the current lack of protection online and the current lack of protection with both digital assets and the online interface.

I'd just like to reiterate that we're a voluntary team. We've undertaken 12 months of research. When the first callout went out for case studies we were hit with an avalanche of response and the initial research was purely to try and identify what the problem was. Now obviously there is a problem with the word "replica". The replica - now legalising the direct copying and the utilisation of the creator's name, the creator's brand name, and in most cases the creator's imagery and the creator's marketing tools. We have some examples, should you have any questions there.

The other situation we found was the copy situation was endemic, and it was endemic not only on a retail level but on a commercial level or a contract level, as it's called in our industry. A contract level is when architects and interior designers or property developers specify let's say a chair, an XYZ chair in quantities of 100. What happens in that scenario is the specification goes out, the words they use equal to equivalent – "equal or equivalent to".

So, for example, Adam Goodrum, who's here today, Australia arguable most – a most successful designer of note, outside Marc Newson at the moment. Let's say there was a specification sheet for a big hospitality project, per se. That specification sheet would read, "equal or equivalent to" and "Adam Goodrum", and there would be a photograph of

Adam Goodrum, "XYZ chair" and there would be the actual photograph and the technical specifications of that. Then what happens that in turn then goes out to tender.

Now, whilst this copy situation is legally allowed, quite often property developers or other people in that food chain will then take the product, take it offshore, and then it's now legally – copies of those – inferior copies of those products are legally allowed to be reimported.

Now, that has a twofold thing whereas a case by case standard when that can be actually solved, i.e. people come to an agreement here, that's a short term solution on a singular basis. On a broader scale what that means is it's enabled a facility in China or South East Asia to then start producing these products which then infiltrate the greater market. So it is – it does have a greater fall out.

The unexpected consequences of a lot of these replica, I learnt myself which we can demonstrate in a moment, is the actual volume sales where we have products like this, which assembled to become a light that's around half a cubic metre in volume and it's lightweight and it's intended to minimise its footprint and we can show you that later. We can also demonstrate the volume and the content of the polystyrene of the replicas of that particular where it's almost one cubic metre of polystyrene. So there are other fallouts from this that have a lot more than an economic impact, they have an environment impact.

On the number of case studies that we've got or - some of which we have, if you're interested, today to table - a lot of the independent designers, who are the ones that are being ripped off by big business - in the last week alone I heard the word "scare" from five Australian studios. These Australian studies are run by an industrial design graduate or a furniture design graduate. They are around the 25 years of age and most of them are engaged in expensive litigation, and we can go into that more if you're interested.

But one case in particular, the only one prepared to go on record, which is Marz Design Coco Reynolds, the reason why she is not able to be here today, she has a full time job in another sector. A lot of designers are not able to make money any more out of their core career in industrial design.

So this, when we're looking at design led innovation, does not create any innovation. It also has a twofold effect where it's leading to the creation of more expensive products so that designers, with a very short lifespan in terms of their design protection, their 10 year or their five plus

five design protection, are tending to create more complicated and more expensive products in an attempt to try and get some sort of return on investment in that short life span, as opposed to what would happen if we had designers creating less expensive products because they enjoyed the same protection of the European – their European counterparts have and therefore we might be able to create a market place that is Australian designed, quite often Australian made, and avoidable by everyone's understanding.

Within that I'd just like to conclude that, I think, the word "replica" in itself is misleading and I think that if there was nothing original created then there'd be nothing to copy. So therefore we need to protect original design.

MR COPPEL: Thank you. So the source of the problem that you were talking about is the length of term of protection in Australia for a registered design, or is it illegal - - -

MS CHESTER: Enforcement.

MR COPPEL: Or is an enforcement issue?

MS SARGEANT: It's twofold, if I'm understanding your question correctly.

MR COPPEL: You've gone through a number of examples and you're drawing the difference in the UK and Denmark and I'm just wondering whether the difference between Australia and the UK or Europe is in relation to the level of protection given to a design is lower in Australia than in the EU?

MS SARGEANT: If I'm understanding your question correctly, the problem is two-fold. One, if there was a level of protection that was equal to 70 years, for example, Tomek Archer, who is a designer sitting here today, he had his hit product when he was 19, it was design registered, and he's speaking tomorrow in Canberra. Several months after the design registration came up then the copies started to appear. It's a product that has appeared in the Australian Financial Review last year when they did top 20 Australian design moments, that included the Holden Monaro and that included products from Adam Goodrum and from Tomek Archer in that top 20 Australian design moments, and that's from a business news point of view, not from a design new. So the length of time is one issue.

The legality, it falls probably outside this conversation, but the legality of replica and copy has created a unique culture in Australia

where the consumer expects to have a Mercedes Benz appetite with a Toyota budget, so to speak.

MR COPPEL: You mention the term replica copy, there are also reproductions and I know, in the furniture area, I think they're called licenced reproductions or icon furniture. Are you distinguishing between those different forms?

MS SARGEANT: So within what we were looking at, we weren't looking at necessarily design icons. We were looking at Australian designers working in the marketplace now, established ones, and the next wave, and trying to work out what needed to be done to protect the next wave of our creative producers. So the licenced reproductions wasn't something we were necessarily looking at. Replica is quite clearly defined because you can Google the word "replica" and say "a replica Craig Bassam." Over 600,000 references come up in Google, under replica that, so that's an example of replica. A copy, of which we have examples of, is when it's exactly the same version, it just has a different name. So they're the main, replica and copy is where we believe the core issue is.

MS CHESTER: The enforcement would only come into effect for a copy, as opposed to a replica, given it's been distinguished?

MS SARGEANT: At this stage replica is legal and whilst that exists that opens the door to copies. So therefore, without the two being references and without that hole being closed the same way as the UK - the UK has dealt with it by giving a blanket issue of extending design right from 25 years to 70 years after the author's death, in line with northern Europe and extended the grace period to two years, which is the time cycle it take to create a chair, for example.

I've been in the furniture industry for 30 years and working primarily here in Australia, but that has led to a lot of work with the top European factories, and the life cycle is two years, to be able to allow a creator the appropriate time to refine, to research, to market test and then decide which one of the 20 products, or which 10 of the 20 products they've designed then, in turn, should be registered.

MS CHESTER: So just so we understand, so the EU has moved to lengthen the term of protection - - -

MS SARGEANT: The UK.

MS CHESTER: The UK, for design.

MS SARGEANT: Correct.

MS CHESTER: Has addressed the issue of the distinction between copy and replica, is that right?

MS SARGEANT: I can't answer that at the moment, I'm afraid, and I'll like to get some more understanding of that. But what I do understand is copied designs, and I'm not sure with the replica, but I'm seeing, through the UK headlines which are in mainstream press, it's pretty easy to see, it seems to be that they've put a blanket ban across all of them to stop the sales, the manufacture and the importation of these items.

MS CHESTER: Of the copies?

MS SARGEANT: Of fake furniture, not the original furniture. We use the word real and fake.

MS CHESTER: Unauthorised copies?

MS SARGEANT: Unauthorised, yes.

MS CHESTER: So they've changed the penalty system attached to unauthorised copies and importation of unauthorised copies. Any other changes to the enforcement system? Just so we know.

MS SARGEANT: I'm certainly not an expert in the UK law, but I noticed, around 18 months ago or two years ago, when the intended laws were announced for 2020 that, in itself, I thought was a huge step. What blindsided all of us was on 14 February, when it was announced in the Daily Mail, the people's paper nonetheless, that these excessive - they've criminalised it. They've actually criminalised copy and fake furniture, with these hefty penalties of up to 10 years' gaol and 50,000 pounds. But on the other side, to protect their own creative industries, they've joined the EU convention.

When I watched designers here in Australia exhibiting at the Milan Fair, which is the biggest global platform for design, and they're competing on the global stage. They're representing Australian design and they're intending a lot of the products that are made here are intended for export. We have many quotes and many examples of either first time exhibitors or seasoned exhibitors having other nations simply laugh at them saying, "How do you even have a career in Australia with those flimsy protections?" We are seen as a dumping ground for a lot of the copy furniture because there's no legal protection. Then given the proliferation of these online resellers, they are just coming here and using

Australia because legally they can sell here. Whereas the UK now, they legally can't, these online sellers can't.

MR COPPEL: So has the UK essentially adopted copyright term for design work? Essentially extended copyright to design or is it basically just modelled - you mentioned 70 years, which life plus 70 is the term for copyright.

MS SARGEANT: Yes.

MR COPPEL: Is that what has been adopted, life plus 70?

MS SARGEANT: Yes, life plus 70. It was previously 25 years and the UK have now enforced life plus 70.

MR COPPEL: You mentioned, also, a European agreement, is that the same thing as the Haig Agreement, which is a broad - - -

MS SARGEANT: That I'm not an expert, but my colleague here will be able to speak when the DIA speak because they assessed the draft document in detail.

MR COPPEL: Well, maybe that's a natural segue.

MS SARGEANT: Absolutely.

MR COPPEL: So before you do, if you could, for the record, give your name and who you represent.

MR SCHOTT: I am Bradley Schott, I'm speaking as a state councillor of the Design Institute of Australia, the DIA. I'm also representing Dr Brandon Gien, from Good Design Australia, today because he, unfortunately couldn't make it. He just happens to be a fellow of the DIA as well.

The DIA has taken a somewhat broader view, because we don't only represent product designers we also represent all of the other areas of design. So that includes the corporate design thinking side, it includes interior design, jewellery design and all the other area, so our interests are fairly broad. The interests of an interior designer aren't necessarily the same as those of a product designer.

So, essentially, what the DIA is arguing is that we should be encouraging more design-led innovation in the Australian economy. The way to do that is perhaps rather than allowing existing designs to be

copied, after a certain period of time, what we should be encouraging is competition in the market between new and different designs. We'd still like to see competition in the market but we'd like to see that between different designs rather than different manufacturers copying the same design.

We think that in the design market I think it's a little bit unique in that the rights attached to a design don't necessarily prevent consumers getting what they want. So I think in our submission I used the example that a consumer can't just go and choose another cancer drug. So extending the term of protection for a cancer drug would definitely limit the rights of a consumer because it will raise the price of cancer drugs if you extend that term of protection.

However, for something like a chair, it's a more mature market. There are an enormous number of chairs to choose from and the utility of that chair can be obtained from any number of other products. So there's no reason to allow a consumer to purchase a cheaper copy of a particular design of chair when there's an enormous number of them that they can choose from that will do the same thing. So we're essentially arguing that there is more benefit overall to the community from protecting design and encouraging competition between different designs in the market.

MR COPPEL: So in the situation where a design has reached the length of its term of protection and then you have multiple manufacturers making copies, and you may also have a manufacturer making a licenced reproduction, which will come with a badge of authenticity and so forth. There will be a very different price, obviously, but the consumer must almost see these things as two separate products. One is the genuine, another is a copy and why can't those two sit side-by-side?

MR SCHOTT: There's a couple of things. The average consumer might not be able to tell the difference between the genuine article and the copy. More to the point, the average consumer might not care. I think I made the argument, in our submission, that if the utility value that, for example, the chair creates is that of status. So if you buy a particular chair people will think that you are fabulous.

If you allow copies of that chair, then it reduces the status of that chair. It not only reduces the status of the copied design, because there are so many of them out there at such a low price it reduces the status of the original design as well. So while it might benefit a particular consumer to go and get a chair cheaper, it becomes a zero sum gain for Australia overall. There's no net benefit from allowing that to happen.

Some of our members have pointed out to us that the current fairly short term of protection, on the world scale, results in some designers deliberately avoiding creating low cost products because the lower margin on a low cost product mean that they can't make a reasonable return before their registration expires.

In the long term it's probably better to increase that term of protection to enable designers to come up with new low cost products for our market and for the world market, rather than simply allowing existing designs to be copied at lower cost. Because if we just allow the copying and no new, cheaper designs are being created, then eventually there will be no new, cheap designs. That is not encouraging innovation.

MR COPPEL: The segue was following a question on the Haig Agreement, so maybe I can put that to you. I think, in our report, we're suggesting that a decision on whether to join that agreement would need to be, first, based on an assessment of the relative costs and benefits. Can you give us your view as to what you would see as the costs and benefits of joining the Haig Agreement?

MR SCHOTT: The costs would be short term, I guess, in that acceding to the Haig Agreement would immediately increase our minimum term of protection to 15 years and it would provide other complementary rights, I guess, between other countries that are members of that agreement. So there may be some designs registered overseas which might automatically become registered here in that case. That might increase the cost in the market of a few products that are caught up in that. That's a short term effect.

The benefits of that would be that Australian designers would have access to that system, so it would be more easy to register their design in multiple jurisdictions so they can export that design as well as the increased term of protection which might enable designers to develop lower cost products because they have that additional time in which to make it original. So I think the short answer is that the costs would be perhaps short term and the benefits would be long term.

MR COPPEL: You mentioned, in your answer, there would be maybe more designs registered in Australia which sort of prompts me to ask, given furniture and loading is a global market, how do you go about protecting those designs, in terms of the global marketing, in terms of informing when you make a decision to register a design in the UK market, the US, Japan?

MR SCHOTT: What actually happens now is that a lot of Australian designers actually move overseas and work in Europe. They may work for manufacturers over here or they may operate independently. So they effectively migrate to where the protection is better for their work.

For designers who are exporting from Australia, they need to plan ahead, to some extent, because I think there's only a six month grace period that you get. So you register your design in Australia, you then have a six month grace period in which to register that design in overseas markets and they will take your original registration date in Australia as the date of registration so you don't accidently get caught having prior artwork.

MS CHESTER: Has there been any change in what would be seen, and I know that design is a large church, we're covering from furniture through to jewellery, has there been any structural changes over time in what you see to be the commercial life of original design work?

MR SCHOTT: It's curious. I suppose I could probably speak as an interior designer on this, where I would be specifying products more so. There's a period of, say, 10 years where a product would be hot, that is, it would be very popularly specified on the market. That doesn't count the development period of that product, so it may well have taken them five years to get that product to the market, but it might have a life of 10 years. It will then, I guess, go off the boil but really good designs will then tend to come back again. After a period of maybe 20 years, I guess, it's the nostalgia cycle. A really good design will become popular again and designers will start to pick it up again. So what happens with a short period of protection is that that second wave of popularity, I guess, doesn't help the original designer of that product.

MS CHESTER: With the term that we have currently. Is that second wave, is that sort of the majority or the minority of designers, from your experience?

MR SCHOTT: I would say it's really successful designs that manage to achieve that. There are good designs that will have their time in the market, if they're lucky they'll make a return in the time that they have before their registration expires. But the really good designs are the ones that will come back again and become classics.

MR COPPEL: There are laws that exist for protection against the passing off of copies or fakes, how effective are they in protecting the owner of the registered design that still under term that had been copied?

MR SCHOTT: Our members tell us that essentially they need to spend a lot of money on lawyers to enforce that protection. Most design studios are small businesses, or very small businesses, being an individual and they simply don't have the resources to enforce any of that. Essentially, once they've lost their design registration they really don't have the resources to protect themselves beyond that.

MS CHESTER: The interplay with the trademark system, and I know from some of the submissions that there is a lot of ignorance in the market around original, copy, replicas and I guess we might be dealing, slightly, with a bifurcated consumer market, those people that really know their stuff and know the designers and know that's what they're happy to pay for, does trademark help there to facilitate the distinction between the original and the authorised copies of that original versus the unauthorised copies and the replicas?

MR SCHOTT: Trademark does help but I think the huge disparity between the protection that's available, as a registered design and as a trademark or as a patent, for that matter, I think it can encourage perverse incentives. So designers try to come up with some sort of innovation that they can patent, like a new way of stacking something, or they build a lot of their value into their brand, rather than building the value into the design of the product itself. So I think it would be better, ultimately, if designers could concentrate on designing, rather than working towards protecting themselves with other means, such as trademark or patents.

MR COPPEL: Just one final question, you mentioned that often there's ignorance as to whether a product has been copied or not, do you see the solution to that being changes in the IP laws or more specifically targeted measures that directly tackle this lack of awareness?

MR SCHOTT: The DIA has been arguing for both. We need to allow designers the space to design the innovative products and make a reasonable return on them. They won't do that on all of their products, some of them won't make a return and the ones that do have to pay for the ones that don't. So we need to allow space for the new innovations to happen and we need an education campaign about what is good design. Part of that, I guess, is allowing designers the space to design good new, cheap designs that retailers will carry so that people will see good new design in the shops and they can go and buy it.

The problem, at the moment, is that for the average consumer to see good design they have to go to a shop, for example, Matt Blatt, who sell replicas and they see copies of classic designs there. That's how an average consumer sees good design now. They tend not to go to the small

showrooms that sell independent Australian designs and if they do they see that they're all very expensive. We need to somehow support the design community to create those designs that consumers would have access to.

MR COPPEL: Are there any jurisdictions that do particularly well, in terms of information campaigns in this area?

MR SCHOTT: I don't know about information campaigns.

MR COPPEL: Or awareness.

MR SCHOTT: It seems to be more of cultural. Places like, in particular, Italy and Denmark are two that I know of. There's generally a culture of buying a few good things, saving up to buy a few good pieces of furniture, for example, and then keeping them for a really long time. We don't have that sort of culture here. It seems to be buy something pretty and then throw it away when it breaks. I think it probably takes more than an education campaign to change that.

MS CHESTER: Anne-Maree, you've brought a colleague with you, we've heard from authors today, we're very happy to hear from designers as well, if you'd like to say anything.

MS SARGEANT: I'll speak on behalf of Kobe. Kobe represents makers in Australia, so as leading makers they craft some of the finest furniture in Australia that is showcased all around the world and they, on a regular basis, are asked by individuals and by leading design firms, to come in and directly copy. People walk in with a page of a magazine and say, "Can you do this?" So the making industry has now grown up to be as strong as the industrial design and the furniture design industry so makers need to be considered within this conversation.

MS CHESTER: Thank you very much for coming this afternoon.

MR COPPEL: The final registered participant for today's hearing is Jon Holland from Space Furniture, and also Richard Munao from Cult. Good afternoon. Make yourself comfortable and then for the purpose of the transcript, if you can give your name and who you represent, and if you'd like to give an opening statement, please go ahead.

MR HOLLAND: Yes, thank you. My name is Jon Holland and I am here representing Space Furniture as well as importers and manufacturers within the furniture industry. Richard Munao is the owner of Cult and he's an industry colleague who is also, I guess, representing our

arguments against – or the quests to change the IP laws in Australia and have more relevance to our industry, I suppose.

So if I can begin with the key points? It's really about the respect for the original design and designers and their works. I originally come from the UK and have studied design. So part of my design education was about originality and striving to produce original designs. I think that's something that's concurrent through everyone's education. We don't copy work. I think so fundamentally for me there's a very kind of moral aspect to this – to the IP laws and in turn protecting original design.

Currently the protection for designs is insufficient and, in particular, the use of the term "replica" is particularly damaging and actually leaves the door open for protected designs to be copied and sold within Australia. So we represent a number of brands internationally and locally, original design brands, who invest huge amounts of money to develop new designs and progress, I guess, design in general. The products that we import into the country, or manufacture ourselves, are able to be sold under the terminology "replica" as direct copies. Furthermore, the use of the designer's name, the original name of the product, and the manufacturer, can also be used when replica products are sold. So what, I think, this demonstrates is that the replica work can actually utilise the owner and designer's original ideas and actually trade off the back of them. Quite often, it's the strength of the brand and their investment in the brand that is then utilised to sell from.

Obviously, it's incredibly costly to pursue legal aspects to protecting design. I think this is also quite inhibitive when it comes to a fairly endemic situation where - I mean, I've been in Australia for 14 years - the scale of the replica industry, as it were, has grown exponentially in that time alone. I see that as being a reflection of how easy it is to copy products and use original products' names to actually sell them. Perhaps I could pass over to Richard to introduce himself.

MR COPPEL: Thank you.

MR MUNAO: My name's Richard Munao. I'm the founder and managing director of a business called "Cult" and we've been in business for 20 years. I'm a cabinet maker by trade. I guess, for me it's been a quest for the last 20 years to try and, obviously, innovate in many ways, bringing the best international design to this country to be able to afford to be able to then invest in Australian design. We work with a number of Australian designers, Adam Goodrum who's here, and many others.

I guess our thing has been earning from importing to obviously invest in Australian design. I think, if we think about our icons whether it's the Sydney Opera House or the Sydney Harbour Bridge, they've all been designed and I know how we'd feel if they were copied. I guess, from my perspective, it's not really about – if you look at one's going on in this country right now, the copies are opening shops everywhere and those that – us that people talk about charging too much for original products, we have shops that either in Alexandria in Chippendale. So we tend to be moving and consolidating versus opening in Balmain, opening in Oxford Street.

So I think there's obviously a cultural issue and I do believe that the cultural issue will only go away with changes to the law. I think replica is a compliment to a copy, fake, and that's what they are. I think, to be able to take a photograph of the Opera House myself and be protected and to have the knowledge of say a Tomek Archer or an Adam Goodrum that studies for four to five years, lectures at UTS and gives back to this country, and not protecting what they do, to me it's a bit shameful.

When the first thing I heard was that we're coming through with an innovation culture as a government initiative, I think it's important to understand that that will only happen with changes to laws and protecting our Australians. Most people talk about the copy industry being a problem for the originals. I think, to be honest with you, I can't really say that that affects my business. But what does affect my business is that you choose to buy a copy instead of something that Adam's designed or Tomek's designed, and that takes away from Australia.

Very proud, just recently, that one of Adam's collection – and I think it's pretty important to say that in 2014 we launched a 20 page catalogue of Adam's collection. Two years later we've launched a 50 page catalogue of Adam's collection. Now all this has been developed, designed and manufactured in Australia. The manufacturers that we work with, our timber manufacturer has doubled his staff since working with us. I think the important thing to understand is that every investment we make doesn't give us a return. Some do, some don't. Out of the 11 ranges that we've worked on with Adam, I'd like them all to give me a return, but some are just hit and miss. It's easy to sit on the fence and wait for the hits and copy them. It's harder to innovate.

I guess, what we need to foster, in my mind, is people competing on design. That's why we see – we talked about Italy, we talked about Denmark. I mean, I think it's quite interesting that Denmark, as a small nation of 5 million, don't hide behind the population of 5 million. 80 per cent of what they do, they export. Brands like Jorgensen, Bang &

Olufsen, Louis Poulsen, and Fritz Hansen. It goes on and on and on. They export meat to Australia.

So, I think we could actually be a bit more – and one of the things we've done with Adam is we talked about, as part of the brief, we want a collection that's not easy to copy and that's exportable. My real concern, to be honest with you, is that unless we can get the traction in our country before we're copied, there's no money to get – to take it offshore. I think that's one of the things that's important for me, and our collective businesses. When companies, obviously like Space, work on collections and getting them made overseas for protection, I think that says a lot about our current value system as far as design is concerned.

MR COPPEL: Can I ask you then what specific change in the IP law that – or IP laws that you're calling for that would address this issue that you've portrayed of copying that is not currently in the design laws, in the design, registered design laws?

MR MUNAO: I think we should expel the copycats that stifle the economy. I think it has been this question about substitutional-ability. I mean, in my mind, I think when it was said before that you can buy an icon chair or you can buy an Australian chair. I mean, that's the way to do it. I think it's obvious. I mean, we follow in most cases, historically, the UK laws, why not follow it now?

MR COPPEL: But is it a question of enforcement, or is it a question of laws that allow the - - -

MR HOLLAND: I think the ability to use the term "replica" and pretty much copy a product and sell that commercially in Australia is the strongest issue, and the one that needs to be addressed. I think a longer term, longer protection of designs is paramount. Good designs do sell for many, many, many, many years, far in excess of 10 years, 30, 40, 50 years sometimes. Not-so-good designs don't sell for that long and they therefore, perhaps don't need to be protected. But it's hard to know the success of a design. But, fundamentally, if someone's produced something and, as Richard stated, has gone through education and not just initial education to study design but it's a whole education of working with manufacturers, understanding manufacturing capabilities. The whole life of a designer is about learning and their work, I guess, embodies that. So they need to be protected in a much better way and for a much longer time.

MR COPPEL: So in any instances where there may be ignorance of a genuine article, the use of trademarks is a formal intellectual property that

can provide the consumer with information that will enable them to better make a distinction between a replica, a copy, and an authentic product. To what extent do you use the trademark provisions to gain better awareness and a distinction between general articles and copied articles?

MR MUNAO: I mean, every design that we actually work with a designer on, because we obviously don't own the designs the designer does, we register the designs and we obviously register the trademark.

MR COPPEL: You use trademarks?

MR MUNAO: We do use trademarks.

MR COPPEL: Use both.

MR MUNAO: Yes. Now, I guess, that's fine. But again, the protection is not long enough and, in many ways, you just – you can still use the designer's name. We don't trademark the designer's name. But you could still say a replica Adam Goodrum chair. I think the concern about the "replica" word in itself is almost suggesting that it's an authorised reproduction of the designer's product. In actual fact, there's no – I mean, if you go to someone's website, without mentioning names, the whole designer's bio is on there and they've got no rights to sell those particular products. I think that's absolutely criminal.

MS CHESTER: So from what you're saying, just so I understand, the carveout for replica, in your view, is really effectively allowing the authorisation of an unauthorised copy. So where there's meant to be some slight distinction to make it a replica as opposed to an unauthorised copy that – it's not a material enough difference?

MR MUNAO: Definitely, look, the replica – most people that's how they get away with it because they call it a "replica". I think the problem with that is that, I think, first of all it's actually confusing the consumer because the consumer believes they're probably buying a reproduction. The other thing it's doing is it's stealing from the author. I mean, the author of that item does not get one cent towards something that he or she designed. It's stealing.

MS CHESTER: And the - - -

MR COPPEL: This is - - -

MS CHESTER: Sorry, Jonathan go ahead.

MR COPPEL: So this is post-term of the registered design?

MR MUNAO: No. We're talking about things that have – we've seen some Australian designs that have been copied with no term. I guess, things that – well, as many of the products that we sell from an imported perspective are still not protected at all.

MR COPPEL: So I'm still then a bit confused as to whether those examples are case of infringement or is it something in the law that makes that use of the word "replica" or making a replica legal within term.

MR MUNAO: From what I understand, there was a recent case where a particular manufacturer, an American manufacturer, took one of the companies that sells replicas to Court. The law stated that they can do it as long as they call it a "replica". So that was the grace for the – so in my mind that's – you can cheat. Sit beside the guy beside you and copy his work and as long as you don't get caught or use this thing in front of it, then it's okay. I guess, that's the issue really.

MR COPPEL: So the judgment was like saying a replica is a different product from the - - -

MR HOLLAND: I think, historically as well, it always used to be – copies used to be more representative of older designs and now we're finding sometimes within – sometimes less than a year of a product being placed in the market, copies being readily available and sold under the terminology "replica". So it's not as though a designer has an opportunity to - even to establish a degree of sales in any given time. I think the other aspect to it is that copies in almost all instances are inferior in quality and, I think, this has a detrimental effect on the designer's work as they're commonly associated with that designer or manufacturer. So I think there's an impact there as well.

MS CHESTER: In terms of there's a distinction between unauthorised copy, which would be an infringement of the designer's rights during the term of protection, and what's deemed a replica, does this coexist in other jurisdictions? I think we've heard that it's not in the UK. But are there other international jurisdictions where the replica is a carveout from being viewed as an authorised copy of a design protected work?

MR HOLLAND: Not that I'm aware of.

MR MUNAO: Yes, not that I'm aware of either.

MS CHESTER: So it's an Australian manifestation?

MR HOLLAND: Yes. I guess, and furthermore to that, we deal with a number of international manufacturers and their response is that this is quite a unique scenario to Australia.

MS CHESTER: Can we have the catalogues to take?

MR MUNAO: Yes, sure.

MS CHESTER: Is that okay?

MR MUNAO: Yes.

MR COPPEL: Can we have the chairs? We'll swap you.

MS CHESTER: Thank you very much.

MR COPPEL: Which one? Pick one.

MS CHESTER: I want both please. I'll share later.

MR HOLLAND: Thank you.

MR COPPEL: Okay, thank you.

MS CHESTER: Thanks very much.

MR COPPEL: So, ladies and gentlemen, that concludes today's scheduled proceedings. For the record, is there anyone else who wants to appear before the Commission before we adjourn?

MR ARCHER: I could make a comment just to answer the - - -

UNIDENTIFIED SPEAKER: We'll get you to speak tomorrow in transcript.

MR ARCHER: Okay, I'm going to speak tomorrow at some time.

MR COPPEL: Okay.

MS CHESTER: If you're happy to hold for tomorrow, if not you'd have to come up and say your name, transcript.

UNIDENTIFIED SPEAKER: Does that mean he can't speak tomorrow though?

MS CHESTER: No, he can have two.

MR ARCHER: I can have two?

MS CHESTER: You can have two goes.

MR ARCHER: Yes, I just wanted to - - -

MS CHESTER: No, if it's relevant to the commentary today, that's fine.

MR ARCHER: My name's Tomek Archer and I'm an architect and I have previously worked well in the music industry, and I'm a furniture designer. I just wanted to take the opportunity to respond to a couple of those questions about what model might be more appropriate. I think we've talked a lot about design registrations, a little about patents and trademarks. The glaring omission to me seems to be that in the UK and EU they talk about copyright. Copyright is something that allows protection without the requirement for registration and without having to pay fees. It's been used by authors who write books, musicians who write songs, and all kinds of other – architects that design buildings, and I don't understand why designers don't fall under the same rules in Australia. So that's something that I consider as an alternative. As far as I understand it's actually the extension of copyright to design in the UK that has extended and created those new conditions in that market.

UNIDENTIFIED SPEAKER: What of the enforcement?

MS CHESTER: Sorry, let's wrap it up first.

MR COPPEL: Yes. We can't have comments from the floor because it won't end on the transcript, a formal requirement.

MR ARCHER: Yes. Well, that's all I wanted to say is just that in my experience from the music industry, and from the architecture industry, and from other industries - and I think the reason for that is just understanding the difference between patents and trademarks, which typically represent large businesses and the large investment in investing advertising for brand recognition, large industrial investment for patents and the way things are produced, manufactured, put together and the way they work, as opposed to individual authorship which is typically the case for the creation of designs.

That's more in line with the crafts. It's more in line with authors. It's more in line with songwriters. It's more in line with architects where it's

actually an individual that's producing this work typically and therefore it's not necessarily the case that this person will have the resources to go and register every idea that they come up with before they share it with anyone. It would be the equivalent of asking an artist to go and register all of their paintings and pay for it before having an exhibition. If they don't do that, someone can come to the exhibition, snap a few photos, and start printing postcards of the most popular one. That seems to be unfortunately the case for Australian designers.

Your only chance for protection, limited in terms of protection term as has been brought about, even to get this five plus five year protection, you have to register it before you show anyone which means you cannot market test it, which means that all of us develop designs based on experimentation, experimentation through process, experimentation on what people like, experimentation on sitting on the thing seeing how it wears. It's not something that comes up like this and it's not something you can see - immediately identify which one you need to protect. It's only very few designers who are fortunate in their entire careers to create something that will be able to sell for 20 years. So we're not talking about protecting the vast majority of the market, we're talking about protecting those lucky few, or the talented few who are able to produce something and preventing from – big businesses from going and just picking those several and just completely wiping out their careers by pumping out cheap copies of the same products.

MR COPPEL: Okay.

MS CHESTER: Thank you.

MR COPPEL: Thank you.

MR ARCHER: Thanks very much.

MR COPPEL: Thank you. So I adjourn these proceedings. So this formally concludes the public hearing for the IP Arrangement Inquiry for today. We will be reconvening tomorrow morning in Canberra, and I understand we'll be seeing some of you in Canberra. So thank you very much.

MS CHESTER: Thank you.

MATTER ADJOURNED AT 5.37 PM UNTIL WEDNESDAY, 22 JUNE 2016

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 PRODUCTIVITY COMMISSION, CANBERRA
ON WEDNESDAY, 22 JUNE 2016 AT 8.34 AM

INDEX

RESUMED **[8.34 am]**

MR COPPEL: Good morning. Welcome to the public hearing for the Public Hearing for the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements. My name is Jonathan Coppel and I am one of the Commissioners on this inquiry, and my colleague, Karen Chester, is the other Commissioner. The inquiry started with a reference from the Australian Government in August 2015 to examine Australia's IP 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 these issues. A number of roundtables have also been held with groups of interested parties on specific topics to inform the inquiry. We released the draft report in late April, which included over 20 draft recommendations and draft findings, along with a number of information requests. We have received a large number of submissions in response, the total number of submissions now in excess of 500.

We are grateful to all the organisations and individuals that have taken the time to prepare submissions and many of you will be appearing in today's hearing. The purpose of the hearings is to facilitate public scrutiny of the Commission's work and to get comment and feedback on the draft report. This week the Commission has held public hearings in Brisbane and Sydney with hearings to be held in Melbourne tomorrow and Friday, and a second day of hearings in Sydney scheduled for next Monday.

Following the public hearings, we will be working towards completing the final report, having considered all the evidence presented at the hearings and in submissions as well as other informal discussions. The final report will be handed to the Australian government later this year. The participants and those who have registered their interests in the inquiry will be advised of the final report's release by government, which may be up to 25 parliamentary sitting days after completion.

We 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, I will 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. A transcript of the proceedings will be made available to participants and will be available from the Commission's website following the hearings. Submissions are also available on the website. For any media representatives attending today, some general rules apply. Please see our staff member at the back of the room for a handout that will explain the rules. I don't think we have any media at this point.

Observers at this hearing are not permitted to take pictures or recordings of any type and, to comply with the requirements of the Commonwealth Occupational Health and Safety Legislation, you are advised that in the unlikely event of an emergency requiring the evacuation of this building that the exits are located next to the elevators. If you require assistance, please speak to one of our inquiry team members here today. Please do not take the elevators in that event. Your assembly point is on Rudd Street, which can be found by turning right on exiting this building, and then turning right again onto Rudd Street.

Participants are invited to make some opening remarks of no more than five minutes. Keeping the opening remarks brief will allow us the opportunity to discuss matters and participant's submissions in greater detail. Participants are welcome and invited to comment on the issues raised in other submissions if they feel they wish to do so.

I would now like to welcome the first participant who is Simon Bush from the Australian Home Entertainment Distributors Association. So, Simon, if you would like to make yourself comfortable and then, for the purposes of the transcript, if you could give your name, who you represent, and then feel free to give your opening statement. Thank you.

MR BUSH: Thank you, Commissioners. My name is Simon Bush. I am chief executive of the Australian Home Entertainment Distributors Association. AHEDA represents the 1.2 billion home entertainment film and TV industry covering both physical discs and digital sales with members including all the major Hollywood as well as Australian independent distributors. I'm also a director of Creative Content Australia. My statement will include data not present in our joint submission.

We are an industry that has been at the forefront of digital disruption and has embraced each new technology at every turn with the ambition to get content to consumers in new and exciting ways on any platform they choose. Content owners license their content to any platform you can think of and competition is fierce across the industry. The market has

been very effective in driving technology adoption and price erosion for consumers.

What a robust system of copyright allows is for massive investment in production of creative content that Australians love so much. Movie making is inherently risky, and the industry does rely on a small number of films and TV shows doing very well with most films losing money. It is against this backdrop of innovation of risk and investment that the copyright serves its original purpose today as it did back when the copyright was enshrined in the Statute of Anne. Rather than being past its use by date, copyright has been continuously reformed and updated with additional exceptions granted and interpreted by Australian Courts to allow not only fairer use, but also allowing for innovative businesses to thrive, such as Atlassian in the emerging Fintech sector.

There are two draft recommendations in the PC report, however, I wish to refer. Others, along with our submission, I believe, have talked to concerns we have with fees proposals. The first is on draft finding 18.1 which says that, "The evidence suggests timely and cost effective access to copyright protected works is the most efficient way to reduce online copyright infringement". I'm not sure of the evidence and data the PC relied upon when it made this statement, but let me put forward some facts.

AHEDA has commissioned respected global analysts, IHS, to conduct international pricing and the following data is from Q3 2015 and it's in US dollars at the exchange rates at that time. The average EST, which is electronic sell through, standard definition new release and catalogue prices in Australia were 11.86 for new release and $7.98 for catalogue. In the UK they were 11.67 and $8.54. In the US they cost 14.56 and $9.47. So what that means Australia was cheaper than both major markets for everything except 19 cents more expensive than the UK for a new release film.

For high definition new release and catalogue, Australia was cheaper than the US and the UK by a substantial margin. For example, the average price for a digital catalogue film in Australia was $9.73 and in the US it was $15.08. For video on demand pricing, which is the largest method of digital transactional consumption, it also shows that Australia is cheaper than both the US, the UK in both SD and HD across both new release and catalogue and I'm happy to provide this data, more data as well. It is incorrect to say then that transactional video prices are higher in Australia. This is simply not true. So I hope that deals with the cost effective concerns.

Now, turning to the issue of timeliness that would somehow reduce piracy. In 2015 nine out of 10 of the largest box office films in Australia were released here before the US. In Australia, the window between theatrical and home entertainment is being reduced from 120 to 90 days. However, most piracy surge is 300 per cent after the release of the DVD and digital version is available, suggesting availability is not the issue itself, but availability of a quality digital copy for piracy purposes is.

Further, if availability and price somehow is a panacea for piracy, then how do you explain that Australians have the largest per capita piracy rates in the world for Breaking Bad when it was available the day after broadcast digitally for a few dollars an episode. Despite this, pirates prefer free, and that is a business model with which we can't compete. We know this from 2015 research by the Department of Communications that confirmed free content was cited as a major reason for content theft by 55 per cent of Australia, and 2016 CCA research found that 68 per cent of pirates submit that the main reason they download or stream from infringing sites is because it's free. We are very aware that when we do surveys into piracy, and we were told by analysts, there is a huge difference between stated and actual behaviour. In other words, people will say they won't pirate if they were given it easily and for a decent price, but when that is available their actual behaviour doesn't necessarily change.

Dr Brett Danaher, et al, of Carnegie Mellon University, evaluated the effectiveness of three ways of website blocking in the UK on three different dimensions. Firstly, the effects of blocks on visits to blocked sites; the effect of blocks on visits to all piracy sites, both blocked and unblocked; the effect of blocks on visits to legal streaming sites. They found the following, when the 19 sites were blocked in November 2013 it caused an 85 per cent decrease in visits to the blocked sites, so in other words, they weren't using – only 15 per cent were using VPNs to get around it; it caused a 30 per cent decrease in total piracy visits amongst affected users; and caused a 12 per cent increase in visits to paid legal streaming sites.

When a further subsequent 53 sites were blocked in November 2014, it caused a 90 per cent decrease in visits to blocked sites; caused a 22 per cent decrease in total piracy visits amongst affected users; caused a 6 per cent increase to visits to paid legal streaming sites; and caused a 12 per cent increase in visits to legal free ad supported sites.

Currently before the Australian Courts are two cases around injunctive relief for site blocking which, over time, when a number of sites are blocked it is not unreasonable to expect a similar outcome to that

of the UK. Further, we have research that suggests that media around the Dallas Buyers Club Court case last year did change people's behaviour and attitudes towards piracy on the basis that they may be caught.

I firmly believe that the solution to film piracy is a united approach around getting content to consumers in new ways, such as with (indistinct) services like Netflix, Stan, and Presto, at reasonable price points along with government leadership around the value of copyright and some targeted and effective enforcement. This multi-faceted approached will ensure that we have local providers of content as well supporting local jobs and productions. There is also the moral issue of valuing and protecting creativity and endeavour, and the investment that follows.

The second matter I wanted to raise is draft recommendation 5.1 which, in essence, is a recommendation that geoblocking should not be allowed and that circumvention should be encouraged. From reading transcripts of Commissioner Chester on ABC Radio on April 29 explaining this recommendation, it seems to stem from a desire that the PC believes that Australians should be able to access overseas platforms, like Netflix, and presumably HBO, NBC and all the US cable networks, from Australia.

The ramifications of this recommendation in impact are quite large and, perhaps, not fully appreciated. Australia's free to air networks rely on, and pay for Australian rights for the major US TV shows to generate viewers and advertising. This, in turn, places a requirement on the network to invest in local productions under government licence models. If Australians access all their content offshore, then the local networks will surely wither and die.

Now, in terms of local film production, territorial licensing rights are important to how productions are funded and made. In other words, the project is sold to distributors in various territories, such as the US, UK and Europe, and once presales and advances are made, the production is then green lit. Without such territorial licensing less, rather than more, local productions will be funded.

The logical conclusion of this recommendation is that content will only be accessed and made by global platforms who can apply global rights. There will be no room for smaller projects who have a niche audience. Moreover, by encouraging Australians to access overseas based platforms for content consumption, they will be taking revenue offshore and ensuring the emasculation and bypassing of the Classifications Act, which Australian based platforms legally have to comply, which is arguably another unintended consequence. I'm almost finished.

Having read the Productivity Act 1998, I understand the policy guidelines for the Commission include growing the economy to achieve higher living standards, growing Australian industries, recognising the interests of industries, employers, consumers in the community likely to be effected by proposed measures, increased employment and for Australia to meet its international obligations and commitments. In my view, the recommendations on copyright put forward by the PC will, in fact, result in reduced investment, jobs, and revenue, and shrink the economy.

The film and TV sector supports 46,000 FTEs and contributes 5.8 billion to the Australian economy. The cultural contribution of a vibrant copyright sector is also worth considering, on top of the significant economic contributions. Copyright underpins investment in creative content and the evidence for change is, at best, weak and contentious. Thank you. I'm happy to take any questions.

MR COPPEL: Thank you, Simon. Maybe I can pick up first on your first comment that relates to draft finding 18.1?

MR BUSH: Yes.

MR COPPEL: You asked what evidence the Commission based that finding on. It comes from government surveys. It comes from consumer groups that have done research that looks at the impact of material that's made readily accessible, as one of the drivers of legal access to copyright material. I'm wondering whether draft finding 18.1, which doesn't make that distinction as to whether it's legal or not legal, is the source of your concern? We are referring to making it readily accessible in a legal manner.

MR BUSH: Yes.

MR COPPEL: So I'm wondering if that is something that - - -

MR BUSH: I think I mentioned it in the statement around stated natural behaviour. So you can do surveys of people saying, "If it was more available and cheaper will you pirate (indistinct)" and they'll go, "Yes". But the reality is the actual behaviour doesn't actually necessarily shift those pirates. We've done that research and we know. When it is available, a lot of people don't shift their behaviour. So I think we just need to be mindful of some of those surveys where you do actually ask people and focus groups what they will do because it doesn't always

change. So as I said, I think it's a multi-faceted approach, this issue. I think availability is important, the right price is important.

I think there was a big media push last year by Choice and others saying, "We don't have Netflix in Australia. Isn't it outrageous? We should access it offshore". By the way I don't believe VPNs are, in fact, legal and I think that's one of your points. But Netflix is available now here, Stan, Presto. The market is working so why do we need to intervene and make – and also there's unintended consequences, I think, of promoting people to access VPNs and go offshore. I think there are some issues there that probably need teasing out and thinking about.

MR COPPEL: Just one more point on this, why do we need to intervene? I mean, in a sense what we're saying is that there's a large part of the responsibility of the providers of materials to ensure that the material isn't illegally accessed. You're arguing there's a multi-faceted approach. What are you then saying, specifically, about the role that the sector plays and the role that government can play in terms of meeting those goals of better access to legal material?

MR BUSH: I don't think the government needs to play any role. Why does the government need to get involved in this market at all, when the market has proven over decades that it will continue to provide content to consumers?

Perhaps there's a misperception from some, I'm not suggesting yourselves, that the studios in particular and distributors and rights owners, want to lock up content. They want to do the exact opposite. They licence content to any platform that's willing to acquire the rights and distribute it to consumer in any way. They're happy to do that and they want to do that. They make content and invest a lot of money in content. They want to make money from it. It's pretty simple economics. They make money from it by licensing it to consumers to purchase it or access it. So the market is very simple from that point of view, they want to make money from their investments and not lock it up, and not control it, and not keep it away from consumers.

MS CHESTER: So I think the evidence that Jonathan referred to, you might want to have a closer look at the Choice submissions and several others that we received, because they also looked at not just survey evidence, but also what actually happened in cases where there were change to content access and the response of consumers. So our position is piracy is a problem. It requires a holistic solution. The evidence base that we've seen suggests that some people will still continue to pirate, others will do the right thing.

To some extent, circumventing geoblocking, based on the evidence that we've received and heard, puts pressure on the business models to change. So you speak of these providers wanting to do the right thing and getting the content out to the folk down under. But it was only after mass circumvention of geoblocking that those business models changed and Netflix became available in Australia.

So, I guess, what we're saying is, in terms of government, it was raised with us in our pre-draft report consultation that there was still some uncertainty around Australian legislation, and whether Australian legislation could be construed to suggest that if an Australian were to circumvent a geoblock that would be illegal under Australian law. Our recommendation is let's just address that uncertainty, and that's something that we're still trying to come to a landing, as you rightly suggested.

So I think we're, kind of, on the same page in terms of a holistic response is required. We're just saying let's remove that legal uncertainty so consumers in Australia can maintain the pressure on overseas content distributors to continue to do the right thing, as you suggest that they'd like to do.

MR BUSH: Look, yes, I think you just need to be careful and mindful, as I said in my opening statement, of what message that's sending and where do you end that process of pushing for people and encouraging Australians to go offshore to get their content. As I said, the networks buy rights. Australian TV networks buy their rights for shows, and that actually draws the audiences and that enables them to, through advertising - and there's the government requirements for local production quotas. If everyone just buys their – accesses their content offshore, that has flow-on benefits or issues, I should say, and concerns.

So I guess it's to be mindful of that, and going back to your charter of the Productivity Commission is not for every Australian to get every piece of content ever made in the world. It's to grow the economy and protect jobs and things of that nature. So it seems like a small thing, but I just think you need to be aware of the - in my view, be aware of the ramifications.

I don't know if Netflix came to Australia specifically because people were using VPNs to the United States, which is your point. I don't know that was the case at all, because they'd rolled out – they had a rollout plan, as I understood, it in the UK, and then Australia, and then parts of Europe, territories in Europe. So they targeted all the Western economies that have copyright protections in place. That's where they rolled out their

services. They didn't roll it out in Spain because they've got massive piracy rates there. They don't roll it out in Asian countries because they've got massive piracy.

The other impact of, if you go back to the original Senate, I think the House of Representatives Committee Report into Internet Pricing and IP Pricing, which that was a recommendation from. You can take (indistinct) say, "Well, we should have global pricing". That was one of the things they were really upset about was the fact that things cost more in Australia, particularly business software than – not so much film, but products. So we should have, sort of, this – we should have global pricing. Now, that's got massive ramifications as well. I know you're not suggesting that, but that comes up along with the same recommendation that you're making.

MS CHESTER: Yes. Simon, we're mindful that you've quoted some examples in your opening statement about there isn't a pricing or a quality disparity for the examples that you gave. We've received evidence that there still remains pricing and content offering disparities, for example, with Netflix Down Under versus Netflix in the US.

MR BUSH: Sure.

MS CHESTER: So there are still those disparities. Allowing folk to circumvent geoblocking will just maintain the pressure on those disparities to be narrowed if consumers - - -

MR BUSH: That's got to do with global rights, Commissioner. It's got nothing to do with Netflix – that change between what content is available in the US and what content is in Australia will change over time, as the global rights are applied for different shows. It may well be that the local Foxtel or a local network will buy the rights for Australia and therefore won't be available on the Australian Netflix, and that's as it should be. That is as it should be.

MS CHESTER: We understand that. We understand the business models. I'm just saying that your opening statement did suggest that content's like for like, prices are like for like. I'm just suggesting that we've got an evidence base that suggests that's not the case, regardless of what underpins it.

MR BUSH: So this goes back to the point I was making before about pricing standards around the world. That is a very slippery slope and I'll send the Commission some research on that.

MS CHESTER: So the Commission is not making any - - -

MR BUSH: Should something be cheaper in India than Australia?

MS CHESTER: Simon, just to quickly – the Commission is not making any recommendation on that, nor did we in our draft report.

MR BUSH: Right. Yes.

MS CHESTER: We're just talking about allowing consumers to express their - - -

MR BUSH: Okay.

MR COPPEL: Films, DVDs were areas where parallel import restrictions were lifted some years back. Can you talk us through the impacts of that change to – if any?

MR BUSH: I'm pleased to be able to say that 95 per cent of DVDs, Blue-ray discs sold in this country are manufactured in Australia. So there are massive factories that churn out discs in this country and employ people. Technicolor, Sony DADC, Regency, are the three big ones. They manufacture discs and they ship them off to local retailers.

So the whole just in time – we've got local classification requirements. I mentioned that in my statement. So we have to comply with those both digitally and physical product. In fact, any product, from speaking to the classification branch, any product that's marketed or sold to Australians is – there is a requirement for classification markings. So again, encouraging Australian to access their content offshore means they're not getting the benefit and legal requirement for classification markings and consumer advice. So for that differences in the packaging and being able to manufacture it and get it to the local retailers when they ask for more discs, it's all done locally, which is fantastic.

MR COPPEL: Were there any impacts on the Australian Film Industry?

MR BUSH: No. I mean, there is still region coding on discs which is a form of geoblock, in a way - some people might see it as that. There is region coding on discs. But I don't think region coding is a particular big issue for the consumer or the market. It used to be when I first started this role, 13 years ago. Region coding on discs was a major issue.

I haven't had one conversation around region coding on discs for over five years, primarily because most players, DVD players are multi-region

players, so it's not an issue any more. In fact, Blue-ray discs, I think there's only three regions globally for Blue-ray discs. I think for 4K, I hope I'm right in saying this, I don't think there's any region coding on 4K discs at all. But, yes, so look in terms of answering your question, there was no impact on that issue for us, but I think we had unique circumstances and we'd be different from, say, the book industry.

MS CHESTER: And was there any impact on, I guess, the issue that the – my colleague might've been getting to was in terms of local content in those products versus offshore content?

MR BUSH: Sorry, I'm not sure what you mean by that, Commissioner. In terms of - - -

MS CHESTER: Well Australian films versus offshore films being – so where the actual content came from as opposed to where the disc was manufactured?

MR BUSH: No. Look, the beautiful thing about DVD, and it's still very – Australians are actually one of the biggest countries in the world to still collect DVDS. We still buy a lot of them. A lot of other countries have gone – they're buying a lot less DVDs. So we're very fortunate it's still a billion-dollar business in this country, albeit is decreasing.

No, it's quite – it's not – when I say it's not cheap to access – to manufacture and press a DVD, it is cost effective if you can sell enough units and get it onto shelf space. Shelf space through the retailers is a big issue these days, they're shrinking what DVDs they do sell, and the mass merchants are coming in and they'll only do the Top 20. Then people say well that's a - digital provides a good opportunity and a cheap distribution platform and a global platform for selling niche and smaller product. That is true in one sense, but also the research shows unless you can create it and people can find it, then you actually don't sell anything. So it's a bit of a false economy.

What we're finding is around the digital sites and the streaming sites is you're getting niche streaming sites being established like Dendi's got a streaming site in Australia, subscription site which is just around their arthouse sort of content. Madman, who is a member, an Australian company of ours, they've got a WWF wrestling site and I believe they're building, or they've built, an anime one. So you're starting to see that you can't rely on an iTunes or one of these global platforms to get your product discovered or your film discovered. It's really, really hard. There's so much stuff there, so many titles. So if you can create this little community of - there's another Australian-based subscription service

whose name escapes me, but they're focusing on Australian content - Australian productions and Australian documentaries, which is fantastic. So there's a home - sort of niche homes for these digital films and documentaries, which is great.

MR COPPEL: I just want to come back to enforcement, because when we talk about copyright, very quickly the issues of infringement come up and in your submission you are arguing that there are good reasons for not capping costs or damages in the Federal Circuit Court and I think this view is quite a unique one and I was wondering if you could sort of talk us through the reasons for that point of view.

MR BUSH: Not for damages. Look, I am not a copyright lawyer and I cannot give you, other than what was in our submission it would be difficult for me to sort of enunciate that further for someone who actually goes in the Federal Court and argues those cases. Michael Williams, who I believe you've met - we're happy - we would be happy to take any questions you have on notice and come back to you and provide you with details on notice. We are happy to do that.

MR COPPEL: Thank you.

MS CHESTER: This issue might fall into the same category then, Simon, but you didn't comment on this in your opening remarks, but in your submission you had some issues with our draft recommendation relating to the repealed section 51(3), which is where under the current Competition and Consumer Act IP licensing and affording arrangements are not subject to the competition laws. So that was something that was subject to the Harper Competition Policy Review and several others prior to that have made the same recommendation. We have revisited the ground.

MR BUSH: Sure.

MS CHESTER: And spoke to folk and got evidence on it. So I'm just not sure what is underpinning the concerns of extending the competition laws to - - -

MR BUSH: Look, again, I caveat it with I can't delve into this in great detail, but my understanding is that the copyright doesn't - it doesn't protect an idea, but it protects the expression of the idea. So in other words I am not sure where the anti-competition concern lies with film and TV content. So if someone makes a periodic, medieval, mythological drama called Game of Thrones, there is nothing to stop another network or

producer making a medieval mythological drama called, I don't know, Vikings or the Last Kingdom, or something else.

If someone wants to do a cop show based upon evidence in the lab, then there's nothing to stop another shop being made on exactly the same principles and basis. So - and in fact you get examples in the film industry where there could be the same film made about the same subject and there is a race to get it to market first. You've seen that with the Osama Bin Laden - I think it was Seal Team Six and Zero Dark Thirty - I might get the names wrong, but there are examples where you are getting films made together on the same subject matter.

MR COPPEL: Yes.

MR BUSH: So I guess that would be only what - that's probably about as detailed as I can get in terms of answering that question.

MS CHESTER: So the issues that were concerning folk with it not being covered was around, sort of, very complex licensing arrangements, particularly in the pharmaceutical and digital contents base, and some of the licensing arrangements could be anti-competitive.

MR BUSH: Right.

MS CHESTER: So I don't think the initial concerns that you are talking about relate to extending the competition laws.

MR BUSH: Yes. So, look, again, I could take that on notice and get back to you with some further information.

MS CHESTER: That would be good. Thank you.

MR COPPEL: Your opening remarks and submission oppose the recommendation - draft recommendation in favour of fair use, as fair use as the basis for an exception.

MR BUSH: Yes.

MR COPPEL: We are trying to get a better understanding of the thinking behind the opposition in terms of what copyright material that is currently remunerable would no longer be remunerable under a fair use provision basis for an exemption for copyright. .

MR BUSH: From listening to media transcripts and things, I think you might be referring to particularly educational licences in particular as to

one of the areas why you think fair use might be a better way to go. Is that - - -

MR COPPEL: Well, we don't see them as either/or. In our draft report we don't make any recommendations in terms of removing provisions for a statutory licence for education or for government use for that matter, but as an illustrative use, the draft recommendation as it relates to fair use does – it's as one of the factors, education. So there will be some material there that is considered fair use and I guess that's the question that I'm asking. There will also be a lot of material that will still be - that would be remunerated under the copyright system.

MR BUSH: Yes.

MR COPPEL: We're trying to get a better idea - - -

MR BUSH: Yes, I make a general point and I may come to the specific, and look, fair use has been through the ALRC process of which has been very central and involved. You sort of get these polar, opposite views I think and that's - and you get the - sort of the Google on one side saying everything should be made freely available, and you get the content owner saying, "Well, look, the system works fine," and you get the various iterations in between.

Look, I think from my experience having been doing what I've been doing for about 13 years, I've seen the Copyright Act and further exceptions being amended and granted, and courts interpreted how they think things should be dealt with virtually every year. So to suggest that copyright is - the current system is inflexible, is outdated and needs to change, I think is inaccurate. I have seen it work and I've seen it to be updated. There is an exceptions-based regime. If an argument is mounted to the government, then they change it. Pretty simple.

To suggest that we throw out the system we've got and all the case law, and bring in fair use, without that case law, and with questionable evidence as to its benefits and there is research in Singapore to suggest that it actually will take the economy copyright industries backwards, I think you need to be pretty certain about what you are recommending in order to make that recommendation.

The list of examples that you put in your report, we're responded to those in our submission, but a rap song uses another lyric in its opening lyrics as one of the justifications of, well, we'll take a high-risk approach. I think some of these examples are fairly, I guess - I don't think it would be harsh to say that they are trivial.

In terms of statutory licensing, I understand you had a fair use hearing, which is under Chatham House Rules and there was a representative from (indistinct) there and you probably got a good sense about what the benefits may or may not be for the educational institutions who deal with the statutory licensing model and what are the benefits that they may see, and there's probably not much more I can say on that point, but there is an ability and they currently have the ability to license any content they want for use in educational institutions and they do that, whether they think they're paying too much is a matter for them and in the process, in terms of the exceptions under the Act for certain uses, there are exceptions.

If they want further exceptions they can be justified and argued for education institutions and cultural institutions. There is a vehicle - there really is a vehicle for amending the Act and, in fact, there is a lapsed piece of legislation from the last parliament that's going to be renewed in the new parliament, according the Mitch Fifield. I think it's non-controversial so both - either side will bring it back into the parliament around the Disability Access Measures Copyright Amendment Bill. So that will go through the parliament later this year, I would imagine. So again, it's another example that you can amend the Act and create additional exceptions if there is a need.

MR COPPEL: I think that's one of the arguments that we put forward in the draft report for fair use in that it is much more flexible and adaptable, particularly in an environment which is subject to so much technological disruption. We were discussing earlier before the proceedings started today the VCR exception which was eventually legislated at a point in time when VCRs were essentially no longer used. Format shifting, caching; there are many examples and in the period where the legislation doesn't catch up with the technology can also be a source of uncertainty or lack of predictability for both copyright holders and users, and having a more principle-based Copyright Act, you could argue provides greater predictability. You will never remove entirely uncertainty, but if there are a set of principles which are well understood, those can act as a basis for an adaptable approach that takes into consideration at the time how things are changing in this area which is probably one of the areas of the economy which is at least over the recent period been subject to probably the most rapid change.

MR BUSH: Look, I guess all I would say in response is you are talking about consumer uncertainty or industry uncertainty around how things can be used today and I assume you are talking about uses on the Internet primarily and digitalisation of content. That is a small, little area. I don't think you could say that copyright is inhibiting innovation, creativity,

growth and investment, and that's a primary mandate of the Productivity Commission, to grow the economy, jobs and investment. It's not stopping innovation in this country. No-one is suggesting that. What drives innovation and investment is venture capital and a range of other factors.

In terms of bringing in a fair use system, I would argue and you won't be surprised by this, for me to say that I think it brings in a lot more uncertainty than it replaces. There is evidence out there to suggest that it actually could have a detrimental impact. So it would be a bold recommendation and I would question it.

MR COPPEL: Can you explain a little bit the evidence that you are referring to - the Singapore example.

MR BUSH: The Singapore one. I think - I hope I am write in saying this, it was Prof Giblin did some research, I think and then it was Barker, I think, did some corresponding research saying that - - -

MS CHESTER: Professor Rebecca Giblin is highly supportive of moving to a fair use system.

MR BUSH: Of course she is, yes.

MS CHESTER: She says it is more predictable.

MR BUSH: Of course she is. Yes, I understand that. Yes. No, there is a number of academic copyright experts that I know that you have presented with, but they have got no "skin in the game" as I will call it, in terms of actually creating, investing and doing stuff with copyright that support opening it up. It's interesting. You look at - you've got the academic copyright lawyers sort of sitting here and, that's fine, they can have their view as they have a right to have. Then you have got, sort of, the Googles and other people who have a commercial interest in freeing up of copyright, if I can call it that.

So I call it the "lifters and leaners", to use that political language if you like. You've got the lifters are the people who create, invest, put money, make stuff, who want to commercialise it. Copyright enables that to happen and I'll call it the "leaners", the people who want to take that and use that for their own purposes to drive advertising to their web site or whatever their purpose might be.

So I just think if you're talking about fair use in Singapore, there is evidence coming out of Singapore that it's driven the contribution backwards.

MS CHESTER: So the terrific thing about our Act that you keep referring to, which is about consumer - which is about the wellbeing of all Australians and not just growing the economy, our processes do allow us to listen to everybody and work through to the evidence that they present.

MR BUSH: Sure, I understand that. Yes, of course.

MS CHESTER: Good, yes.

MR COPPEL: Thank you very much.

MR BUSH: Thank you very much.

MS CHESTER: Thank you.

MR COPPEL: So the next participant is Jessica Coates from the Australian Digital Alliance. If you could make your way to the table when you are comfortable for the purposes of the transcript. If you could give your name, who you represent and then a brief opening statement, thank you.

MS COATES: Hello, my name is Jessica Coates and I am the executive officer of the Australian Digital Alliance. We are a coalition of non-profit and for-profit organisations that all support the modernisation of Australia in the interests of balancing the interests of both consumers and creators equally within the copyright system. Our members include libraries and archives, schools and universities, the disability sector and the tech sector. So we have a very, very broad base of representation, all of whom come together the idea of balancing interests for the - in the interests of consumers and Australia as a whole.

As the Commission knows, the Commission has received our written submission - several, in fact, by now. We are very supportive of the Commission's findings in the draft report, particularly the overall finding that the copyright system has over the years slowly grown more and more weighted in favour of copyright owners and that that weighing currently is inappropriate.

We are particularly supportive of four recommendations, the ending of perpetual copyright in unpublished works, which we feel is basically unjustifiable from an economic or moral point of view really. The extension of the safe harbours, which we feel is a logical and easy step to bring us in line with the rest of the world, and the adoption of an open access policy for publicly-funded research, which we just think is great

but most of all, as you know, our primary focus is on fair use. We very strongly support fair use and the Commission's recommendation that we adopt that. We would say that this is not a recommendation that comes out of nowhere. It is the sixth time that there has been a report over the last 20 years; an independent report that's recommended, fair use, and so we are very glad that you guys have added the economic perspective to that.

In terms of the debate going on around fair use, we feel that we support it because we feel it is the most important step that could be taken at this time by Australia to rebalance our copyright system for the interests of the broader community representing both creators and consumers. The beauty of the fair use model is that it, of course, does include the fairness test which limits it quite - very substantially and ensures that it won't impact on property right owners. We support the Commission in its focus on using fair use as a way to ensure that the Copyright Act does hone in on the concept of preventing activities that are harmful to copyright owners.

We believe economic and moral harms should fall within it, so the fairness factors can cover that, but we feel that the current copyright system certainly goes way beyond that and bans - places a blanket ban on absolutely everything as our previous presenter said. It bans a whole lot of trivial things which might not seem like much, but it seems inappropriate for the system to be crafted to ban everything and then only carve out a very few small things.

We are concerned in looking at the debate that's been going on around the Commission's recommendations, particularly the public debate in newspapers and stuff. We worry that there is a strong misunderstanding of fair use out there, that there does seem to be an equation of it with all uses of free. It's going to allow piracy. It's going to end all statutory licenses in Australia. All three of those statements are clearly not true. Fair use - the fairness factor does limit it substantially and so it doesn't allow all free uses and things like that.

It won't replace statutory licensing, there's no evidence for that; there's no argument for that based on any other system that adopts fair use and so those who have been arguing that viewpoint and putting forward figures based on that viewpoint are misrepresenting the likely impact of it. We feel it will only carve out round the edges of existing activities and very few activities that are currently licensed will be replaced by fair use. A few will.

We recognise there will be a little bit of balancing, particularly in the statutory licence for educational use, but only a very small amount. We don't think it will be a large financial amount. The primary benefit that we are seeking from fair use is to increase flexibility to allow institutions such as libraries and archives, schools and businesses who have to obey copyright law, who can't just ignore the trivialities that have been banned, to actually make full use of materials, to not have to focus so hard on the walled garden within which they exist in the current Copyright Act.

We are also a bit concerned that in the public debate there has been - and in other submissions there has been a lot of focus on people who are objecting to focusing on fears of the impact of fair use on one particular industry or one particular group of people without engaging with the discussion about how fair use will impact Australia as a whole and we note that even a few of the submissions seem to argue that copyright law should just be about providing incentives for creators, proving funds - money - maximising money back to creators rather than maximising the benefit of - for Australia as a whole, and we strongly don't support that.

We do feel that copyright law - we feel that providing financial benefits to creators is very important. We strongly support that. We are not arguing against removing financial benefits for creators at all. We feel that the copyright system as a whole should be aiming to increase the pool of knowledge that we all have access to and that includes through licensing, but it also includes through recognised exceptions and through a system that eventually ends up with strong public domain. So we would just like to add that perspective to the debate that it isn't just about how individual industries work within the commercial market and what money comes in there. It's about the broader landscape.

As you know, we have some suggestions - while we strongly support your primary recommendations, those four in particular I was mentioning, we have some suggestions with respect to specific elements of them. Not for you so much, because I'm sure you've read it, but for the transcript I will say, for instance, we favour the fees factors put forward by the ALRC more than the ones proposed by you. We also favour including a few of the other ALRC recommendations, such as saying that we should remove section 200AB and some other exceptions.

We would suggest that you should add to your recommendations, add orphan work specifically to fair use, that you should add Crown copyright materials for your open access recommendation and that we should put in something about Australia working internationally to prevent extension to the copyright term and we recognise that Australia cannot reduce its copyright term at all and we don't argue for that, but we thought that in

light of your strong focus on the term, that would be a recommendation you could put that we try not to extend it anymore.

We also think it would be good for you to extend your discussion of contract and licensing to include TPMs. I think that there was a little bit of it implicit in there, but you didn't discuss the issues to do with - particularly with the exceptions on TPMs in the Act and they are very - highly restrictive and the TPM provisions are arguably not well targeted at the moment. So it would be good to have your view on that as well.

Overall - sorry, just to finalise - we thank you very much for adding the economic perspective to the debate, which is often raised by people arguing about whether or not it would be good for Australia's economy to have fair use and freer copyright. So thank you very much for doing that.

MR COPPEL: Thank you, Jessica. Let's start with fair use. You made the point that the fair use provision would better serve the Australian community and you mentioned libraries and archives in particular. Can you just maybe give us some concrete examples on how fair use would change practices in libraries and archives in favour of the broader Australian community?

MS COATES: The primary difference fair use will make - there are two primary differences that fair use will make; library and archives. Library and archives do have an exception that is intended to be flexible, section 200AB that they can have access to. However, section 200AB is quite confusingly-worded. It has a limit based on whether or not there's other exceptions in the Act and people are unsure how that applies. It requires that everything be a special case and there is different commentary out there on how broad it is. We, of course, argue that it is quite flexible and it allows quite a few uses. Other people argue, for example, that it doesn't allow mass use; so you can't mass digitise.

The result of this is that there's a lot of confusion and a lot of fear in the industry and it just isn't used that much. Things have improved over the 10 years that we've had this exception so it is starting to be used, but primarily by the big guys, the National Library, some of the state libraries are daring basically to make use of this exception whilst almost the rest of the industry, basically, is very uncertain about whether or not they can use it, and it's- which means it doesn't get used, which means that 90 per cent of the sector really operates within the very limited exceptions that we have at the moment.

They, for instance, allow the library to copy and supply material to a member of the public for research and study but not for any other use. So

one of the most frequent questions we get asked is what about a family history project? What about somebody who wants to have this World War II poster for their grandfather's 90th birthday party? And the libraries feel that they can't say yes to that. They feel that because section 200AB is so specific and because they've been told, basically, to stay away from using it, they can't do that.

We feel like the fair use test would - is preferred by the sector, because it essentially is a far more intuitive test. It is likely to make things more flexible and it will make individuals less afraid to do things like that. So that's one of the benefits that it basically is an easier test that provides similar things to section 200AB, well, to our argument of section 200AB. We feel it is also broader than 200AB, but that depends on how you would interpret it.

The other major benefit of fair use to libraries and archives is that at the moment, for example, if you do take a very broad definition of 200AB, you could argue that they could digitise a whole lot of orphan works and put them up online, which is great and we would like to do more of that; however, once they are put up online, they can't be used. Libraries and archives as an industry focus very much on the interests of their clients and the Australian culture and access to knowledge as a whole, not just on what they individually can do within the walls of their institution.

Even if you say that they can put these materials up online, an orphan work then can't be used at all by anybody else in society under the section 200AB provisions. It also makes it difficult, because they are limited to the operations of the library and archives. It also makes it difficult for them to collaborate for example with commercial businesses, which is a growing area. There has been some great stuff New Zealand about it recently. It makes it difficult for instance for - this is moving outside libraries and archives, but kids can do all kinds of things under fair dealing or the existing exceptions for school projects. They can create great video; put it together and hand it in, but then they can't enter that into video competition, because there is no flexibility outside the walls of the school.

So for these sectors like libraries and archives and education sectors that do have some flexibility already within the Act, that flexibility is very walled. It is within their own activities and so fair use not only benefits - helps them benefit their clients, their students or that kind of thing in a much broader way, but it lets them engage with society in a much broader way and it just increases flexibility. It just makes their lives much easier,

because they can take a sensible and reasonable approach to does this use look fair.

I should point out, both of these sectors are very conservative. They are very unlikely to really push them that much. They are not going to be saying it's a free-for-all like some people have suggested and things like that. They will always be quite limited in what they do, but it will just give them that extra flexibility to say in these circumstances we are not harming the copyright owner and we are not asking for money, we are not - you know, sort of, it's a work that is extremely old. We don't know the copyright owner and all those kinds of things. We can do these things, because they seem reasonable. They seem fair.

MR COPPEL: Just on that point, the critics of fair use have argued that a principle-based approach to an exemption creates uncertainty and that can actually chill the confidence in relying on fair use, because there is always a risk that litigation will follow; that you've gone too far. I am interested in your views on this uncertainty argument and how uncertainty or greater predictability can in a fair use system provide greater confidence as to legitimate use under fair use.

MS COATES: Yes. I think there are three main arguments here that I can think of immediately. One is that there is quite a lot of evidence, mainly by academics from the United States showing that the United States' fair use provisions aren't that uncertain; they are relatively predictable. They tend to have, like, large categories of uses. If you are within those categories you are fine. It is really - there are some grey areas around the edge where there's uncertainty potentially - like, where you are not sure if your use is permitted and whatnot, but of course 90 per cent of the time or 99 per cent of the time people aren't acting in those grey areas. Currently, under our Act those grey areas are completely banned. So I don't see that it's necessarily a drawback to allow people to explore those grey areas in the one per cent of times, or whatever that comes out.

So, (a) it's not as uncertain as people say it is. (b) Our current system is very uncertain as well, fair dealing includes pretty much the same fairness test as fair use. It is slightly limited but that fairness test is applied all the time. We all apply reasonable reasonableness all the time as part of the laws, like basically there are principle based elements all the way through the Australian copyright and non-copyright laws already. So saying that this particular principle based element is too uncertain seems to be underestimating our ability to cope with these because we have been coping with them for a long time.

But then the third one, the one that is one of my personal favourites, and I think we've heard this from me before, is that the current system already has a great deal of uncertainty based on how complex it is. Most of the exceptions in the Copyright Act, or at least most of the recent ones, there's 90 of them, we'd have to go back and see if the old ones are better, go for a page and a half and have dozens of caveats, only in this case, or if you do this, and on those circumstances, blah, blah, blah, and particularly operating within the library and archive sector you see this a lot. And this is why this creates huge uncertainty.

This is why we want something like fair use because the complexity of the current system creates a whole different sort of uncertainty, uncertainty as to whether or not a use that you feel seems perfectly okay, it's logical, it seems reasonable, we're all pretty sure this should be fine, does it fit within this, and you have to basically be a copyright expert to get around that uncertainty. That's an uncertainty that favours the expert in against a lay person, so we feel that fair use, the beauty of fair use, is that it does open up the ability for your average lay person to make better use of copyright material and better understand it. This flows into the whole idea that people do already make a great deal of use of copyright material, thinking what they're doing is legal when it's not, around all these frequent uses and things like that, and if we can adjust the Copyright Act to align with those views of people it reduces uncertainty, if you want to call it, or within the Act in that basically people understand copyright law. And that's better.

MS CHESTER: Jessica, one of the issues we're dealing with is trying to - I guess there's two buckets of uncertainty here. There's whether moving to fair use in an overall sense and in the longer term will be more uncertain than fair dealing, and I think you've dealt with that. Then there's managing the transition in moving fair dealing to fair use, and we've certainly had some feedback post our draft report to suggest the Commission bravely straying from the ALRC wording may in effect exacerbate that transitional uncertainty to the extent that it would undermine our ability to draw on jurisprudence from other international jurisdictions.

We kind of get that, given that our objectives were very similar to the ALRC, that by starting to talk about outcomes we could sort of exacerbate that transitional uncertainty. Are there other unintended consequences from your perspective of us straying from the ALRC wording, apart from making it more difficult for us to leverage what's happened in international jurisdictions in reducing that uncertainty during the transitional period?

MS COATES: Well, the first one that I can think of is definitely that it's not just international jurisdictions we want to pull in, we want to pull in the Australian jurisprudence as well which as Simon Bush, a previous presenter, actually explicitly mentioned that one concern of moving to fair use would be that we would lose all our current jurisprudence, we wouldn't if we use the same fairness factors that we use currently. It would be essentially taking all the law that we have at the moment around fairness and just continuing it, it will just continue seamlessly, and the only thing that would change is that you would no longer have to consider the extra step of was it in a specific purpose. So that actually seamlessly brings in a lot of our existing jurisprudence if we keep them very similar to our existing law.

So that's one. And then within your factors that you suggested we should point out that we actually support you in all your goals in most of those things, mentioned transformativity, talking about whether or not material is commercially available, we understand why it is that you would pull that in, particularly if you want to target these - target uses that aren't harming the copyright owners. So you're basically saying look at what's been done with that. We support them and we think that maybe they'd be very good for EOMS and stuff.

Our concern with putting them in the Act ties in to - and there are different ones for different ones, a good example is transformativity, we are concerned that by using the transform - because transformativeness is such a big issue within the US case law already even without it being mentioned in the Act, we are concerned that if you mention it in the Act it automatically starts implying that anything that isn't transformative use isn't allowed. And obviously that isn't the intention of fair use because there are many uses that aren't transformative that are fair, forwarding an email, that's not at all transformative, almost certainly fair, currently banned under the Australian law.

But then there's another example would be the commercial availability thing. We worry a bit about courts trying to come up with different meanings for different elements. So if you have the impact on the copyright owner up here and you have the commercial availability down here, the court is kind of forced to try to determine what - why it's mentioned twice, those kind of issues, similar issues are considered twice and so they start saying well if it's commercially available at all then it can't be a fair use, which again probably isn't the desired outcome.

MR COPPEL: In your remarks you noted that you preferred the wording of ALRC into the fair use, you also suggested that within fair use you deal with orphan works, which is something that we tried to encompass within

our wording for fair use, based on the fairness factor for administrative uses and so forth. The ALRC's approach often works differently, with a more specific way of managing orphan works, how would you see orphan works being brought within fair use using the ALRC approach?

MS COATES: I would say that inherently we think that fair use covers orphan works in many, many circumstances and the ALRC said this as well, if you just apply the standard four factors in particularly for older orphan works I think that most of the time you will find uses at least in a non-commercial setting are fair. And a true orphan work that's older and you can't find the copyright owner. We're not opposed to an extra thing like the ALRC recommended but we think fair use itself already will encompass a lot of things.

The one thing that we would like to happen with orphan works potentially is it be included in that list of illustrative examples. And we see that as a better place than within the factors themselves just because we do think the factors can already encompass orphan works and we are conservative, we are copyright lawyers, and therefore we favour keeping the system as similar as we can. But that list of illustrative uses I feel is a better place to suggest orphan works because we could actually use - you know, uses with orphan works, might be something that you could include as a purpose.

MS CHESTER: We did have feedback from some participants to our inquiry that the draft or interim ALRC report also included in the illustrative examples, public administration and then the final report did not. We're trying to connect the dots. Is that something that you're - - -

MS COATES: Unfortunately, I am not. I was out of the country so I wasn't part of the major discussion, so I can't tell you.

MS CHESTER: That's okay, we'll continue - - -

MS COATES: And I don't think the ADA had an opinion on that. We were happy either way.

MS CHESTER: Well we'll continue our forensic journey on that one. In terms of fair use running in parallel to statutory licensing, our report also gets into the issue of the governance arrangements, not just from policy perspective but also our collection agencies, and we've been having some feedback from stakeholders on whether or not the current governance arrangements and the code of conduct around collection agencies is kind of contemporary best practice. Is that an area that you have any views on?

MS COATES: The ADA has very slight views on that in that one of our members group, member groups, are Australian schools, the National Copyright Unit, and we understand from their experience, and from the universities' experience that we work with, that the current code arrangements for collecting societies don't often lead to a lot of changes. Basically that there isn't a very clear independent element in the review process, and it ends up with most of - basically the collecting societies have to all agree to change the code, and it means that the code very rarely actually gets adjusted. I know that they particularly are interested in greater transparency about distributions and things like that. Obviously we recognise commercial privacy elements for the sector but we feel like there should be some ability to see that.

Personally, I would say also maybe the ADA also is a bit supportive of we know that the model in Europe and a few other countries, I think it's Europe, or the UK, anyway, requires collecting societies to take into account the interests not only of the creators but also the wider community when they are setting up their licensing systems just as their overarching principles, we'd love to see that included in the Australian collecting societies. Other than that the ADA doesn't have a very strong opinion. We do strongly believe in maintaining collecting societies, we think that they are very, very important and we don't want to rock the boat too much. We just want to have more flexibility in sections around the - - -

MS CHESTER: I think it is the EU determination which from our discussions with folk in Europe was pointed to as emerging best practice.

MR COPPEL: Thank you, very much, Jessica.

MS CHESTER: Thanks, Jessica.

MR COPPEL: Our next participant is a collecting society, APRA/AMCOS. We have Brett Cottle. So if you could when you're comfortable for the purpose of the transcript give your name and who you represent, or your names, and then if you - - -

MR COTTLE: I'm accompanied by general counsel, Jonathan Carter, is that cool?

MS CHESTER: Yes, that's fine.

MR COPPEL: Yes. If you just go forth and then feel free to give a brief opening statement, thank you.

MR COTTLE: My name is Brett Cottle, I'm the Chief Executive of Australasian Performing Right Association Limited, and Australasian Mechanical Copyright Owners Society, APRA and AMCOS respectively, which are collecting societies that represent songwriters, composers and music publishers in the administration of copyright in musical works. APRA covers performing rights, broadly, including the right of communication to the public and AMCOS broadly covers what are called mechanical reproduction rights but are really recording rights on behalf of songwriters and publishers.

Between the two societies we represent in Australia and New Zealand directly through membership about 90,000 writers and we have about 100,000 licensee clients across Australia and New Zealand, the vast majority in Australia. Between the two collecting societies in financial '16, we will collect a total of around $335 million in royalties and our overall expense to revenue ratio is around the twelve to twelve and a half percent mark.

It will come as no surprise to the Commission that the draft report issued by the Commission is widely viewed both in copyright circles and in authorship circles quite negatively, and certainly in some quarters with great alarm. I've just come back from a board meeting of the International Confederation of Authors Societies, which as it happened passed a resolution condemning the recommendations of the Commission. And certainly there is a great deal of interest internationally, and as I say, alarm, about the direction of the recommendations contained in the draft report.

We have made two written submissions, including the most recent one, addressing the contents of the draft report, and I certainly don't propose to reiterate everything that's in that written submission. There are a couple of important points that I'd like to supplement with some information and there's a couple of pieces of information I'd like to update the Commission on. But by way of general comments, in support of the view that the draft report is being viewed very negatively, I just thought I might make a few general comments, if that's okay, I will only take a few minutes to make those comments?

MR COPPEL: Sure.

MR COTTLE: Clearly there are aspects of the substance of the recommendations which has caused great concern. I think the recommendation that the extremity of a recommendation concerning term is alarming to authors generally. The idea that having enjoyed a life plus 50 and then a life plus 70 term for more than a century, seeing the idea of

that being cut down to a very limited term which would expire well within the lifetime of most authors who would see their own works go out of copyright, has really caused a great deal of disquiet and alarm amongst the authorship community.

But I think there are deeper issues in the report and I think that some of those issues do flow from the language of the report. You've received many comments on what we regard as some rather undergraduate language in the report, "Copyunright", and that sort of thing, I think doesn't help. But the very definition of copyright used by the Commission in the report is concerning, it's a definition which emphasises the negative, it says that copyright is a right to prevent the doing of rights when of course the statutory definition is that it's a right to do certain rights.

I think that definition employed by the Commission does infect the body of the report in the sense that it heavily emphasises copyright as an obstacle to commerce rather than as a foundation for artistic creativity. I think that's the thing which has unnerved the authorship community the most, there's a sort of failure, if I may say so, to recognise that copyright is something more than at the margins of the professional life of artists and authors, it is the foundation, it's the core of their professional life. Without copyright they literally have nothing to base their professional life on.

So in the same way that there are protections in our community or recognition in our community that other forms of property are deserving of recognition, the idea that copyright is a pillar and a foundation of artistic life is something that they would have liked to have seen in this report. I think also there's a view expressed in the report that the purpose of copyright is about creating an incentive to create. I think there's another element that authors see in copyright and that is that it's the element of equity and the notion that having created the work that it's only right that they receive a fair return for its use whenever that use occurs and however trivial that use occurs, they want to see the potential for getting some return for the use of their work.

I think that notion of equity in copyright is missing from the report, the extent to which it has economic consequences and can be viewed through an economic prison, I don't know, but I think it's something that authors certainly feel very strongly about. I think the other thing that I would say by way of a general comment is that although there is recognition in the report that the Internet and the digital economy generally have had an impact and have presented challenges for authors and copyright owners, I think there's a singular failure to understand

exactly how dramatic that impact has been. And it links to the notion that's again a centrepiece of the report, that copyright has overreached, copyright has gone too far.

The way authors view what's happened to their livelihood and what's happened to their property rights is that for 20 years they have been under absolutely unprecedented attack, many have seen their livelihoods and means to produce an income completely decimated. The vast majority have seen the Internet dramatically reduce their incomes, even if they've been able to stay in business. I think the report fails to understand just how dramatic that attack has been and just how dramatic those changes have been.

All they have is their copyright and here there is an agency asserting the view that in the face of this attack copyright has somehow gone too far and ought to be pulled back, ought to be pegged back in the interests of consumers. Consumers have completely rorted the creativity of musicians and songwriters now for 20 years. It's now trending in the right direction and a lot of the damage that has been done is now being overcome in the marketplace, but the idea that their rights ought to be cut back in the face of what's happened is certainly alarming to them.

If I may, there's only one other introductory comment I wanted to make, and that's related to this idea of innovation. And one seems to get from the report is that innovation by users, good, innovation by copyright owners, not so good. Certainly not to be necessarily further encouraged. We just don't understand that idea, the innovation which is important economically for this country is innovation largely to do with originality, it's to do with the creation of new works, as indeed I think is recognised in the incentive idea that the Commission has put forward. Innovation, insofar as the use of works is concerned is, we would argue, relatively marginal and relatively unaffected by the rights that comprise copyright.

What's really important is that this country encourage innovation in the creation of new copyright works, that's where the money lies. I just wanted to point to two factual circumstances that kind of illustrate that issue. There's a Melbourne band called Cookin on 3 Burners which has been around forever and it's a sort of a funk, soul band, and it writes and produces original material, it's, I think, self-funded, and self-released, unaided by dreaded intermediaries, about four albums, and it released a song in 2008 called This Girl and the song became a sort of minor cult hit but didn't really go anywhere.

That song, skip forward to 2015, that song was mixed by a French DJ, and France being a country that highly respects copyright and values

authors' rights for what they contribute culturally and legally, and economically, that French DJ properly sought permission to mix that track. He wanted the stems to produce a reinvention of the track. And that track is number 1 this week in France and Germany, it's number 2 in the UK this week, and will be number 1 in the UK. So it will be the biggest hit in Europe at the moment. And those songwriters have preserved their copyright in that original composition, the song is heavily mixed on the original composition. And that song will earn a great deal of money for them and for the country.

Of course, the song was a song that didn't become a hit within the first couple of years after its release, it became a hit - it took a while to come to its potential. One of the reasons it came to its potential was of course the French DJ wanting to mix the song. But he got permission and he was able to go through the process very easily through the record label and the relevant publisher, got permission, and everybody will win from that example. To me, that illustrates that the system can work extremely well. The idea of derivative works and transformative works can be accommodated in a commercial setting well and truly. At the time he made that mix nobody knew that it was going to be a hit, it became a hit about 12 months after release.

So I think it also illustrates the fact that we want to encourage as a nation our songwriters to produce these original works and also it illustrates that there's growth in our export earnings from copyright. In that final connection we have a table at paragraph 23 in our submission which shows what's happened to APRA/AMCOS' export earnings over the last few years for Australian, New Zealand compositions. You will see that in 2013 earnings were just under $22 million and in 2015 they grew to $34 million, this year they will grow to $40 million. So there will have been almost a doubling of export income for Australian songs during that last three year period. It's a very dynamic part of the economy at the moment.

That's really what I wanted to say by way of introductory comments but there's one other issue I wanted to address at the outset and it's the issue of the extension of term from life plus 50, life plus 70 years. This figure that's been used in the Commission's report that gets trotted out every time there's a review of copyright in this country, and it's the figure that derives, I think, from Philippa Dee's research and paper published in 2005, suggesting that the cost to the Australian economy of the extension of term was in the order of $88 million. I've seen that figure trotted out, I think, in the context of a report done by Henry Ergas, I've seen it trotted out in a New Zealand review of term of copyright, and I've seen it trotted out in Australia in any number of academic papers.

It is a complete and utter fiction. I need to explain to you why it's a fiction. If you go back and look at Ms Dee's methodology in 2005 she made the assumption that the average work was created 30 years before the death of a writer so that the 50 years post mortem the average work was created had a life span of 80 years. She then assumed constant royalty income for copyright works over the 80 years of their life. So that if you then added for each of the additional 20 years one eightieth of the total pot of royalties going to the average work you of course got to 20 eightieths of additional revenue, additional royalty income. So that gave you, that increased the royalty payout pool in respect of the average work by one quarter, 25 per cent.

Well, we've just analysed our distribution statistics, and bear in mind that we pay out well over $250 million a year, we're probably the largest copyright payer in the country, I would have thought, and certainly the amount of data we have relating to copyright entitlements is larger than any other Australian company's data. Our assessment, based on our last four quarters' distributions, is that the total number of works whose copyright is between 50 years and 70 years after the death of the author receiving an allocation in our distribution amounts to 0.33 per cent by number of works. They payout for those works by value of the distribution is 0.19 per cent.

MR COPPEL: Are those numbers, I mean, broader set of numbers, material that you could submit to the Commission?

MR COTTLE: Yes, we can provide, we will provide the supporting documentation to the Commission. But it means that the overestimation by the author of the paper in 2005 of the cost to the Australian economy, based on data by the largest royalty payer in the country, is a factor of somewhere between 100 and 125 times. By our estimation the true cost to the Australian economy of the extension of term is somewhere south of a million dollars on the total royalty pool as estimated by Ms Dee in 2005. She estimated a total national royalty pool of $350 million, I don't know whether that's right or wrong, but on our percentage it would be the percentage would not be 88 million, the figure would be somewhere south of $1 million. The net present value, instead of being $700 million, would have been five to six million dollars total cost to the Australian economy.

Now, I recognise that our statistics can't necessarily inform conclusions about the film industry, about the television industry. But they're the best statistics anyone's produced and we will supplement this comment by providing them to the Commission. The problem with this, it's not an academic exercise to go through and attack that figure. That is

a fundamental factual backdrop to the whole tone and direction of the Commission's draft recommendations, it's that copyright has gone too far and needs to be pulled back in the interests of the Australian consumer, who's had to bear this ludicrous cost of extending term to life plus 70. It's not true. It's absolutely untrue.

MR COPPEL: Well, if I just turn it around and, given those figures, can you then give your views on the benefit from that extension of term from 50 to 70 years, in terms of an incentive to create things like - - -

MR COTTLE: It's a completely fair comment, completely fair question. At the time of the extension, of course, we supported the extension of term. Our members are not only writers but music publishers, and music publishers have an inventory of aging works. Of course, it's in their interests to see the value of that industry – inventory be preserved over time. So we supported the extension of term. We have never asserted that there was any enormous benefit to Australian writers and we have certainly never asserted that the additional term would incentivise writers to create more works. I, personally, don't believe for one minute that the extension of term is an incentive to create a new work.

I think what is an incentive to create a new work is the feeling that the country respects what they do and is prepared to accord a property right to them, which is consistent with international standards. I think that is something they feel very strongly about. But I think that's the most that can be said.

MR COPPEL: Can I, before we continue, just for the record, note that the draft report makes no recommendation to reduce the term of copyright. That is a misunderstanding that has been quite widely held, particularly in participants relating to the copyright – in the copyright sector. We did make a finding that the average revenue from a newly published work, typically, flow over the first two to three years and then be very minimal which, I think, is consistent with the numbers that you've presented there - you presented to us today. But, because of our international obligations which has a length of term which is life plus 70, we haven't made any recommendations that go to that. So I wanted to make that point.

MR COTTLE: So, thank you. I don't think, for one minute, we expected any suggestion that term be reduced at all, let alone to that level, would be one taken seriously. But I think it's important in the context of the general tone and direction of the report, because there is a very strong feeling in the report, at the risk of repeating myself, that copyright has overreached, that copyright – the reforms and changes made to copyright over recent years have all been in favour of the copyright holder and, by implication,

are at the expense of the Australian consumer. I think it's that issue which I'm seeking to address in putting to rest that idea that there was this enormous cost to the Australian consumer.

MR COPPEL: Okay.

MR COTTLE: There are some other issues related to that, but maybe I could leave those aside for one moment.

MR COPPEL: Okay. Now all intellectual property is a balance - is the balance between the interests of the owner of the intellectual property and the wider community in terms of the users. It's for a period of exclusivity. When it comes to copyright that term is life plus 70. That's around five or more times longer than it is for other forms of intellectual property whether it's patents, designs rights.

You made the point of equity and being able to make a balance between the rights of copyright owners and the broader community. When you think about it in those terms, how do you then incorporate the uses that can come from the broader – to the broader community from copyrighted works? So, if you could elaborate on how you reached that judgment that you're essentially saying that the existing arrangements that have had – that are appropriate, that they are working?

MR COTTLE: Yes, sure. Well, I mean, I suppose there are a number of particular prisms through which those arguments are undertaken. The most important of those is, I think, access, availability and enjoyment of a rich, cultural life. I think copyright broadly serves the purpose, as you point out, of providing incentive to create. We would say it also provides this additional purpose of providing an equitable treatment of the works and their authors.

I think the current debate is heavily focussed around access and availability by the community in a – in economically reasonable fashion. What I would say about that is that insofar as music is concerned, the current balancing of rights has created, for Australian consumers, a completely unprecedented and unparalleled ability to access the world's musical repertoire, legally, incredibly conveniently, and incredibly cheaply. I mean, for $10 a month you get access now to the world's recorded repertoire on any one of a number of different services, whereas 30 years ago you would've paid $10 for a single album. So there's just no comparison between the ability of Australian consumers to enjoy a rich cultural music life, based on the current balancing of interests.

When I talk about the balancing of interests, that goes down to the fact that Apple is able to, and was able to launch its Apple music service here and its download service here amongst the first countries in the world, because it was able to be licensed, it was able to add on a cloud based blocker service. It was able to be licensed, nobody's unhappy. It wasn't hindered in any way in its ability to innovate in that space and nor have any of the subsequent players in that field been hindered in any way.

If you ask Spotify, if you ask Google, if you ask Apple – I have no idea whether they're giving evidence to you – whether they've been hindered in their ability to innovate new music services, which have had enormous benefits for Australian consumers, unprecedented benefits, they will, I'm sure, say, "No. No problem. We've been able to obtain the licences quickly, efficiently, without litigation and without animus". So I would say it's a signal achievement of the Act that's it's been able to create that environment.

I know the argument rages about Game of Thrones and access to disaggregated content. One thing that's worth noting is that the music industry, through the advent of digital services, was forced to disaggregate its content. So the album has effectively disappeared. We're back to individual tracks. That's emerging in the audio visual field. But I would dare say, equally, that the access to content in the audio visual field, you can argue a bit about price, but I would say that the access is as good anywhere in the world. It's as good in Australia as it is, pretty much, anywhere in the world now.

MR COPPEL: I think when it comes to licensing arrangements – legal licensing arrangements and these new business models, I mean, we would say that these are innovations in themselves. They're enabling legal transactions between copyright owner or musician and a consumer. That's all well and good. There's a lot of innovation there. It's given a lot more diversity and it shouldn't be discouraged. I think the points that you were making then in your opening remarks were really getting at the issue of piracy, if I'm not mistaken.

MR COTTLE: Sure. Yes.

MR COPPEL: I'm just trying to – I mean – so enforcement is obviously an issue.

MR COTTLE: Yes.

MR COPPEL: But do you address enforcement through term and scope of copyright or you are looking at something which is much more

focussed on enforcement and what would – in that context, what is the role for government?

MR COTTLE: Well, obviously, the role for government is to create the statutory infrastructure against which these markets that provide incentive to create, provide equity in returns, and in turn provide a sufficient incentive for technology users of the material also to innovate and to come to market. That's the role of the Copyright Act to enable this trade to occur, I would've thought. I would say, broadly speaking, it functions in Australia incredibly effectively, really, given the lengthy and higgledy-piggledy backdrop of the drafting of the legislation from really the early 1960s onwards.

The other point I wanted to – two points really. One is that the content industry, the music industry understands and appreciates the symbiotic relationship with the technology innovators extremely well. The truth of the matter, widely acknowledged within the music industry, is that Apple rescued the music industry with – in formulating a digital service that appealed – that caught consumers' imaginations. So there is no question that the industry is now beholden to, and reliant on, the great technology innovators.

The other point I wanted to make is that there are other illustrations of how copyright services the purpose. One of the illustrations I wanted to bring to you was, I suppose, connected to the push for fair use and I don't intend to say a lot about fair use, because I know you've had a round table. We were involved in that.

But I did want to say this: really, the significant push for fair use is really coming from the educational sector. But so far as music's concerned, I wanted to put these statistics to you. We, as music collecting societies, have arrangements, licensing arrangements in place with the entire school sector in the country. We have some arrangements in place with the tertiary sector. But the entire schools sector is covered.

By that I mean, that licenses are in place covering every school in Australia authorising the public performance outside of the classroom, authorising recordings, authorising sheet music photocopying, authorising the various digital uses that go on with a school, covering all music. The arrangements provide for a return to the music copyright owning universe of $1.97 per pupil throughout the country. So the cost to the community of copyright in music in the education sector is $1.97 per pupil at the moment, and we'll provide those details to you.

I just would've thought that that's a balance. I don't think it's an excessive sum. I think it's a sum which is fair and reasonable to parents and to the taxpayer and it's probably fair and reasonable in the end to music copyright owners. But the fact that those arrangements are in place, the balance, the backdrop for those arrangements to be in place seems acceptable and has facilitated those arrangements. No one, as far as I'm aware, has complained about those arrangements.

One of our worries is, of course, that if you start altering the statutory backdrop about what can be done and what can't be done and argue about what can be done and can't be done, then you risk interfering with that commerce. I think that's an undesirable impact of fiddling with that expression of a balance in the Act.

MS CHESTER: On the issue of the role of collection agencies - and our report didn't recommend any changes to statutory licensing arrangements.

MR COTTLE: Yes.

MS CHESTER: We do see them working in parallel to fair dealing or fair use.

MR COTTLE: Incidentally, ours is not a statutory licensing arrangement with the schools; it's voluntary.

MS CHESTER: Okay. Sorry. But the overall role of collection agencies and the licensing arrangements that fall around that. So does that mean that your organisation is still subject to the Collection Agencies Code of Conduct?

MR COTTLE: Yes.

MS CHESTER: One of the emerging things in our report is let's make sure the governance arrangements are contemporary best practice both in terms of policy in Canberra and we've got half a chapter that deals with that.

MR COTTLE: Yes.

MS CHESTER: We didn't really get too much in our draft report into the issue of the governance arrangements around the collection agencies, Brett, and it's something that has come up in some submissions and round tables. It'd be good to get your views on the code of conduct and where you see that in an international sense in terms of contemporary best practice.

MR COTTLE: Yes.

MS CHESTER: When we were in Europe, and in particular in the UK, we met with someone you probably know, John Mottram.

MR COTTLE: Yes.

MS CHESTER: He was pointing to the EU determination for collection agencies and he, kind of, pointed to that as the high tide mark of contemporary best practice for governance arrangements for collection agencies. Just good to get your views on whether the Australian Code of Conduct stakes up against the EU determination, if you're familiar with it.

MR COTTLE: Yes. Ours, of course, was the first code of conduct for collecting societies internationally, certainly that I am aware of. So it really has become the benchmark and the template, in many respects, for subsequent codes that have been developed. I think that the European directive in relation to collective management is heavily directed towards the way in which societies have to operate against each other, if you like, in competition with each other within a single market. So, I think, that the directive is heavily influenced and directed towards that scenario and, of course, ours is not. Ours is more focussed on pure governance issues, transparency, accountability, consultation, all of those kinds of things.

There's been some criticism, I understand, of the independence of the review process. The fact of the matter is that the code is pretty broad in its ambit and coverage. It's broad in its range of obligations in collection societies. The code reviewer, who is of course an ex-Federal Court Judge and we've had a history of ex-Federal Court Judges and I can assure you they're fiercely independent, they have the ability in their review to examine any area of the behaviour of a collecting society. They could examine the way in which we relate to licensees, consult with or communicate with licensees. They can examine the level of transparency we make to members. They can examine our financial accountability, our distribution rules, all of that.

Of course, in APRA's case, we're also subject to authorisation by the ACCC, and the ACCC can examine all of our input and output arrangements as well. So I would say there's a very high level of scrutiny. The fact that the code reviewers have successively chosen to conduct their review by way of examining complaints against societies and use those as the sinkholes to look at what societies are doing, is a completely logical and understandable way of doing it. You can argue that the reviewers

could look more holistically at what the societies do. How much do you want to add into the system?

I would say that the obligation is on us in terms of accountability, the scrutiny on us in terms of those range of government functions, is as high as anywhere in the world. You're not going to expect me to say we need a compulsory mandatory review of collecting societies. I think the current, the sort of light touch voluntary review is pretty good. What it means in practice is that whenever we receive anything that looks or smells or resembles a complaint, we know that it has to be reported and we have to show the code reviewer how we've dealt with it. So it's an alarm bell for us.

MS CHESTER: So two quick follow on questions, so I understand the review process.

MR COTTLE: Yes.

MS CHESTER: So, firstly, when they're conducting a review, apart from looking at – and I understand that's an annual review or bi-annual reviewer or something.

MR COTTLE: Yes, annual.

MS CHESTER: Apart from looking at complaints that have come in, do they actually look at new emerging code of conduct practices globally?

MR COTTLE: I might ask Jonathon. There's a review of the code itself every three years.

MS CHESTER: Three years, okay.

MR COTTLE: Certainly the first thing the code reviewer would do in that context is look at what's happening internationally, I'm sure.

MS CHESTER: Okay. We'll go and have a look at what they've looked at then, and see if that might be helpful.

MR COTTLE: Sure.

MS CHESTER: The other question is, have they made any material changes to the code since it's been in place?

MR COTTLE: There have been some relatively minor changes. Can you recall?

MS CHESTER: Sorry, you better state your name for the transcript, if we're going to do it on transcript.

MR CARTER: It's Jonathan Carter, and I'm general counsel of APRA and AMCOS. The changes have been relatively minor, in my understanding. There was a change to capture the activities of the Copyright Agency in its administration of the resale royalty right because, strictly speaking, it fell outside.

There was a lot of debate last year in between the declared collecting societies and some of their licensee stakeholders as to whether or not the code went far enough in terms of the obligations it imposes on societies around transparency of distributions, in particular. Justice Lindgren, ex-Justice Lindgren, heard a lot of evidence on that and ultimately found that changes did not need to be made to the code, is my understanding. So the short answer is, no, I don't think there have been dramatic changes.

MR COTTLE: Can I just add one comment on this, the great irritant for some licensees, a very small number of licensees, in the way the collecting societies operate is that they don't see how much of the money they pay goes to individual writers, and it drives some of them crazy that they can't see their $1000 a year, how it's divided up amongst the writers we pay. The reason we can't do that is that, of course, without the writers, each of those writer's permissions, we can't disclose their earnings to anybody, except under statutory request.

We've gone to an enormous amount of trouble on various occasions to show them how we distribute the fees from a particular sector, what technology we use, how much money goes – comes in, and how much money goes out, how much for administration. It doesn't satisfy anybody. They want to see how much of their money goes to which writers and we can't provide that information. No level of transparency can really get to that point.

MS CHESTER: So we'll leave governance.

MR COTTLE: Yes.

MS CHESTER: I wanted to come back to a point you raised earlier on, particularly in your opening remarks about what, kind of, constitutes new works. I was interested in the example that you mentioned - - -

(Announcement made over loudspeaker followed by music playing in background)

MS CHESTER: The example that you mentioned where the French DJ guy did the remix of the Aussie song.

MR COTTLE: Yes.

MS CHESTER: Did he then register that as a copyright piece of work within France? So was it recognised as a new copyright work?

MR COTTLE: It's recognised as a new recording, so it has a new international standard recording code, and a contractual deal was obviously worked out between the original artists and the DJ as to the sharing of royalties for the recording. But my understanding is that the composition copyright, the underlying musical work remains the copyright of the original authors, and the original publisher.

MS CHESTER: So he didn't get a copyright around the - - -

MR COTTLE: Not of the song, no.

MS CHESTER: Okay.

(Discussion in relation to music playing in background)

MS CHESTER: I guess that then poses the question, where do you draw the line between what's an original new work, like the song that was done by the guys in Melbourne versus when it's transformed so substantively or parts of it are transformed so substantively that it, in itself, becomes a new work. So is that something you have a view on?

MR COTTLE: Not really. I mean I think that that is something that has to be left to – and I know there's kind of an internal inconsistency in our argument here. I mean, I do think that the issue of substantiality is something that does have to be left to the Courts to decide. I don't think that you can really attempt to formulate mathematical rules about substantiality that are going to assist the industry.

I'd only say that an awful lot of sampling is done, an awful lot of remixing is done. The industry is used to dealing with those requests. There are arguments, I know there are some illustrative figures in the draft report about the theoretical cost of getting clearances for samples. I know there's an avalanche of examples in there. It just seems to me there's so much sampling that is out there, there are so many remixes that are out there – I mean, you go on iTunes, for every – mini tracks have a half a dozen different remixes available. So the commercial arrangements are

being made. It's not actually a problem. It's a problem in the minds of a large number of academics. It's not actually a problem on the ground. Deals are worked out. People do the trade.

MS CHESTER: No, I was more coming from it in terms of the perspective that it would be easy to misinterpret your earlier comments to suggest that unless something's purely on a stand-alone basis, an original piece of work, that transformation, if it is substantive, couldn't actually be a new work and be subject to copyright?

MR COTTLE: I think if it's a genuinely transformative work, i.e. it's - - -

(Announcement made over loudspeaker)

MR COTTLE: - - - a new original work then, of course, it's subject to its own copyright.

MR COPPEL: I've got just one final question, sort of, prompted by a news report last week relating to Led Zeppelin.

MR COTTLE: Yes.

MR COPPEL: I don't want to talk about Led Zeppelin, although I could. The comment was made that there's been a quite steep escalation in those types of cases. It was referring to the United States. Is that something which is also prevalent in Australia, and what's driving it?

MR COTTLE: To my knowledge it's not prevalent in Australia. I think it's absolutely going to become much more prevalent in the United States. Really, the big copyright case here was, of course, the Kookaburra Down Under case. That was an experience for everybody involved that was devastating for every single party involved. It was an utterly devastating experience, particularly in terms of the financial obligations imposed on all parties to it. Copyright litigation is a tremendously undesirable thing and is to be avoided at all costs, in our view.

I might say, in that regard, in our connection we deal with, as I say, about 100,000 licensees. We deal with 10s of thousands of businesses using music at any one time. We have thousands of infringers. But we institute probably no more than four or five cases a year, and only then at the – when all other avenues, ADR and everything else, have been exhausted. So the amount of copyright litigation in this country is remarkably small. I would say remarkably small.

MR COPPEL: Good. Thank you very much.

MS CHESTER: Thank you.

MR COTTLE: Thank you very much.

MR COPPEL: So we're going to take a break now and we'll reconvene at 11 o'clock. No? We'll have a 10 minute break and we'll reconvene at 10.30. There should be coffee and tea just in the foyer outside the room.

ADJOURNED **[10.29 am]**

RESUMED **[10.45 am]**

MR COPPEL: We will reconvene and our next participant is Medicines Australia along with the International Federation of Pharmaceutical Manufacturers and Associations. So if I could ask you for the transcript to state your name, who you represent and then invite you to make a brief opening statement. Thank you.

DR SNOKE: Thank you, Jonathon. So it's Dr Martin Snoke, policy and research manager at Medicines Australia. I'd just like to make a brief opening statement if I may, please. So I thank you for the opportunity to appear before this hearing to further discuss the Medicines Australia submission to this latest inquiry into IP. My director Elizabeth de Somer and our chairman Wes Cook would like to tender their apologies for not being available today, but I am here on their behalf.

I am here today on behalf of Medicines Australia. Medicines Australia represents the research-based pharmaceutical industry in Australia which brings new medicines, vaccines and health services to the Australian market. Our industry generates around three billion dollars in exports and invests over one billion dollars in research and development every year.

To achieve this, our industry is highly reliant on ensuring that there is a stable and predictable policy environment in Australia. Many factors influence the industry's decision-making with regard to investment in Australia, including the intellectual property arrangements. As Australia transitions from a resources-based economy towards a knowledge-based one, perceived weakening of IP domestically and internationally will send significant negative signals and have a detrimental effect on

pharmaceutical investment in manufacturing and research in development opportunities.

Our submission highlights why this is so and I am happy to answer any questions on that during the course of the session. It is also worth noting in this context that biomedical technology is identified by the Government and the Opposition as a future growth industry which should be encouraged. Governments of all persuasions are emphasising a need to Australia to improve the pharmaceutical sector's competitiveness in commercialising biomedical technology. Obviously, IP and IP arrangements will play a crucial role in this.

The Medicines Australia submission response to the recommendations made by the Productivity Commission's draft report. We recommend that the commission reconsider these recommendations, both in the context of Australia's international trade applications and also in light of the fact that IP is an important ingredient required to grow this important sector in Australia.

As you know, we attended a round-table discussion on Friday, 17 June in Melbourne where the Commission sought further information on three particular areas; namely patent term extensions, ever-green and pay for delay We have a couple of requests for information following that roundtable, which we are in the process of gathering. We are also happy to provide further information you would like us to provide following this hearing today.

I'd like to take the opportunity at today's hearing to support Medicines Australia's submission to the inquiry and clarify any matters. I am joined here today by colleagues from IFPMA and JPMA, which further emphasises the signals that this inquiry is sending to our international trade partners. Now, I have to pass to Andrew Jenner.

MR JENNER: Good morning, everybody and thank you very much for having us. My name is Andrew Jenner and I represent the Global Pharmaceutical Federation in Geneva. I am a former patent examiner, before I then moved over to be the lead negotiator for the UK Government in the WTO Trips Council and in the World Health Organisation, and implemented compulsory licensing regulation during the negotiations in Europe and into the EU Law as well as the implementation of (indistinct) exemption. So hopefully a useful bit of experience for you, but also I was one of the respondents to the Gowers Review which was a similar review that was conducted in the UK Government at that time.

So I am now working as a consultant. I specialise in global strategy for UN agencies, including WIPO and WHO, health-based organisations and NGOs as well as multinational organisations and business associations. One of the things I would like to perhaps start off by looking at is where does IP fit when we're thinking about investment decisions, because I think something that the report can perhaps have a little more of an in-depth look into is how do you create those sustainable innovation ecosystems?

Something that we have been working very closely with with the International Chamber of Commerce is what are the necessary components that countries should have in order to attract foreign-backed investments, and here the way that the globalised economy is working now is that you are looking for much more synergy between the local innovative industry and the multinational, and what can they do together? How can you create with those partnerships and collaborations? And it really is government that helps drive that.

So perhaps some of the four key things; one is is the country innovation friendly? What is the environment like? Is it the kind of a country that not only is innovation happening but that is commercialised. Do you have relevant partnerships between academia and industry? I think when we look at how the pharmaceutical supply chain and value chain has evolved you are looking now at collaboration in virtually every single part in that innovation chain; whether it's with academic institutions or whether it's with clinical trial organisations and so on.

So I think one of the things that I'd like the Commission to understand is how do you create that environment and understand how the environment works in practice, particularly when you look at the regulator and the role of the regulator in ensuring that those medicines are both safe and effective. The other thing that Australia does have is you have a trained workforce. You have effective infrastructure. You are open for trade and investment and these are the kind of things that we as companies are looking for. You do not discriminate against foreign investors vis-a-vis local investors.

But more critically is that what is the policy intent within Australia? Are you looking to build sustainable innovation ecosystems where there is a very long-term focus? Is there policy coherence between the different government departments or are you looking more for a commodities trade industry and are you looking to be competitive globally on the commodities and service market?

The reason I ask that, is that many of the middle-income countries that we are dealing with are also looking at how they can capitalise on these things. I'm losing my voice because I've been on too many air-conditioned planes. So I might stop there, but just to say that when you are making these policy decisions the environment that is created on intellectual property rights is crucial to understand what is it that companies are looking for across the compendium of issues? It is not just intellectual property rights, but that is critical to understand what kind of innovative environment that you are trying to create.

I think when the Australian Productivity Commission is having a look at these issues, particularly in the area of pharmaceuticals, you really want to try to understand what is it that makes Australia a unique selling feature? What puts Australia ahead of other countries, because what we are seeing is that a lot of countries are realising that they are in competition with each other. So how can you show that you are the place to do business for the innovative industries? And I think that is something that when we come out into the more specific and detailed questions we can highlight how it could be that Australia demonstrates that they are the place that is innovation friendly and this is the place to do business. So I thank you for that opening statement.

MR COPPEL: Thank you.

MS MAKINO: I am Yoko Makino. This is my honour to do a presentation as a representative of JPMA. Japan Pharmaceutical Manufacturers Association, JPMA, is a (indistinct) organisation that established in 1968 which represent the R and D-oriented pharmaceutical companies in Japan. JPMA are devoted to (indistinct) to the promotion of the health and welfare in the global population to development of innovative medicines. My submission is on behalf of former (indistinct) I additionally present Japanese - the examination system that shown in draft report table 9.1. If you have the draft report, please see the table 9.1

MR COPPEL: Yes.

MS MAKINO: So in Japan, eight years the examination appeared for (indistinct) entity as well as (indistinct). Is very important time for post marketing examination to be confirmed efficacy and safety of a drug to ensure health of nation people. Why we need the examination system, you call that data protection period.

So, as you know, notwithstanding long R and D time lines, (indistinct) may cause harmful side-effect after the new drug approval, during post-marketing period. Medication-related health disaster may

occur and sometimes causes unexpected serious issue for patient health. Therefore drug approval already in Japan requires originators of newly-approved pharmaceutical product to (indistinct) report (indistinct) on new product through the R and D examination period.

Turning to (indistinct) drugs, for all manufacturers are prohibited from seeking approval based on originators clinical trial data until the safety and the efficacy will be verified by analysis of outcome from post-marketing examination.

Why we need eight years? So in Japan in the examination period had been required six years until 2007, and drug approval authority conducted survey and recommended extending into eight years as time necessary for patient. It means that six years was not enough to be confirmed safety and efficacy of a drug.

Japanese data protection period for new chemical HD (indistinct) is not six years, but eight years, which protect interest of patient rather than the holder of marketing approval and it is currently the examination period for confirming safety and efficacy of an approved drug. The period may be extended to 10 years unless certain conditions - an additional four or six years available as the examination period for new indication and new formulation, new combination et cetera. On the other hand, (indistinct) protection period in Australia for new chemical entity is only five years without any extension for new indication or a new formulation.

Finally, I will just say the examination system is a (indistinct) providing safety and efficacy of a drug for Australian people, versus more cheaper drugs for Australian people. We have to carefully consider which should be prioritised. The draft report prioritised generic manufacture of cheaper drug, rather than Australian health and welfare. We believe that better protection period must contribute to access to innovate safe and efficient drugs for Australian people. So that is all my presentation. Thank you. So your deep consideration will be appreciated. Thank you.

MR COPPEL: Thank you. Maybe I should say just by way of introduction, the draft report does recognise that intellectual property, particularly in the pharmaceutical sector is a way in which the large upfront research and development costs can be remunerated without the risk of once the innovation is discovered being copied, and in the pharmaceutical sector, it is quite easy for a molecule to be reverse engineered, and so in the absence of intellectual property there would be certainly less of an incentive to make those upfront investments.

We have also tried to look at the relationship between intellectual property and innovation, and we would agree that there are many other factors than intellectual property which enter that equation. It is very hard to disentangle the contribution that intellectual property laws make. But if you've got any material on that point I'd be interested in hearing what the evidence is.

In the context of the draft report, we have a number of recommendations that relate to the pharmaceutical sector and one of those was the extension of term, which was introduced explicitly as a means of attracting investment in Australia in the pharmaceutical sector. It hasn't had any noticeable impact, at least on the criteria, and our recommendation is to focus on the design of the extension of term to provide for any unreasonable delay that is due to the Therapeutic Goods Authority, I think it's called, the regulator. In doing so limit the scope for any potential gaming of the system as to who that calculation for extension of term, due to delay, to bring a new drug onto the market.

So I'm interested in getting a sense from you as to the type of processes that you need to go through and the times that are involved in those processes from the discovery of a new drug to the actual marketing of the new drug, to get a better sense of the nature of the types of delays that could be encountered.

MS CHESTER: Focusing very much on the Australian perspective because quite often we're dealing with drugs that have already gone through efficacy and registration processes internationally before that's happening here. So our TGA is getting it after it's already gone through a review process so it would be good to get that sense of what's the difference.

MR COPPEL: Maybe if you could start, Martin.

DR SNOKE: Sure, and thank you for the question. So I guess it's an interesting perspective to consider the entire chain of the development of a pharmaceutical medicine in an innovative way. It's quite a lengthy process. I guess our perspective is very much the patent term of 20 years plus the extension of the additional five years generally leads to the intention of a 15 year effective life.

I think the information we provided in our submission shows that some molecules and the effective patent life is actually less than 15 years, less than the intention and we would like to consider how the system could be improved to increase that rate of actually achieving that effective

term of 15 years, rather than just the on paper amount of the 20 or 25 years.

In terms of the process, so we'd like to recognise the work that the TGA is currently going through. So there's definitely been improvements over time, in terms of the processes that they have been doing. Obviously we would like to see those improve further, to increase the time to be reduced so that medicine can then be further considered by the Department of Health, through the PBS and feedback processes. So we want to contend that it's not just the regulator's consideration, through the TGA, but it's the entire systems approach where both the TGA and the PBS should be incorporated and considered when looking at the time of the patent and the patent (indistinct).

MS CHESTER: Martin, when you mentioned the evidence that there's some molecules, I think you said, that the effective life was less than 15 years, what are the underlying drivers of that effective life being less than 15 years, and of those drivers, which of those are in the control of the pharmaceutical company versus those that are in the control of a regulator?

DR SNOKE: The drivers are many and varied. They can be right at the start, in terms of going through the clinical trial process. So one of the issues and concerns that some of our members have is about the fragmented system of the clinical trials process that we have in Australia at the moment. So in terms of going through an ethics committee, providing notification of approval through the TGA and having a consolidated system is what we would like to see that makes it simpler and easier for that process to be undertaken. So that's right at the start, in terms of the early stages of clinical development, so even going through the very initial stages can be highly varied, in terms of the timeframes. I'm happy to look further at some actual times and we can get some examples if that would be of use, and come back to you with those.

MS CHESTER: I think key there is the attribution, in terms of what's in the control of the pharmaceutical company and what's in the hands of the regulator would be helpful.

MR JENNER: I think one thing that is always present in this process is that with most areas of technology you can sell your product as soon as you've manufactured it. I think one thing that makes pharmaceuticals unique, and agrichemicals, is that you have to go through that clinical trials process. You probably know that once you - if you do do that early stage research and you find something is safe and effective, in class, so it

cures cancer, to then insert that into the most complex organism known to mankind, the human body, is incredibly complicated.

Even aspirin in my country, they used to say, "An aspirin a day keeps the doctor away." Most now believe that aspirin would not be granted regulatory approval because that process is now much more stringent and the side effects that are in place. So, again, you're accounting for the time taken for those clinical trials to take place in order for you to get that regulatory approval to demonstrate to the patients that it's safe and effective. I think this is where you come back to the policy intent. Is it something that Australia would like companies to acknowledge and to see that you are acknowledging that significant period of time taken before you can get that product to market.

In another area, an iPhone or whatever it might be, you can market that and it's often first to market play wins the day. In pharmaceuticals you have no control of that. So this is the compensation for those delays and I think many countries acknowledge that that is a significant period of time. If it's less than five years in some countries then you don't get any extension at all. If it goes beyond the five years then there is some extension.

I notice in the report that you have mentioned that sometimes there was a delay between starting clinical trials in one country than say in Australia. I think one of the reasons for that is round about the safety, the Phase 1 clinical trial is for the healthy volunteers phase and if there are any problems you would want to isolate that in one country before you then start clinical trials in, say 20 or 30. So it's important that when you start the clinical trial process that you are seeing the test results around the safety of that (inaudible) therapy before you start to make these approval processes (inaudible) different markets, so that you can amend that medicine as necessary to ensure that whatever side effects that may arise during that Phase 1 safety phase can be remedied before you then start the more wider Phase 2, where you're looking at still a lot of safety and efficacy and your Phase 3, where costs will skyrocket and you're looking at many disease-symptomatic populations where you're really looking at the efficacy in Phase 3.

MR COPPEL: It's been put to us that the pharmaceutical sector isn't the only sector that has delays that effectively are due to regulatory approval processes that reduce the effective life of the patent. The automobile sector, the aviation sector, innovations there need to be tested before they can be legally sold on the market. There's no specific extension of term in those sectors. I think the pharmaceutical is the exception to the rule.

MR JENNER: I think you also find it in agrichemicals as well.

MR COPPEL: In agrichemicals there is the extension of time, true.

MR JENNER: I think it's partly because of the timeframes involved. The timeframes involved, I mean I was a mechanical engineer that worked in the automotive industry and I think when we were patenting in that space the time taken to do your testing is very small. Also if you're dealing with more complex, specialised technologies, the ability of your competitor to manufacture and to copy is much less. So, again, you're looking to show that you can get to the first to the market, that you're - I was working on air-conditioning units, that your air-conditioning unit is more effective and cheaper than the oppositions. That's within your gift, you can speed up testing as you wish. You can put more people on that particular process if you want to get it through faster.

That's very different from a regulatory approval process where there is a very prescribed method in which you have to do that and it's not within your gift, you cannot predict when you will get marketing approval from the regulator. They want to test your hypothesis, they may need you to conduct additional clinical trials in different patient populations and so, which is absolutely their right. But it's that lack of control and the significant period of time that makes agrichemicals and pharmaceuticals unique in that regard.

MR COPPEL: You also mentioned the approvals, with respect to a new drug being on the Pharmaceutical Benefits Schedule, which is always a risk. It's a commercial risk that you would need to factor in at the beginning as to whether a new drug, not in relation to whether there's a delay to be on the PBS but whether it actually does get onto the PBS and I'm interested in why you think there's a case for the time it takes for the new drug to be eligible on the PBS is something that should be taken into account, in terms of an extension of term.

DR SNOKE: I think with that one it's more about the universal public health system that we have in Australia. In terms of the private market for innovative medicines that have been approved by the TGA, it's actually going to be quite small in Australia. So functionally, unless a medicine is available on the PBS, its availability is usually quite limited. So we consider both of those factors, so whether it does get recommended by the PBAC to be listed on the PBS, as well as how it's considered through the process, should both be factored into that timeframe consideration, given that it can take many years to go through that PBAC process. It actually can take longer than going through the TGA process at times with that.

MR COPPEL: I'm just thinking, I mean the research and development is, as you mentioned in your opening remarks, it's very much global and there may be parts of it that's done in Australia, parts that are done in other countries, that's the nature of innovation today, particularly in the pharma sector. To what extent then, when you're making that judgement as to the risks associated with the development of a new drug, for a market like Australia, which is less than 2 per cent, the risk of whether that is on the PBS or if it is on the PBS there's a delay of an extra year or so, how big and important is that in the initial decision to conduct the research and development and maybe to continue the research to the actual development stage of a new drug, considering that the commercial perspective would be looking at this from a much broader perspective than simply the Australian market?

DR SNOKE: It's an interesting perspective in that the average time of development is between 10 and 15 years of the new molecule, in which case trying to project into the future how long the process may be looking at that time is very difficult to determine the impact on the initial decision for research and development. I'm happy again to consult with our members and find out what their perspective is on whether they have some case examples to highlight whether that impacts the research time.

MR JENNER: One thing is it's interesting how the business model is evolving. The (indistinct) one-size-fits-all medicine is fast becoming a thing of the past and I think that's well-recognised now. So you're looking now at much more targeted treatments so, therefore, when you're thinking about this subject your patient population size is critical for results of operating in the market, competitors and then, of course, your rate of entry environment, your IP environment is critical in order for you then to decide to launch your medicine.

So, again, in terms of when you're thinking about the launching perspective, rather than the research and development perspective, having these kinds of systems in place is critical for that decision, particularly for more specialised medicines or whether patient population size is relatively small. We are seeing that happening in cancer, we're seeing it happen in the therapeutic space, personalised medicines is growing so the large patient population sizes that you experienced, often with chronic diseases, are not necessarily going to be the case where you look at more complex NCDs, non-clinical diseases, such as cancer. So those things will actually have an impact on whether or not you decide to launch a medicine within a given market.

There's other factors as well, of course, but I think those are things that when you look at your risk profile and your reward profile, "What is it that makes this market make sense?" And sometimes it makes sense and sometimes it might not.

MS CHESTER: So one of the issues that we have to balance here is pharmaceuticals is very much a public policy issue and there are costs to the Australian government and, indeed, the Australian taxpayer, of the extension of terms and a number's actually been put on that, Andrew, of a quarter of a billion dollars every year, and that doesn't include additional costs to consumers.

So Jonathan's question is kind of like a fundamental question; given the size of our market and given that it's unlikely the drug has been Australian R&D'd and first in world here through the TGA, what bang for buck is the Australian community and the Australian government getting from allowing the extension of term to be linked to the PBS factor? We need to see some hard evidence that that is material to the decision as to whether or not to proceed to invest, and we haven't got that evidence to date, which is why we're just very much focusing on unreasonable delays of the regulator.

MR JENNER: Just a quick question then. You're acknowledging that a clinical trial process you are merely focusing on the time taken for the regulator, because I think there are almost three discrete elements here. There's the one which is the clinical trials process, that is crucial in order for you to be able to submit your information to the regulator to then assess. Then you have the price and reimbursement system. Those three things I think are different.

MS CHESTER: So we're just focusing on the extension of term here and the policy objective of the extension of term was to actually uplift R&D in the pharmaceutical sector in Australia. It hasn't achieved that result so now we're looking at the efficacy of the extension of term, so it is quite limited to that policy objective.

MR JENNER: You're only looking at the price agreement reimbursement extension piece, or are you looking at the clinical trials timetable result?

MR COPPEL: No, it's through the TGA.

DR SNOKE: So I'd just like to consider further, there, as well that one of the policy intentions was on R&D. We'd like to consider further where there are other policy intentions subsequent as well and in addition to just

R&D investment in Australia. So happy to get back to you as well, if we can find something.

MR COPPEL: Can you tell us then, of the new drugs that are being cleared through the TGA how many of those, new in a global sense, so they haven't been also cleared through other health regulators in other markets, and to what extent can you then, in that process going through the TGA, draw on, or the TGA themselves, for that matter, draw on that earlier evidence that's been submitted for that regulatory approval process? I'm just trying to get a sense of where you're starting from scratch, essentially, which could be one of the sources of delay in getting through regulatory approval.

DR SNOKE: So just to clarify the question, please, the question was around whether a first in class new molecule being brought to the Australian market, relative to any other market in the world, and what the impact of the process here is on that decision?

MR COPPEL: What the impact is, in terms of the length of time it takes when you are clearing a new drug, which hasn't had the benefit of going through a regulatory clearance process in another jurisdiction, where that information could then be part of the assessment that's used by the Australian regulator and by the proponent?

DR SNOKE: We'll have to consult with members and find some examples, if available, on whether that's the case. We would probably refer to the TGA, they may have more information on that situation and it compares. Our impression and understanding is that there has been a lot of work recently on harmonisation systems internationally and we're quite interested to see how that's progressing and the impact on timeframes as well. Our understanding is they are getting closer and closer together. Back to your point earlier, Australia, as a market, is less than 2 per cent globally so the case of a molecule being brought here, exclusive of any other market, is probably likely to be a relatively rare situation.

MR JENNER: From the international perspective, if that's useful to you, there is the International Conference on Harmonisation that is trying to do just that. As part of the TTIP negotiations between the US and Europe, the whole industry, the (indistinct) and the originator industries is trying to push for regulatory convergence on both paediatric clinical trials and mutual inspection of sites so the EU recognises a site inspected by the FDA and vice versa. Those things are still not yet freely available globally. So there is a lot of repetition. We are saying it would make perfect sense if the major regulators could come together to recognise clinical trial results, to recognise mutual recognition agreements of site

inspections, for example, but that's very much a work in progress. And, we, of course, appreciate that there are some other issues here. In other words, sovereignty issues here. And there is a comfort if the regulator can see how this will respond in Australian patients, vis a vis other countries of the world. But I think that certainly we would be strong supporters of streamlining that system so that you could create these synergies and work is ongoing in multiple fora.

MS CHESTER: In our draft recommendations under the extension of terms there's also a caveat with respect to export and manufacture. I think, Andrew, it might have been in your submission, a suggestion that that caveat would facilitate forms of infringement. I'm just wondering if you could elaborate on what particular forms of infringement you're suggesting it would result in and then what evidence base you can point us to.

MR JENNER: Sure. When you think about what is the rationale and policy intent of any extension period, whether it's in the United States or if it's in Europe or whether it's in Australia, you are compensating for the loss of market during that process. So in theory, you're compensating for that period of exclusivity that no longer could be exploited because of the regulation process.

As part of patent law, you are forbade, under patent law, to export, to manufacture, to import unless you have written authorisation from the rights holder. So if you just look at that rationale behind this is an extension therefore of the patent too, then it would make little sense then to allow activities that are classically associated with (inaudible) to take place during that extension period.

MS CHESTER: So if the extension of term is in the Australian market and the exclusivity in the Australian market is preserved, how does manufacture for export undermine that exclusivity in the Australian market?

MR JENNER: I don't know what you mean by the Australian market. Because under patent law, if you export a medicine then that is patent infringement.

MS CHESTER: So the Australian government has afforded an extension of term and as part of that affording of the extension of term there's an allowance for manufacture for export, we're suggesting that should continue, given the objectives of the extension of term didn't manifest themselves from a policy objective standpoint. So if the extension of term

still protects the exclusivity in the Australian market I don't see what harm allowing export of manufacture during that five year window.

MR JENNER: I think if you are an Australian manufacturer and you want to licence out your patent rights to a third party, in any given country, whether it's India or whether it's the United States, or wherever, where you might not have patent protection, for whatever reason, then you could enter into a licencing deal with that third party within that country. So if a manufacturer in Australia is allowed to manufacture and export to that given market, that licencing opportunity is lost. That licencing opportunity would be a normal thing that you would expect under patent law.

DR SNOKE: We'd also be concerned, if I may as well, there's an increased risk of, during that extension, that the products could become available and a patent challenge in the Australian market could occur during that time period, even though it is developed and marketed for manufacture of export only. Plus there is an increased risk through that as well, which we'd be concerned about.

MR JENNER: The other thing is, as well, a lot of the problems are around diversion of products as well and what you often find is that if a product is manufactured within a market where a patent is protected there is an increased likelihood of infringement activity, given that the product is already physically in the market, so how do you prevent that from seeping into the market in some way?

DR SNOKE: There's also a risk of how it would impact on any international trade obligations as well, through free trade agreements and TRIPS is mentioned in the draft report. We'd like to see some further clarity on how that would eventuate.

MS CHESTER: So there was a suggestion, in one of the submissions, that you thought there were some issues with the Australian/US free trade agreement, is that right? Apart from making that suggestion is there an evidence base on which you formed that view?

DR SNOKE: Our view was based on our reading of the free trade agreement text. I'm happy to explore that further.

MS CHESTER: Thank you.

MR COPPEL: I'm just picking up on one of the points you make in your submission, trying to get some clarity in relation to data protection and you note that some of the clinical data is already published and it's sort of

entered into your thinking on objection to what we say in the draft report, vis a vis data protection, which is essentially keep the system as it is and not recommending any change. But if you could explain how that clinical work data, what do you mean by that data being in the public domain, through research publications or something else?

DR SNOKE: That's correct. So feedback from our members indicated that in many instances clinical trial data is made publicly available through other methods. So, as mentioned in our submissions and YODA Project, which tries to consolidate clinical trial with data and make it more publicly available.

It's also mentioned that our clinical trial data is also provided to doctors generally, as well, to make it available to them so they can see what's coming down the future and through many medical publications as well, to create a better informed environment about what is coming down the pipeline.

MR COPPEL: So that data that's available to doctors is something that they would use, it's not something that enters into the public domain, other than the doctors themselves?

DR SNOKE: It would depend on how you would define public domain. But our view is that we consider that is more in the public domain, from that objective.

MR JENNER: There is a huge amount of information on clinical trials published online. You've got clinicaltrial.gov in the US, you've got a similar system in Europe. I think the people who are expert within those fields can understand that data and they can use that data, but it's also important that you don't pre-empt what the regulator is actually going to endorse, because there are unintended consequences of people second guessing what the clinical trials mean and there have been some notable problems with that, particularly my own personal experience in my city in Swansea there was somebody who pre-empted the outcome of the MMR vaccine and said that this creates autism in children, which meant a lot of people did not take that vaccine, which meant we had an outbreak just a couple of years ago.

So I think you have to have a degree of trust of the regulator. There is a lot of information out there that's published but, at the same time, you don't want misinformed people making pre-determined judgements on that data that can undermine the role of the regulator.

MR COPPEL: So once the regulator has made a decision, the data that they have drawn on can't be released for five years, I'm interested in how you make that balance between the type of data that is available in the public domain in pre-regulatory approval and that information that is then held in private, even though it's been cleared by the regulator for a further five years and if you could give some sort of sense as to what are the considerations for that level of difference in the treatment of information?

DR SNOKE: There's quite a substantial investment required to generate that clinical trial data and just to clarify that, the data is kept confidential, our understanding is it's kept confidential by the TGA and that doesn't preclude after the data exclusivity period has ended from others relying on the information when they submit to the TGA. So in that respect, the information can be used, even though it may not be publicly available. One question we would consider further is, what's the intention - - -

MS CHESTER: Sorry, used by who, if it's not publicly available?

DR SNOKE: By others wishing to make a submission to the TGA that would like to rely on that information.

MR JENNER: They just have to prove bio-equivalence between the molecule and the originator.

MS CHESTER: So the issue is they can access the data but they can't rely on it, during the five year window? I'm just trying to understand what you said, "It's still available" who's getting it?

DR SNOKE: Sure. I'm happy to refer to the TGA, they might be able to provide greater clarity on the intricate detail of the process. Our understanding is that a submission can refer to that data that is being held by the TGA, given that it's now been shown to be effective and safe and they can then refer to that information, even though it isn't publicly available. So it is back to the bio-equivalence.

MR COPPEL: Can I come back to IP protection and the incentive to invest and extension of term when it comes to the end of the effective patent period or is added on to extend the effective patent period. So that can be 15 years after the first commercialisation of the new drug. The value of that, from the perspective of the initial commercial decision to invest, would be discounted back and trying to get a sense from you as to how important is that incentive, or how significant is that incentive at the end of that period of commercial life or exclusive use, I should say, more than commercial life. I guess it gets the initial upfront costs and the

profile of returns on that investment and how significant those out periods are, in formulating that initial commercial decision.

DR SNOKE: It's quite significant, is my understanding. So, as noted in our submission, that the required investment in risk taking by innovative manufacturers and research based manufacturers is quite substantial and that return, as you mentioned, would weigh quite significantly on that decision at the start, given the billion dollars that's required during the development process and the long timeframes, a 10 to 15 year investment price is substantial and the average cost of between one and half and just over two billion dollars required to develop a new molecule, on average, is substantial to that time as well. So it's more examining, as you said, a net present value or the discounting back of that time period doing the investment decision, it weighs quite significantly, those additional years.

MS CHESTER: It might be helpful for the transcript, because the discussions we had last week were a round table with Chatham House rules, but we did ask the question then and I understand we're going to hear back from you, from your membership. So if you would look at it, in terms of return to equity, that additional five years extension of term, what percentage, as a return to equity, does that account for and we need it to be unbundled in terms of just looking at the extension of term in the Australian market. So given, as Jonathan rightly pointed out, it's 2 per cent of the global market. So we're trying to work out what swing factor is it, in the decision of the original R&D to be made and the commercialisation of the drug, of the medicine.

We get high level comments that it's really important and it's a billion dollar investment but, at the end of the day, it's discounted, it's 2 per cent of the global market so really, at the end of the day, how much of that is really contributing to the return of equity on that decision to go ahead?

MR JENNER: I think the decision on R&D that we're so distant in time. You don't even know if you're going to be successful in a given class. It's more relevant when you're thinking about launching your medicine than at the R&D phase. Because the R&D phase you're looking specifically at trying to find a new therapeutic class and so on. So if you then are successful that is when the decision comes as which market do you want to launch in or not. I think that becomes the critical issue, particularly, as we mentioned, the patient population sizes for many of the new therapeutics will be slightly smaller.

MS CHESTER: So we're happy to look at it from both perspectives, in terms of the original decision to go ahead with the medicine and the R&D which is, as we know the large upfront cost versus will it come to the

Australian market, in terms of the commercialisation costs, which, I imagine, would be a small fraction of the upfront costs.

DR SNOKE: Happy to explore those options.

MR COPPEL: One of the other issues that we discussed at the round table was the strategic or gaming potential in the system and ever-greening is a term that's used. It's sometimes seen as pejorative because there are examples of drugs that are based on existing drugs but have incremental improvements, in terms of patient wellbeing. There may be, for instance, a variation on the initial drug that has less side effects, for example. Interested in getting an idea from you as to whether there's a difference in those upfront research and development costs for those types of drugs, compared to ones which are, essentially, new molecules, essentially, that treat a particular health issue.

DR SNOKE: I'm happy to consider that but, I think as you mentioned previously, we'd like to challenge the idea that strategic is viewed in a negative context as well. Also the fact that looking at patient outcomes is obviously quite critical and would challenge that idea that any improvement in patient outcomes, in terms of effectiveness or responsiveness to a medicine should have an impact on the decision and on the incentives that are also associated with whether that innovation occurred or not.

It would be concerning, from our perspective, if there was any change that would impact on that incentive to keep changing and improving medicine when it could have huge benefits for the patient's health. So I believe the example was provided previously on that.

MR JENNER: We have a publication on incremental innovation that we can give you but I think incremental innovation takes place both through the originator industry (indistinct) and we think all of that increases choices for patients and therefore is vitally important for innovation, as it stands.

In Geneva we have discussions on ever-greening a lot and it's fascinating how the term is mischaracterised or people have very different understandings of what the term means. I mean you have the inventive step objection that is there to stop spurious applications but there's actually more important considerations around that molecule later one, for example, when you submit your original dossier to the regulator to say, "I would like to conduct further clinical trials. I think I've my enhanced efficacy, I think I've got better treatment options for patients, I've got less

side effects." The regulator will assess that and then say, "Well, yes you can proceed," or, "No, we don't think this is useful enough."

If you do proceed you are then based upon that hypothesis that you must achieve. So, again, if your change is not good enough you will not get regulatory approval for that. So similarly, at the end of the process, when you look at pricing and reimbursement systems which you have in Australia, or even a private market, if you're looking at a given molecule and you believe that on a cost-benefit analysis the incremental innovation is not sufficient to justify the cost you are still free to revert to the original molecule that's now patent has expired. If you want the new one, well there's probably a very good reason why you'd want that new molecule because there is actually a significant enhancement for patient treatment options around that new molecule.

So again I think that when you look at the incremental innovation space, and that's pretty much how innovation happens in virtually every single market, it's important to look at the outcome and not only the IP system but what actually happens with the regulator and in the commercial space, will anybody buy it, because there are plenty of medicines that have gone through but nobody wants to buy them.

MS CHESTER: I think it's for those very reasons that we actually recommend the way to deal with ever-greening, given we've had conflicting evidence on its occurrence in Australia, although the justices do seem to think it's happening, is that we align Australia's inventive step in our Patent Act to that in the EU, which is slightly higher, as the best way of dealing with the issue.

MR JENNER: My understanding is that you have enhanced your inventive step analysis and that's still ongoing, you're assessing how that works, is that right?

MS CHESTER: Raising the bar took us there, EU is higher still - yes, we want to get up to the EU.

MR COPPEL: Specifically in relation to the non-obviousness or obviousness aspect. Thank you very much. Our next participant is Belinda Wood, from Generic and Biosimilar Medicines Association.

MS CHESTER: Did you just offer him a generic, did you?

MS WOOD: Actually in the UK his doctor would be required to prescribe the lowest cost medicine.

MR COPPEL: Welcome, Belinda. If you could, for the transcript, give your name and who you represent and then if you have an opening statement please go ahead.

MS WOOD: My name is Belinda Wood, I am the chief executive officer of the Generic and Biosimilar Medicines Association. For the record, we used to be called the Generic Medicines Industry Association, so the Commission would be in possession of some submissions we've made as GBMA and also as GMIA.

So the Generic and Biosimilar Medicines Association is the national association representing companies that manufacture and supply generic and biosimilar medicines to the Australian market, as well as for export. The Australian industry relies on domestic policy makers to get the balance right between patent and monopoly interests and public interests consideration and we feel that's what this Inquiry is about.

The situation in Australia has been imbalanced for far too long, resulting in persistent and inappropriate market entry values to the launch of and manufacture of generic and biosimilar medicines here in Australia, which do not exist in our closest trading partners. The Australian public and the Australian government continue to bear the cost of delayed access to affordable medicines in Australia and through lost opportunities to build and utilise world class manufacturing facilities in Australia for the export market.

GBMA is highly supportive of genuine innovation. Intellectual property protection should be focused at the cutting edge of innovation and not merely used as a commercial strategy to deny market entry of competitors. So GBMA applauds the statements and recommendations of the Productivity Commission in the recent draft report. That report clearly states that ever-greening strategies do delay market entry for generic medicines to the detriment of the Australian community and there is a lack of evidence to support extending market exclusivity rights for pharmaceuticals. Our members believe urgent patent reform is required to right the long-standing and persistent imbalance between pharma monopoly interests and public health needs in Australia. I'd just like to address a couple of the points that were made in the draft report.

So the report clearly and rightly states that patent term extensions fail to incentivise innovation and GBMA agrees with that statement. The patent term extension system in Australia fails to incentivise product sponsors to promptly introduce new products to the Australian market and, in turn, further delays market entry for generic and biosimilar medicines. In fact, patent term extensions are an expensive gift to patent

holders that cost the Australian government, tax payers and consumers a quarter of a billion dollars each year.

GBMA is of the opinion that competition is what encourages innovation, not extensions of monopoly rights. We support an overhaul of the patent term extension regime in Australia and agree with the Commission that any extension should only be calculated by virtue of unreasonable delays by the TGA in approving medicines. Manufacture for export can and must be implemented in Australia. GBMA strongly supports the urgent introduction of manufacture for export in Australia and believe neither domestic nor international laws, nor agreements, provide any barriers to implementation, as explained in our submission. One important point to make about manufacturing for export is that it doesn't only support the generic sector. It would be helpful for all Australian pharmaceutical manufacturers, irrespective of whether they traditionally sit as originator or generic medicine suppliers.

Ever-greening strategies employed by originator pharma companies do delay the supply of generic medicines in Australia. They cost money, as delaying generic medicine into the market, through the PBS, the government and taxpayers, it means that we're unnecessarily overpaying for medicines. The strategic misuse of the patent system in Australia is common for pharma patentees, and there are numerous examples, as we've outlined in our submissions to this inquiry and also to the Pharmaceutical Patents Review from 2013.

Pharmaceutical ever-greening strategies and incremental patenting to create patent thickets do occur in Australia because, in part, patents are easy to obtain and inexpensive to maintain. It's important to remember that the pharma market in Australia is relatively small and patent litigation is relatively expensive so there's great risk is challenging patents through the courts. Right now it's only through the actions of generic medicine companies that these challenges are being brought before the courts.

I'd like to point out that the strategic element of ever-greening is particularly evident in some life-cycle management strategies, often involved in moving the market from one form of a medicine to another, just prior to patent expiry. Examples here would include Venlafaxine to Desvenlafaxine and Oxycodone short acting to long acting. Changes to the inventive step would be a positive move in addressing ever-greening. Granting a patent only where there is genuine innovation and where that innovation has a genuine health benefit. But we also need a government mechanism that would identify strategic misuse of the patent system so we don't continue to overpay for medicines through the PBS.

There is no reason to extend data exclusivity beyond five years, in Australia, for small molecules or for biologic medicines. Data exclusivity is not an incentive for innovation. It's an automatic right granted to encourage commercialisation in a jurisdiction and it can't be challenged. We agree with the Commission's view that a five year data exclusivity period is suitable for all medicines, including biologics and there's no reason to extend.

There's currently nothing in Australia's IP system that encourages generic medicines to come to market. In fact, I'm not even going to sit here today and ask you for an incentive for generic medicines to come to market. What we're seeking is the removal of unnecessary barriers. We take all the risk, the risk of developing a generic medicine, the risk of challenging a patent, yet the main beneficiary of generic medicine market entry is the Australian government, through the PBS, and ultimately the Australian taxpayer.

So you may be aware that when a generic medicine comes to market and, for the record, it's important to note that there is an automatic 16 per cent price cut that is applied, simply through market entry, even if that generic doesn't even sell one unit. Over time, through competition, the price is gradually reduced, and that is to the benefit of the government, the tax payer, through the PBS, through price disclosure mechanisms. So you can see that eliminating barriers so that generic and biosimilar medicines can come to the market is actually good for the ongoing affordability of the PBS.

In conclusion, I'd just like to say this is the second inquiry in three years that addresses Australia's pharmaceutical IP system, but the issues are not new. It's not a new conversation and many of these issues are well over a decade old. So we think it's time to recognise that strengthening Australia's IP system is not about granting further monopoly rights to pharma patent holders, it's about ensuring patents are granted for genuine innovation, loopholes are closed and barriers to market entry for affordable generic and biosimilar medicines are removed. Thank you.

MR COPPEL: Thank you, Belinda. Can I ask you if you have any figures on what is the cost of bringing a generic medicine to market?

MS WOOD: It's significantly lower than it is for a new medicine, obviously, and the development timelines are a lot shorter. I don't have a particular figure that I can point to today, but I'd be happy to provide that. It depends, obviously, on the nature of the medicine itself and on any patent litigation that occurs around that. But, generally, it's significantly less than a new chemical entity.

MR COPPEL: Another point of clarification, you referred to the term of product sponsors in bringing a new medicine to market, who is a product sponsor? Is that a generic manufacturer, for example?

MS WOOD: A product sponsor can be a generic medicine manufacturer or an originator. The word "sponsor" is just used to identify who is bringing forward the application for market authorisation and also who is bringing forward the application for any PBS listing.

MR COPPEL: Another point, you referred to new medicine having a genuine health benefit should be a criteria, are you saying that should be a criteria for patentability or a criteria for whether it's listed in the PBS, because they're quite different things.

MS WOOD: They're very different things. So it's important to recognise that when it comes to the regulator, the regulator is not looking at any incremental health benefit at all. You produce a dossier of information that shows your medicine is safe, effective and of an acceptable quality you're more than likely to have that medicine approved.

I think what it really comes down to here is if we - it's the inventive step argument really. It's saying that if we're granting patents just because of a new formulation are we genuinely weighing up what the implication of that patent is, with the public benefit and, of course, the public cost. So it's an interesting question because it really looks at taking a step out of the regulator, out of IP Australia, out of the PBS and taking a look at who could take a look at and determine whether there is a genuine health benefit in granting that patent.

MR COPPEL: So, as Karen mentioned earlier, in the draft report the issue ever-greening was suggested, given the ambiguity in the evidence, that other measures that are proposed in the draft report, relating to the broader area of patents, through an increase in the inventive steps, the non-obviousness criteria. We've also got a number of other recommendations that I think you support, relating to fees, relating to an objects clause. These are all measures that, I guess, nudge in the direction of trying to get higher quality of patent and be, at the same time, consistent with international obligations. I'd be interested in your views as to whether they would make a - how big an impact do you think they would make, in terms of that contribution towards limiting, at least, the possibility or the risk of practices, I use ever-greening, I know it's pejorative, I don't want it to be interpreted in a pejorative way but I think people understand what we mean when we say that.

MS WOOD: Yes, and I don't mean to be pejorative with the term "ever-greening" either. I think, though, that we are sticking our head in the sand if we think that strategic marketing practices are not being used to extend a monopoly. So we need to call out the fact that it does exist and why it's important to call it out is because of the impact it has on the public purse. If we didn't have a PBS we wouldn't be having this discussion about ever-greening, but we do. And ultimately, the taxpayer is paying for any outcome of these strategies.

I think the recommendations made in the draft report will go a significant way to addressing the strategic misuse of the patent system broadly. I think there are other ways that generic companies would be seeking to call out ever-greening and I think one of our members, Apotex, is particularly litigious and is often in court to challenge what they believe are invalid and weak patents and they have been very successful, over the years, in doing that.

The Pharmaceutical Patents Review also recommended that the Federal government had the ability to challenge patents. Now, that certainly isn't reflected in your draft report but I think it is important to take a look at what other options there are available and I think those options you just outlined would certainly go a long way to addressing the problem of ever-greening.

MS CHESTER: Another area of strategic misuse that we tried to address in our draft report is the pay for delay. We have a recommendation around that drawing on US experiences, unsurprisingly difficult for us to get an evidence base in Australia. So I guess two questions there, firstly, your membership's view on our proposal to, at least for a five year period, look at some monitoring by the regulator, the ACCC, and then, secondly, I guess some people have suggested to us that pay for delay just doesn't happen in Australia and my question to that is, "Well, tell me what's structurally different about the Australian market and business models for pharmaceuticals that would suggest that pay for delay doesn't happen."

MS WOOD: Structurally I think there's two important differences and one is the relative smallness of our market. The second is the fact that clear distinction between the US and Australia where, in the United States, if you are successful in the patent challenge you are granted 180 days of market exclusivity. So there's actually a reward for even entering into a challenge situation. In Australia there's no such reward and I think that the feedback from our members is that there could be some unintended consequences of applying the Federal Trade Commission's approach here in Australia. I'll try and illustrate. It's conceptual and it's a hypothetical

consequence that could result in generic companies simply not challenging if there is, mainly because of the inclusion of the ACCC and the word "cartel", the cartel like behaviour. If there is any implication for generic companies to (inaudible) anti-competitive or cartel like behaviour, if that risk is too great, compared to the benefit of challenging a patent, they won't do it. So it's an unintended consequence of what you're proposing, if it is the FTC model where all settlements are slowed, then potentially there could be an unintended consequence there.

MS CHESTER: Sorry, I don't understand what the unintended consequence is.

MS WOOD: So the unintended consequence is that generic companies won't challenge patents. They won't even enter into a challenge situation through the courts.

MS CHESTER: So we're talking about arrangements that they enter into where - I guess there is a reward for pay for delay in Australia, it's called the PBS not getting a discount for the period of the pay for delay. So there is an incentive to do it - - -

MS WOOD: For the patent holder.

MS CHESTER: Well, it becomes a zero sum game if you're paying a generic to delay you're kind of saying, "Hey, the taxpayer's funding and we're going to share." So there is an incentive. So where people say there's something different about the Australian market that it wouldn't occur, I'm really struggling with that, given that the PBS does provide an incentive. I'm not sure what the unintended consequence would be if the ACCC's getting similar arrangements between pharmas and generics. Are you saying that that would then preclude - so if it's a settlement agreement, where it's just to challenge a patent, why would that cause any concern if the ACCC's looking at that agreement if there's no pay for delay arrangement embedded in the settlement agreement?

MS WOOD: It depends on the nature of the settlement agreement. Say, for example, if its looking like the generic company might be successful in their challenge and the patent holder comes to the generic company and says, "Look, let's just settle this," with a payment, that could be considered to be pay for delay, it could be considered to be a transfer upon situation that would potentially have a negative consequence if picked up by the ACCC and publicised as anti-competitive behaviour.

MS CHESTER: I understand what you're saying, which helps us with the model.

MS WOOD: Does it help?

MS CHESTER: It does.

MS WOOD: Good.

MR COPPEL: In essence you're very much supportive of what we have in the draft report, both in pharma and the broader patent part of the draft report. One of the areas that we're proposing for changes, looking at the use of fees and the structure of the fees for patent claims, do you have any views on what would be an appropriate structure and level of fees for patents, from your perspective?

MS WOOD: I haven't got any specific details on that because I simply haven't asked the members what their views are on that one. Having said that, I did say, in my opening statement, that patents are relatively easy to obtain and inexpensive to maintain. So I think any change to that system that puts a further consideration, on behalf of the person or organisation seeking the patent, if there's another step for them to consider before seeking out a patent, I think that will go a long way to at least causing the applicant to reconsider whether, indeed, they do need that patent sitting around that product.

MS CHESTER: It would be good to get your membership feedback. They kind of understand the commercial metrics of the industry better than we do and what those incentives might be at the margin, in terms of looking to structure the fees and the renewal fees in such a way to still allow reward innovation and patents to be granted without genuine innovations but just to curtail at the margin strategic misuse.

MS WOOD: I have sought their views on whether they think that, as a concept, is a positive one and the overwhelming response is absolutely yes. The more detailed question, though, I'm happy to take on notice and get back to you on that.

MS CHESTER: That'd be good.

MR COPPEL: Another question I had for you is that the patent system, in a sense, is a one size fits all. By international requirements you can't have a system which is tailored for specific sectors, in terms of patent term. This is one of the reasons why we have things like extension of term for the pharmaceutical sector. It recognises that there is particularly large upfront costs associated with research and development of a new drug and it's also to provide that incentive or that initial innovation. So

I'm just interested in your views as to how do you reach an assessment as to whether that balance is correct is always something that needs to be at the back of your mind. We often think about things, in terms of where we're starting from and where we're moving to. But if you were to just look at it purely from removing yourself from the context of the current arrangements would you be confident that the length of term is sufficient in this sector, for originators, to provide sufficient incentive for that new work into research and development of new drugs?

MS WOOD: The previous figures mentioned that the Australian market is 2 per cent of the global market and I think it's very fair to say that global companies are not specifically developing any medicines with the Australian market in mind. So having a consideration of will we or won't we invest this money into this development because Australia may not have an additional five years of patent life? That's not a consideration, as far as I understand, when it comes to developing a new medicine. So the consideration of the Australian experience would be that if we were to commercialise this product in Australia we would be granted a five year extension of our patent term and, on top of that or maybe not necessarily sequentially, but an additional monopoly provision that is supplied is that data exclusivity period in which no one can seek marketing authority.

So do I think it's sufficient? It's very difficult for me to say that, without anything more than my personal opinion. I think, though, the real consideration here is what impact does a five year extension of term have on that cutting edge, innovative work that these companies do so well and if the current patent term extension was to be rolled back and refined so it really does compensate just for regulatory delay that's not going to stop clever companies from bringing new medicines from the lab to the hands of patients.

MS CHESTER: I guess the flip side there might be, though, given we are only 2 per cent of the global market, what impact, if we strayed too far from global patent settings, would that have on the inclination of global pharma companies to bring drugs and the timing of bringing drugs to the Australian market?

MS WOOD: That's probably more of a question to ask the previous speakers, but my personal opinion here is that there could be a detrimental effect to the availability of new medicines for the Australian population. I'm trying to be as dispassionate as I can be about that. I don't think that strengthening Australia's IP regime should go so far as to deny access to new medicines. I think what's really important though is even if the patent term extension is wound back, there is still that five years of data exclusivity. So even if the patent had expired everywhere around the

world, an originator company brining in new medicine to the Australian market is still able to have five years of market exclusivity, once they reach Australia. So I think that is an important consideration to think about.

MS CHESTER: One other issue that you touched on earlier, and also in your submissions, Belinda, was around the cost of challenging a patent or a patent infringement in Australia. We do have some information requests around that and, in particular, our terms of reference asked us to look internationally in other jurisdictions for the kind of best practice. One of the models that we've been looking at is the IP Enterprise Court as a dedicated stream within the High Court system for a lower cost model for IP matters. Good to get your feedback and thoughts on that and then also an understanding of to what extent the costs of litigation, with respect to patents in Australia, are so high such that it just basically channels everyone into a settlement stream.

MS WOOD: Our response to the draft report does say we highly support the option of having a fast-track court system. That would go a long way to encouraging a generic medicine supplier to challenge a patent. I think a combination of all of the recommendations, raising the inventive step, looking at the fee structure for IP Australia and also looking at this option of being able to have a more efficient or expedited court process for challenging patents. I think as a package those things will all go a very long way to reducing some of those market entry barriers for generics. What was your second question, sorry, Karen? You asked about do we think that's a good idea, yes. And?

MS CHESTER: How much of the current costs are seeing everything heading into the settlement stream?

MS WOOD: I'm not sure everything is heading into the settlement stream, so I probably need to go back and have a chat to a couple of members who are particularly robust in their litigation. But certainly the costs are significant and you would be aware of the current proceedings where the federal government is trying to recoup some of the lost savings through the court system.

I think what's important, though, is that all of those costs right now are borne by the generic company. As I said, there isn't an incentive for them to do that. Having a more efficient and more streamlined, if you like, process for challenging that, with an appropriate fee structure, that would go a long way to encouraging and challenging it.

MS CHESTER: Belinda, if you are going to be speaking to your membership that have experience in enforcement, two questions that would be great if you could put to them. The first one is, which court system should such a streamlined arrangement be put in? There's the option of the Federal Court or the Federal Circuit Court. I guess the other issue is, the sort of legal issues that they would be taking through enforcement, through the court system, do they lend themselves to the IP Enterprise Court model, with very truncated discovery, two days of hearings. Like how much of that model would translate across. I guess what we're trying to get our heads around is if we were to make a draft recommendation to what extent are we creating a new demand for enforcement or are we just switching stuff that would be going to the Federal Court in any event and therefore maybe it still needs to go to the Federal Court and have greater discovery processes.

MS WOOD: So is your question around are we going to grow the enforcement or are we just going to make it more efficient?

MS CHESTER: Either is still worthwhile, but from what we heard, from the UK experience and Jonathan and I were lucky enough to meet with Hagen J, who is the judge of the IP Enterprise Court, an academic to do some research around the statistics, which suggested that the IP Enterprise Court did really meet on that demand so there was a growth in enforcement actions.

MR COPPEL: One final question, in your submission on the draft report, you didn't have a view on the recommendation relating to monitoring pay for delay settlements. I was wondering if you have any views on that recommendation?

MS WOOD: At the time we wrote the response we hadn't had the round table and since the round table on Friday I've been able to talk to a couple of the members and this is where - the concern, as I mentioned, is maybe the unintended consequences of it, but I think it's fair to say that any activity that seeks to call out and to minimise areas for generic entry we would be supportive of.

MR COPPEL: Thank you very much. We're going to take a break now and we'll be reconvening at 1.25 and the following participant will be the Australian Publishers Association. Thank you.

LUNCHEON ADJOURNMENT **[12.07 pm]**

RESUMED **[1.09 pm]**

MS CHESTER: We will resume our hearings and I'd like to welcome Michael Gordon-Smith, who we're hearing from next. Michael, if you could just state your name and the organisation that you represent for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks. If you could make sure they're not longer than five minutes, that would be much appreciated.

MR GORDON-SMITH: My name is Michael Gordon-Smith; I'm the chief executive of the Australian Publishers Association. Rather than rehearse our submission or go over material that you've probably heard quite a bit of in the last couple of days, I thought I'd just try to make three points, I guess, of concern about the report.

First, it seems to us that it takes an editorial stance that's not just about economic analysis, and that it's actually informed by a pre-judgment and a negative view about copyright, in particular, and intellectual property perhaps more generally. Secondly, that it doesn't offer, especially on the recommendations that concern us, it doesn't offer any measurement of the social welfare benefit that is purported to result from the recommendations for change. Finally, that the recommendations that it does make that apply to our industry risk substantial damage that might be difficult to reverse. I'll try to take those just one at a time.

You've got a couple of things in the report, the Commission says, "The incentives created by intellectual property to develop new expressions of ideas or creative works". It then defines those as ideas. So right at the beginning of the report it defines as ideas, the things in which creators may have a property right, expressions of ideas or creative works. While it does elsewhere recognise the critical feature of copyright, but it doesn't protect ideas per se, using ideas in that way as the term, the defined term, seems to be either a deliberate or an unhappy division. It conjures up the strawman, that we're talking about ideas and it encourages them out as if copyright was currently applied to ideas and not to their expressions or their instantiation.

When the report talks about parallel importation restrictions, it twice makes the comparison with parallel import restrictions on books as "the analogue equivalent of geo-blocking". Now that's an inaccurate comparison, which doesn't have any useful explanatory value, so it's tempting to think that it's there mostly to exploit the negative public sentiment associated with geo-blocking. Later on in the report, the report compares this the other way around. It says, "Geo-blocking is the online

equivalent of parallel importation restrictions which prevent consumers from purchasing physical goods from overseas markets". Now that's just inaccurate. The parallel importation restrictions under consideration here that apply to books have very limited application and quite specifically don't prevent consumers from buying physical goods from overseas.

Again, the report says, "As with many other reforms, those who seek to gain from intellectual property protections are concentrated and have actively sought to shape policy for their benefit, contrasted to those who stand to lose being dispersed and less aware of what's at stake, and so less vocal and influential". I think that a quick look at the way in which the respective interests are represented, even in this consultation, gives the lie to that. Authors are dispersed; they work alone; there's a wide range of publishers. If you look at the membership of my association, many of them are really very small businesses, unable to support the overhead of strong and sustained influence in policy debate.

A quick look at the companies institutions on the other side seeking to dilute their rights, are very, very much larger. I think that's just an inaccurate suggestion. The Commission quotes approvingly the idea that IP rights "generate monopoly positions that reduce current consumer welfare". There's no real sense in which copyright in a work can be fairly characterised as a monopoly over something without close substitutes.

Some of those points have been made about other forms of intellectual property or other industries, but that's part of the problem with the reports often undifferentiated approach. The only curiously positive remarks it gives to an otherwise critical approach are reserved for plant breeder's rights where it comments that the introduction of them has introduced competition and price signals to a market that was previously characterised by a heightened degree of state provision. It looks like the heightened degree of state provision is in fact what's recommended as an alternative in the case of the book industry.

The question of term has no doubt been raised. Clearly the question of term was not something there that was a meaningful recommendation that the government would be able to implement but it is a concern as an indication of the Commission's assessment of the balance and its analysis of copyright. It should be so clearly unacceptable an idea that a creator would lose all their rights to control the use of their work while they're still alive. But if the Commission's calculations about incentives are correct, it should have been alluded to the possibility that an account of copyright as only that sort of incentive was inadequate. Harper Lee, for example, was it copyright? Was it her copyright or some other right that enabled her to refuse or to delay rather and possibly even to refuse

publication of "Go Set a Watchman"? If it's copyright, an account of copyright that's limited to its operation as an incentive is not sufficient to explain that.

As I mentioned at the beginning, the report doesn't provide really any measurement of the social welfare benefit, the changes to PIRs and to these in particular, are expected to produce. A generous upper bound, accepting the estimates about price and the changes, is going to be measured in the tens or hundreds of millions of dollars, and that's going to be largely offset, we would say, by the reductions in benefits in a range of other things. After about four minutes, let me make just in conclusion a couple of remarks about the specific recommendations.

I am curious as to what features of parallel importation are seen to work against social welfare. Franchising, for example, involves the exclusive licence to use intellectual property and to use some of the services of a franchisor within a defined geographical area, so a much better comparison with parallel imports and geo-blocking. What is it about an author's use of franchising at a national level that makes it socially undesirable, whereas franchising by let's say a retail chain is a desirable form of commence.

While the Commission's terms of reference ask it to take into account the government's response to Harper, the Commission has chosen to represent that there's been nothing different. There's no change to the previous views on this issue. It was open to the Commission, I think, more accurately to find that previous concerns about the possible effect of the Act on the availability and price of books were no longer present; that the need for change had been very substantially addressed; and that any remaining benefits from further change were likely to be very small, limited to some possible small changes in price and a very limited number of titles, offset by the reduction in social welfare from the damage to other consumer benefits through the publication of Australian titles and the maintenance of a greater level of diversity.

The Commission does recognise that there's some change. One quote from the report, "the low cost of disseminating", it says, "(and indeed producing) new works, the globalisation of culture, explosion of copyrightable material, including non-commercial works, YouTube, et cetera. Creators are competing for the attention. In all areas of demand, the more substitutes for a good or service, the more responsive are consumers to a price increase in any of a set of substitutes". It should be clear from that change that the opportunity for people in the book business to keep prices higher is lower than ever. However, instead of concluding that the need had reduced, the Commission concludes not that the need is

reduced but that the industry is better positioned to adapt to the dilution of the property rights that it's based on.

Finally, I guess, just on fair use and particularly the extension of an educational right, I think that raises the very reasonable apprehension of a major impact on the revenues of publishers and authors. I think that's a good enough place to stop. That's about seven minutes, slightly less than that.

MS CHESTER: Thank you, Michael, and thank you for the association's submissions both pre and post our draft report and for your participation in our roundtable on copyright fair use last week, and for sharing some of your further views on excerpts from our draft report. I thought it might be helpful just at the outset just to clarify a few points. I think the first one is that I think a lot of people have relied on media reporting of our draft report, as opposed to prevailing themselves of having a look at our recommendations directly or even our overview.

MR GORDON-SMITH: I can assure you that in our case it's been well read.

MS CHESTER: Just to clarify for the record then that firstly that the Commission has made no recommendation to the term of copyright. Secondly, with respect to parallel import restrictions and the focus in our draft report, if you read our terms of reference in conjunction with the government's response to the Harper Competition Policy Review, which is what the government instructed us to do, we were meant to be focusing on transitional issues as they relate to the removal of parallel import restrictions and that's very much the focus of our report. I'll come back to those transitional issues in a moment.

I do note the point that you raised though with regard to measurement of social welfare benefit and you're more than familiar than others, I'm sure, with the very comprehensive work that was done by the Commission in this area in 2009. We also benefited from the work and the consultation from the Harper Competition Policy Review which is much more recent. But rest assured we are now providing an undertaking that we will be updating the pricing data for our final report and indeed we hope that a cost benefit analysis that's been arranged for by Ernst & Young by the Department of Communications on fair use, we're also hoping that that will be available for us to incorporate into our final report, given they're the two areas, parallel import restrictions and fair use, that are of greatest concern to your association.

If we turn maybe first to the transitional issues around parallel import restrictions. This is where our public hearings have been very helpful in terms of getting a better understanding of progress that the publishing industry has made since our report in 2009. I guess we focused on a couple of transitional issues or areas in our draft report. The first thing that there had been price reductions in books in Australia since our 2009 report. Also the advantageous move in the Australian dollar where it currently stands at the moment would lessen transitional issues for local for local publishers if there are parallel import restrictions. That certainly didn't form our draft recommendation on timing.

I'm also very cognisant of feedback and concerns around potential for dumping of books from overseas jurisdictions and looking at a very recent review of our robust anti-dumping arrangements. I think where we've benefited from the public hearings in better understanding the transitional issues is the evidence that we've received from your industry about how sort of lean and mean they've become over the past six years, which would suggest then that some of the costs that the industry thought might be attached to the removal of parallel import restrictions would be much more reduced than they would have been in 2009.

My question, Michael, after I've been able to make those clarifying remarks is are there any other transitional issues, given that that's what the government has asked us to focus on. Are there any other transitional issues that we haven't identified in our draft report that we ought to.

MR GORDON-SMITH: Well before we go to that, can I just issue take issue slightly with the suggestion that all the report has done is to focus on the transitional issues. I think it would be fair of anyone to report they would not think that that was what you'd done. I think quite a lot of the report, as I went through some of the comparisons, I think quite a lot of the report does rehearse the merits of the idea of removing the parallel importation. It doesn't do so to just the terms of "the government's going to do this and we're just looking at the transitional arrangements". It actually does canvass the merits in a really quite enthusiastic way. I think it would have been open to you, and I've looked through the terms of reference reasonably carefully, I think it would have been open to you to have said different things had you wanted really to represent that all you were doing was looking at the transitional approaches.

In terms of the leanness of the industry and whether those were the costs that the removal of the provisions would impose for it, I am not sure that the issue is about efficiency. To some extent the existence of territorial copyright allows investment in a variety of titles for what's a comparatively small domestic market. So the change is not a question

about the leanness of the industry; that's about removing any of the negative concerns that there used to be about pricing availability. The fundamentals for the requirement to be able to invest with some measure of confidence in a meaningful Australian right is not removed. That's the thing that's at the heart of the question of the removal of parallel importations. Effectively it means that the industry would need to adjust to a situation in which all Australian rights are global rights or global rights are Australian rights. Any right anywhere includes a right to publish in Australia.

In the Commission's previous report there was a little bit of canvassing of the question of what the likely results would be in a world where Australia was the only territory that removed territorial copyright, as opposed to a world in which eventually everybody did, in a world in which in either of those cases there's pressure on Australian authors to deal only with global rights. Inevitably, that means that for those who can, that there will be an incentive on them to deal with global companies and that it will be more difficult for global firms to make an investment in Australian titles.

MS CHESTER: So the author themselves already decide whether or not they're going to enter into global publishing arrangements. Parallel import restrictions just allow a book seller, if they so choose, to avail themselves of accessing those books from an offshore publisher, as opposed to a local publisher.

MR GORDON-SMITH: Sorry, I'm not quite sure I understand.

MS CHESTER: I don't understand how you say that it takes it from our current arrangements of how publishing rights are granted to making them global rights.

MR GORDON-SMITH: Yes.

MS CHESTER: They already are kind of global rights because a local author can - sorry, just let me finish, please, so you don't misunderstand what I'm suggesting. It's up to the local author to decide who they then allow to publish their works, either domestically or in any other offshore market.

MR GORDON-SMITH: Yes, but without parallel importation restrictions it is no longer open to the author to make an exclusive arrangement with a publisher to publish their work in Australia. That is no longer possible for that author. The author can do that. It is open to an

author now to licence you to publish their work in Australia and to licence someone else to publish their work in the United Kingdom.

MS CHESTER: Well, no, that's not correct because I today can purchase a book online from the US or from the UK of a local author that's been published there. It's just the bookseller is not able to do so.

MR GORDON-SMITH: Yes.

MS CHESTER: So we already do have those rights. It's just it's not extended in a neutral way across the ways of purchasing in Australia.

MR COPPEL: It's not extended to booksellers, not to book retailers. It's an individual that can.

MR GORDON-SMITH: It's an individual that can do that and so individuals are able now to avail themselves. Exactly, so the parallel importation rules are a narrowing. It might be better to call them limitations on parallel import protection. The rules, as they are at the moment, do allow Australian consumers to avail themselves of any title anywhere, but it is still for the purposes of the creation, for the publication of physical books, it is still an important element of the relations between authors and their publishers, that the publisher is able to invest with a measure of confidence that for domestic distribution of commercial quantities, they are able to purchase from the author an exclusive right to publish in Australia. That's what you will remove. You will simply remove some flexibility on the part of authors to be able to decide how best to franchise their work in Australia.

MS CHESTER: Franchise in terms of where booksellers can source the book from?

MR GORDON-SMITH: No, who can publish their work.

MS CHESTER: Sorry, no, they control who can publish their works. They're the contracts that they enter into. It's just whether or not a bookseller in Australia can buy it from a local publisher or an offshore publisher. That's why I'm sort of struggling to understand how we're changing the moving to a global rights system. We're just allowing a bookseller to buy a book from the US if it's cheaper than buying it here from the local publisher.

MR GORDON-SMITH: In effect there will be - I mean at the moment it is, as you've identified, limited but at the moment there is this, some measure of meaningful exclusive Australian right. You're seeking to

remove that. The author will not be able to appoint someone as their exclusive publisher in Australia.

MR COPPEL: You've made the argument that a number of others have made that this exclusivity provides a degree of certainty between the author and the publisher to invest in events that promote the work.

MR GORDON-SMITH: But also the creation of the work.

MR COPPEL: The creation and the work itself. We have other creative works where parallel import restrictions have been removed in Australia.

MR GORDON-SMITH: Yes.

MR COPPEL: Do you see there being a distinction between say music and film, where parallel import restrictions have been removed, and books with respect to that argument?

MR GORDON-SMITH: Is it the case that they have been removed for films?

MR COPPEL: Basically the parallel import restrictions that remain relate to books and they are, as you've noted, more limited in the sense that they allow an individual to directly import from another country or another jurisdiction the book. But there are other creative works where the parallel import restrictions have been removed and the question is has the impact of that decision had an impact on the ability for the creator and the publisher to invest in the promotion of that creative work.

We've heard a lot of doom and gloom that would come from removal of parallel import restrictions in books and there's that experience with New Zealand. I'm trying to tease out what was the experience in Australia when parallel import restrictions were removed. If you can talk to that.

MR GORDON-SMITH: I'm not a copyright lawyer but my understanding is that the territoriality of copyright remains for film. That's my understanding of the law is that parallel importation is not allowed for a feature film.

MR COPPEL: I'm talking about DVDs, it could be a DVD of a film, is my understanding.

MR GORDON-SMITH: Yes, okay. We might need some clarification on that.

MS CHESTER: Harper was quite clear on this as well that it's only books that parallel import restrictions remain for in terms of creative works in Australia. We know that there are some licensing arrangements which commercially might suggest that there are some restrictions but there's none on film or music any longer.

MR GORDON-SMITH: I'd want to take advice on that because my advice is to the contrary. I believe it remains on film, but let's put the legal question to one side. The question about what effect did the removal of parallel importation provisions have on the music industry. It is difficult to answer the different factors because more or less at the same time that that happened, everything in music went digital. I think if you talk to people from the music industry, they would confirm that it had a deleterious effect on local retail. Yes, I think over time it does mean that Australian artists have fewer publishers, if you like, here available to relate to, work to, to build, develop and market. I think it would have had a deleterious effect on that, but it's really quite difficult to distinguish that because the transition to digital was so complete in the case of music.

There's a big contrast in books where the take up of eBooks has shelved at around whatever, 15 to 30, depending on the genre and different levels for different types of work. The importance of the physical object of a book, the eBook is not a replacement technology for that in the way that digital production of music was a replacement technology for previous work.

MR COPPEL: This point about multiple factors and it's hard to disentangle that I think, it's a very real issue at the point that's being contested by a number of participants in this inquiry. In terms of the response to the draft report, I think the same sorts of arguments could be put and if you take the case of parallel import restrictions and what is seen as the value that they provide in terms of being able to invest in Australian authors, we're in a situation where we've had parallel import restrictions for decades, the period that I was growing up and most children's books, in particular, would have been non-Australian authors. Now that's a thriving part of the Australian market. It's quite significant and it's growing.

There hasn't been any change - if anything, the only change to parallel import restrictions has been this gradual reduction and yet we've seen this sort of thriving children's book part of the book industry. I just find it very difficult to accept the reason for why there would be such doom and gloom from this change. If you give again the example of New Zealand, New Zealand removed parallel import restrictions in 1998, many

of the effects that have been attributed to that were happening in 2010, and '13. I find it very hard to be able to say with confidence that these are the effects that are going to come from the removal of parallel import restrictions. I'm just wondering whether you've got any reasons or evidence to be more clear-cut.

MR GORDON-SMITH: There's two things. There's New Zealand and there's the question of children's books. Given that we've had parallel importation restrictions have gradually become lessened, why has the industry been able to flourish?

Let's just take New Zealand first. I think the point about New Zealand is less that the removal of territorial property right in New Zealand resulted in very bad things happening, as opposed to yes, there is some questions about what the variety of factors are. I think what's unarguable is that it hasn't resulted in the utopia of massive improvement in social welfare that is advocated by the people who seek its removal. I think to some extent the onus of proof is on the person who's saying, "Take this snake oil; it will help you fly". The comparison with New Zealand is they took the oil but they haven't flown, to the extent that they've also got sick. Maybe there are a series of other factors involved in the getting sick but what's quite clear is that the removal has not resulted in anything good.

There's some questions about price. What's absolutely without question is that there's a marked - and you can find quotes from publishers in stories about New Zealand that provisions such as sale and return are much less likely to be - and it's more difficult for publishers to engage in that which puts a risk of diversity back on to the bookshops, which is probably part of the explanation for the Nielsen book data figures which demonstrate that the range of titles has diminished. That's kind of where I think the onus is on New Zealand.

In terms of how did the Australian industry flourish, the account that I have from members of our association who have been involved in managing enterprises in the Australian industry for a very long time, is that the key transition was actually the creation of an Australian right. If you go back a long time, then Australia was often only packaged as part of a Commonwealth right and that made it very difficult. It was in that context that many of the rights or titles which were unavailable to consumers here, and I remember the frustrations as a consumer myself, were held by publishers who had Commonwealth rights and who were relatively uninterested in the efforts needed to serve a small part of that market for some time. So the window for Australia came later.

The account that I have, as I say, from managers with very long standing is that after big industry campaigns on their part and bashing up the people from the UK to separate out a clear purchasable Australian right, that was a transforming moment in the history of the industry.

MR COPPEL: When did that happen?

MR GORDON-SMITH: It would be prudent of me to say I could get some advice for you on that, rather than to take a guess, but I'm happy to do that.

MR COPPEL: Thank you.

MR GORDON-SMITH: You would like that?

MR COPPEL: If you have an idea. I mean we can look it up.

MR GORDON-SMITH: No, I'm afraid I don't. I would be guessing but that's certainly the account of the history of the industry from the point of view of people who've managed it for longer.

MS CHESTER: Maybe we could turn to our draft recommendations around fair use and we're certainly not the first independent agency to recommend an Australian view for fair deal and to fair use; there's been a number of precursor reports that have done that. I guess what perhaps we did was try to bring a bit of an economic framework to the relative merit of the fair use system and I guess what we're seeking to do there is to actually inject greater predictability by allowing adaptability and technology for neutrality within the copyright system as it applies to exceptions.

I guess two questions, Michael. The first is a lot of folk are arguing that fair use is intrinsically more uncertain than fair deal and yet we've received evidence to suggest that the converse is true. Secondly, a lot of people have portrayed, unfairly so, that fair use is a free-for-all. It's not; it's really just trying to take fair dealing and turn it into fairness factors that would be principal-based legislations as opposed to a prescriptive exclusion legislation. So good to get a sense of what you would see as potentially non-remunerable under fair use that would have been remunerable under fair dealing.

MR GORDON-SMITH: I think the really big concern here is the education one. I think that if you read at the draft stage rather than the final stage of the Law Reform Commission report and I'm not sure which other competitive bodies you're referring to, but if you look at the

proposals at that kind of stage, then I think the reasonable concern of people who are engaged in the business of publishing books and particularly publishing books for an educational market, is that the educational right or the expansion of the educational right really doesn't dramatically change the amount of flexibility that is open to educational institutions now. What it does is to remove any of the other side of the fairness which is equitable remuneration, and that it is likely that - and again, there may be different accounts of exactly what factors were at stake, but I don't think the facts of what happened and when are in dispute. If you look at what happened in Canada as a result of the expansion of educational use right and the amount of money that was paid to educational publishers fell up to, so that the fundamental concern about educational publishers is that the assurances about leakage being prevented and money continuing to be paid, we had little of.

MS CHESTER: Canada is probably a good reason why you could take some comfort from a link from fair deal and fair use in Australia because they're distinctly for two reasons. I think firstly that Canada actually doesn't have a fair use, it's a fair dealing system. But dissimilar to our recommendations where we do move to fair use, we have no recommendations that would change the current statutory licensing provisions and those systems would still remain in place and work in parallel with fair use, whereas in Canada that was not the case.

I also do note that the challenges that the Canadian textbook publishing industry faced are those issues had commenced way before those changes as well. So there is quite a long history there, but I think that the key point is that there is no real parallel between what happened in Canada. It was fair dealing and there was a change to removal of statutory licensing arrangements, whereas here it's fair use and in parallel. We haven't recommended any changes to the current educational statutory licensing arrangements. I'm still trying to struggle with what would not be remunerable under fair use with statutory licensing today that it would be at the moment.

I guess the other question then is you mentioned before that there would be a departure from the equitable benchmark. If you could elaborate on what that equitable benchmark is and what underpins it.

MR GORDON-SMITH: Sorry, I don't - - -

MS CHESTER: You mentioned before that moving to fair use, in conjunction with the licensing provisions, would result in a departure from the equitable benchmark of remuneration. I'm just trying to work out what that equitable benchmark is.

MR GORDON-SMITH: I think I said equitable remuneration. So the provision at the moment under the statutory licence is for the uses that are covered by fair dealing provisions to be matched by some equitable remuneration. That's the phrase and that's the money that is paid.

MS CHESTER: Equitable remuneration being equitable from the perspective of the licensee and the licenser?

MR GORDON-SMITH: No, it is negotiated and ultimately subject to settlement by the right tribunal, but the phrase in the Act in the same way as I might say to you fair in the context of the user or of the creator, the phrase in the Act is equitable remuneration.

MS CHESTER: Obviously what is equitable is informed by fair dealing at present from how you just described how that works.

MR GORDON-SMITH: Yes.

MS CHESTER: Whereas going forward, what would be equitable would be informed by fair use, which kind of takes me back to my original question, what would be the difference? What would be non-remunerable with a move to fair use?

MR GORDON-SMITH: Let me ask that question the other way around. What uses would be available to an educational institution under fair use that are not currently available under the existing provisions and compensated by the equitable remuneration.

MS CHESTER: Sorry, I was asking a question of you, Michael, and it would be good if I could get an answer. You have very grave concerns about what's going to happen to educational textbooks in a fair use along with statutory licensing. I'm trying to get an answer of what's underpinning those concerns.

MR GORDON-SMITH: My understanding is that it to some extent as evidenced in the conversation at the round table the other day, that the introduction of fair use provisions would add a high level of uncertainty and encourage the view that a number of uses which are currently enjoyed and compensated for by equitable remuneration ought not to be subject to any requirement for remuneration. That equitable remuneration is not judged on a specific use by specific use but rather in an aggregate way and it seems from the evidence of the behaviour of institutions in other jurisdictions and from the extent of conversations that have happened in this area over the last number of years, that it is likely that there would be

a reduction in the preparedness and review about what the quotient of equitable remuneration ought to be.

MR COPPEL: Supposing there is none and you had coexisting statutory education licence and fair use?

MR GORDON-SMITH: Were there to be a guarantee that there would be no change to the remuneration from existing users by educational institutions, then I think that if that guarantee were dependable, then I think that it would greatly reduce the level of anxiety on the part of creators and publishers.

MR COPPEL: I don't think you can give a guarantee as to what would happen going forward under fair use or under fair dealing, but I'm just putting to you when you have coexisting statutory education licence and fair use, there's this question of what - I mean this is essentially the same question - what is currently remunerable that would not be remunerable.

MR GORDON-SMITH: I think most of the uses under fair use. I think the copying of chunks of the work.

MR COPPEL: As proposed, based on the fairness factors in the draft report or does it presumably hinge on the fairness factors and the illustrative uses?

MR GORDON-SMITH: It would be better for the detail of this to seek some details from the copyright agency who are responsible for the collection of data and would be far more familiar with the precision of the specific uses. But broadly speaking, the uses that are now regarded as allowed in return for an overall payment would under a fair-use scheme be regarded as non-remunerable. That's the concern.

MR COPPEL: I'm just trying to get a sense of the orders of magnitude and I think this is one of the areas where the Ernst & Young report that the Department of Communications have commissioned and hopefully will be in the public domain before the final report is released, because it could be something that we would be able to draw on and use in the context of finalising the draft report.

One of the other issues that's been put forward in the context of fair use, and I'm not sure if you're in a position to comment on this, relates to the transition from fair dealing to fair use. It can be the source itself of uncertainty and that this could itself be a factor that may ironically maybe even strengthen the educational licence because it does provide certainty. Payment is made. You've got a good sense that the use of the material

would be legal. Whereas in a new environment of fair use, it'll be uncertainty as to whether it really is fair use of not and in that context you may take a very conservative approach to an assessment as to whether it's fair use of something which requires payment.

To limit those areas of uncertainty, we've made a number of recommendations within the context of fair use that tries to provide more guidance to reduce that level of uncertainty, or provide greater predictability is probably a better way of putting it. So things like an object clause, a list of illustrative uses and guidance are designed to reduce that transitional uncertainty that may be created from a shift of that kind. I'm interested if you've got any views on those measures and whether you think they would be effective or alternative ways in which a transition could be managed.

MR GORDON-SMITH: The short answer to that is no. I don't quite understand when you say strengthening the educational licence, whether you are talking - - -

MR COPPEL: Strengthen the use. I mean it could possibly lead to people - our view is that it will remain statutory education licence and there could be uses of copyright material that are considered fair use. People may just simply opt to say a statutory licence covers this material. We're happy with this. It provides a certainty and will continue.

MR GORDON-SMITH: As opposed to? What might they do if not that?

MR COPPEL: As opposed to the concern that you have that with fair use we were paying for these materials. We now think they're fair use and we don't need to pay for them anymore. We're always trying to get the degree to which copyright material that is currently remunerable would no longer be remunerable in an environment of fair use and that will obviously depend on how the fairness factors and the illustrative uses are defined.

MR GORDON-SMITH: Yes, and it seems to me that if there is no substantial increase in flexibility, then what's the need for the change in the area of education. What's the problem being solved?

MR COPPEL: The issues with the fair dealing arrangements, or the Copyright Act more broadly speaking, is it's a prescriptive text and it's a sector that has been the subject of great technological innovations and each time there is a technological innovation, the Act needs to be updated to remove - - -

MR GORDON-SMITH: Can you remove the educational licence?

MR COPPEL: No, I'm talking about - - -

MR GORDON-SMITH: No, I understand that. So it seems to me that the educational licence is in a sense (indistinct) off, that the big concern or the big worry about the introduction of fair use, apart from concerns about leakage, is the implications of changing the educational licence.

MR COPPEL: That's precisely the reason why we say that Canada isn't a good example to look to because we have no material changes to the education licence in the draft report.

MR GORDON-SMITH: Except to the extent that it's covered by fair use.

MS CHESTER: You're right.

MR COPPEL: Exactly, and you're talking about leakage. What is the leakage?

MR GORDON-SMITH: I mean it seems to me that if there is no change then we need no change and the situation at the moment provides all the flexibility that educational institutions require to be able to use materials in the course of their endeavours, compensated for by equitable remuneration.

MR COPPEL: No change to what? To the statutory licence?

MR GORDON-SMITH: To that package of that kind of that kind of accommodation.

MS CHESTER: We're saying that the infrastructure of the statutory licensing arrangements would stay in place but as you rightly pointed out before, Michael, how those negotiations are entered into are informed by the copyright exceptions.

MR GORDON-SMITH: Yes.

MS CHESTER: Indeed the way statutory licensing works at the moment is equitable remuneration based on fair dealing. It would then be equitable remuneration based on fair use. So the two go hand in hand.

MR GORDON-SMITH: We've probably reached the end of where we can have this conversation. It seems to me that the biggest change, that there is no increase in the amount of flexibility that educational institutions have to use material. The big change is the extent to which there is fairness given to the creators of the material that is being used and the extent to which all of those uses are remunerated through the system of equitable remuneration that exists through the statutory licence.

MS CHESTER: One of the other issues that's become a bit of an emerging theme in our report, Michael, is governance, governance as it relates to the policy settings for intellectual property arrangements more broadly. But separately also the governance arrangements around the collection agencies and that's been an issue that's come up in our submissions and also in some of the public hearings that we've had to date. Given the folk that you represent, and effectively at the end of the day the collection agencies are collecting money to go through to authors, the royalties of the folk that your publishers represent, it would be good to see if there are any issues from a governance perspective around the code of conduct that applies to the collection agencies from the perspective of publishers, given that they are representing the interests of authors ultimately.

MR GORDON-SMITH: We don't have any current issues. You've asked two questions. One is a kind of value question about intellectual property. I guess I have a lingering concern, and it crystallised to some extent by the report, that I think there are some profound differences between the operation of patent law and copyright law, and that perhaps slightly to the detriment of copyright policy, to be seen as a part of an overarching intellectual property regime where there are so many really quite profound differences. But really the machinery of government question, it's not something on which we've got a strong view.

As to the governance arrangements of the collecting societies, I think that at the moment they've got more or less transparent - or to the extent that I'm talking about the copyright agency. Although I did previously serve as a director of what was then called the Audio Visual Copyright Society, so I am passingly familiar with it. I'm not at the moment. We don't have any issues about the way in which those institutions are managed. They are more or less transparent to their members. They put a high level of effort into continued communication with their members about what they're doing and the amount of distributions there are that we appoint. Our association appoints two directors to the board of a copyright agency. There are also members that are elected directly by published members of the copyright agency. I don't have any useful comments for you on the code.

MS CHESTER: Thank you. That's it. Thank you very much, Michael.

MR COPPEL: Thank you.

MS CHESTER: I'd like to ask our next participant to join us, Terri Winter from top3 by design. Just take a moment to make yourself comfortable there. Is that a designer water bottle?

MS WINTER: It might be.

MS CHESTER: There's no recording devices allowed.

MS WINTER: Isn't there? Thank you.

MR COPPEL: But there will be a transcript.

MS WINTER: I've just printed those just as a visual aid for what we're talking about. I hope that it's come up in previous hearings but I thought it might be nice to you to give an idea of the extent.

MS CHESTER: Terri, thanks for joining us this afternoon and thanks for your post-draft report submission to our inquiry. If you wouldn't mind just stating your name and the organisation that you represent, just for the purposes of our transcript recording, and then please feel free to make some brief opening remarks.

MS WINTER: Thank you and thank you very much for having me. I appreciate it. My name is Terri Winter. I'm from top3 by design. I'm a retail business trading in authentic original design. Although I am speaking obviously from my own experience at the moment, I have been given a broad amount of experience and case studies from a lot of other retailers in my position. So I think a lot of my references will also be broadly aimed at the retail industry in general.

Top3 by design, we've been going for 15 years, so I've seen quite a few changes in the industry in working with Australian designers and international designers. We carry up to three products by category and they're the best in the world by a merit of design. So design innovation, authenticity, originality are all really key parts of our criteria of the business. At the moment we currently represent over 237 designers from 260 brands with over 4000 products. At the moment, 68 of those are Australian designers. It's quite pertinent that I meet - there's probably most designers in this country that I've come across at some point. I am also a judge on the Australian International Design Awards and the

Discover Design Awards in Chicago as well, so I also get to meet designers and other retailers around the world.

I believe you've already read the submission so I am not going to go into all of that; that's fine. My key points I wanted to echo today were: (1) Designers losing the chance to sell their original work due to the prevalence of copies and replicas, which we'll cover. (2) Customer confusion regarding originals and what an original and what a replica is. (3) Fakes and replica are intentionally creating consumer confusion to their own advantage and the current IP laws allowing and even facilitating them to do so. (4) The perception that original design is expensive is often brought up and I'd like to cover that. (5) The notion that cheaper alternatives are in the interest of consumers is often shown as an argument for that. (6) Fakes hinder the availability of affordable, original design.

These are all things that I'd like to cover. Ultimately, I'd like to overarchingly discuss why it's become commonplace and culturally a point of view in Australia that we have a right to a cheap version of something that exists, so I'd like to cover that off. I don't know that that's something that needs to be addressed as an overarching concern in general.

The designers are losing their chance to sell their original due to the prevalence of copies. As a buyer, I have to select products from many, many on the market and globally you've obviously got access to more and more than we ever did before. I have to make my decisions and my selections on whatever the stock is based on a series of decisions about viability. Increasingly over the last few years, it's become more and more concerning to me that one of those key decisions is whether the product is easily able to be copied or in fact is already copied too heavily in the market, which would affect its viability for sales. I think it's grossly unfair that the original designer will be knocked back by retailers because of the fact that there's a knock off of their product. They don't have the chance to be able to get their product into the market in the first place because of a risk factor that me as a retailer and other retailers need to avoid to be financially viable.

I discovered recently that I was the last remaining stockist of actually three different young brands in Australia and the product had actually performed quite well for me and I was quite surprised. When I raised this with them, they said that really I was the only remaining retailer because all the others had decided that it was too hard and that it's too easy for customers to get fakes and they're frightened they're buying something else. In fact, several of them were buying the copy. One of the difficult things is that it's really my personal passion for original design that makes

me persevere with that because financially there is an impact and that's an impact not only on my business but the whole chain and the original designers themselves.

When an authorised replica is produced, original designers don't receive a single cent so the word "replica" tends to indicate that there's some form of endorsement and I think that that's become one of the difficulties. I am attaching it in my replica a bit later as well because I think that's the key problem here, as well as knock offs. When I talk about "replica" and "knock off", I am talking about unauthorised versions of work and to me they're both the same. In fact, the word "replica" tends to even insinuate endorsement and from a lot of consumer perspectives, I think they believe it is an endorsement, when realistically it's not at all. It almost gives them more rights than a knock off because they utilise the real buyer. They utilise the designers' profiles and photos and things on the website. There are a couple of designers here that have experienced that first hand.

I'm going to let the designers probably sum up a lot of their issues mainly with that type of thing because I think they can cover that off themselves. Recently one designer said to me and I thought this was worth quoting, "I design 15 or so new products at a time. I'll spend years and a lot of money on those products at times. Some work, some don't, and then the big brands and now some small individuals too, come along and pick out the ones that they love most and rip them off. They've got a large Instagram following, so it's a double-edged sword for these designers these days. It gives them a lot of exposure but it gives them a lot of exposure, so it's a problem. He said, "I am now just a product tester for large companies; I just don't get paid for it". So it's a huge problem and his product or their products won't ever get a chance.

Then there's the whole aspect of the fact that the design and registration won't allow it in the public domain first, so they can't even have a chance to do product testing on a product either because they have to then attempt to register all 15, without then having the opportunity to gain feedback, to do product testing and to make modifications. If they don't register it, they really are letting themselves open to those risks. If they take the time to finesse their product and the time to get it right, the rip off will hit the market before they will. That's where it falls into the problem that me as a buyer already knowing about the product actually before it even existed, through a rip off.

There's a customer confusion about originals as well; replica is only part of that. A lot of my customers are very educated in design. A lot of them are architects or interior designers; they're stylists. We've had many

instances where these customers come in and they'll ask for a knock off version of a product. We had a customer come in to our Melbourne store actually - we've got two Melbourne and two Sydney stores, as well as online - they wanted a yellow version of this bottle. They don't make a yellow version of this bottle but there is a rip off that has yellow, pink, blue, green, whatever you like. The customer was adamant that it was a real one. There's actually a couple of pictures of the knock off and real one there in that stuff I gave you. She actually became irate with my staff member, accusing her of not having product knowledge, telling her that she should know her products better. She "expected more from a business like ours", and made her call me to prove to this staff member of mine that she was stupid.

So, of course, they called me. I spoke to the customer and I had to explain that in fact she was looking for a knock off and she was really embarrassed and she was really confused. She was argumentative and upset because she was so embarrassed. I do think a lot of the time that's what happens with the customer confusion. It's not intentional. Then they get scared to ask and now there's this confusion about whether something is original or not and people feel uneducated and they don't want to ask. We have people come into our store now asking if a chair is an original or not, because they have to ask these days. I think that that's what's really distressing for me.

We've had a lot of similar instances on our live chat service and our phone. Just last week actually my customer service girl, Michelle, was verbally abused by a customer on the phone. It was a similar situation. She couldn't find the product she was looking for on the website and the version that she was after and got upset once again that she was told that the product she was looking for was a knock off. She actually hung up the phone. She would have gone and found out later on that we were right, but in the meantime that is creating angst and no one's winning out of that.

I read a blog post actually last night about a very famous Danish chair, which everyone would know, that they didn't know what all the fuss was about because it's really not very comfortable. They sat on that chair in Matt Blatt in a replica store. So they're judging the original piece of furniture based on how uncomfortable the rip off was. That's a genuine consumer comment. Most of our customers can be more educated and people in the design industry are more educated but no one can know everything and the general consumer is not going to know everything. They shouldn't have to be knowledgeable to be able to make those informed choices. It's like replica has become a genre. It's like going to buy vintage. It's not a dirty word to anyone outside the design industry

and I think that that's culturally becoming more and more of a sticking point.

I think that's where people in the UK realised as well how damaging that aspect of enabling someone to label something a replica and giving it rights was such a downward economic spiral. If there's no original design left, there's nothing left to copy and I think as an innovative nation of inventors, we're proud of that. I think that it's unfortunate that we're stifling that and confusing customers at the same time. We had a customer come in to one of our stores actually asking for some product designed by Matt Blatt. He's just one of the replicas but he's the replica agent but he's the most renowned and has positioned himself as a name that people refer to as a designer. The perception that original design is expensive and that designers are ripping everyone off is something I commonly hear.

My sister warned me herself before I went over for a dinner party a year or two ago that she'd bought some replica chairs. She thought I'd better know before I turned up for dinner. When I talked to her at length about that, it was about the fact that she had a budget. Her husband particularly said, "You can't spend more than this". She couldn't find any chairs. She found one she liked the look of and then she went to go and look for it but she didn't know what it all meant. She didn't understand the repercussions of buying a replica. Her attitude was, "Well we can't afford it". If the replicas weren't allowed to be so easily found and easily found on search results. They're high on Google search results because they're passing off on the original designers' information and that gives them ranking. They're actually burying the original designs by being able to do that, which means that the original design is around. It's absolutely available but the general consumer just can't find it and there's no access to that because it's being buried beneath all the replica.

Original design is not expensive. In my collection I've got Australian designed $55 wine rack, an award winning potato masher for $29.95 and a garlic press for $45, and a Goodman's trivet for under $50, when it's €33 in Europe which is completely comparable. There's plenty of affordable design and I think the argument that it's expensive so therefore I've got a right to it, is just a completely invalid one. There's plenty of affordable design.

The second part of that is that designers in Australia these days are intentionally designing complex product so that they can't be ripped off. They're using expensive materials and things like that so that they can produce a product that's harder to replicate and if it is replicated it's obvious that it's crap. We've lost the aspect, like a lot of Scandinavian

countries can, to produce simple, easy design because there's no time with the design registration period to be remunerated for the tooling and things that that may involve. There's also too high a risk of being copied.

I actually even spoke to Richard from Cult, who I know spoke to you yesterday. We were talking afterwards and he mentioned to me that they actually took Adam's Molloy chair over to China to try and get it copied to see if it could be, to make sure that it can't be. Now that's a valid thing that designers are facing these days and I don't think that designers should be put in that position. They should be free to innovate and then it would bring the pricing down. If there wasn't so much replica in the market, then original design could produce more simple product. I think even if the replica companies had to find something else to do, they're still employing a - I'm not going to call them a designer as such, but a draftsperson of some sort, that is producing the rip off. Somebody does it. They could be employing younger emerging designers to be producing them real work. If they had to be put into that position, they will innovate. They'll have to innovate and they could.

MS CHESTER: Terri, I'm just conscious we might run out of time and there's a bunch of questions that we do actually want to get to, to make sure that we understand your views and your submissions.

MS WINTER: Yes, for sure.

MS CHESTER: Have you covered off all the main points?

MS WINTER: Yes, I think so. I think most of those I got to anyway. It's just mainly that folks are generally in fear of product. Designers get to test. Yes, I'm fine. You can give me some questions.

MS CHESTER: I think our questions will get us there.

MS WINTER: Yes, I think so.

MS CHESTER: **We** kind of need to unbundle what the issues are here.

MS WINTER: Yes, please.

MS CHESTER: I guess the first one is around the term of protection for design rights as they stand at the moment. As we understand it, there's the point of registration and then there's the point of certification. From the point of registration it's the five plus five.

MS WINTER: Correct.

MS CHESTER: So that gives you 10 years of protection, but you can only enforce those rights at the point of certification. I guess when you refer to unauthorised copies or replicas, this is not occurring during the period of the design protection?

MS WINTER: I am talking about living, working designers and one of the main problems that we find is that even if designers are protected, they're still being ripped off because it's expensive to legally follow that through.

MS CHESTER: That's why I am asking the question. How much of the problem is within the design protection period because then we need to better understand why enforcement of infringement is not working. Then if it's an issue of it being outside the term of protection, it then sort of becomes an issue of consumer awareness, I guess.

MS WINTER: Yes.

MS CHESTER: That's why I'm trying to sort of unbundle the term.

MR COPPEL: And if you could elaborate in terms of the cost of enforcement that's associated with the certification of the registered design and then the costs that are associated with the purely legal pursuit.

MS WINTER: I'm not going to know all the numbers and right at the beginning I don't profess to be an IP lawyer. But I know from several people that have gone through the experience, it's about $3000, give or take, to register a design. I think a few people here know that. So if they're, for instance, attempting to register 15 or so designs in case one of them is their thing, obviously they're already way on the back foot after all the costs of their original development and things in the first place.

One or two of those designs, if the designer is lucky, will be a popular or a hit product and that has to be able to cover over the other ones. It's not like they know which ones are going to be the most successful. So what one of my cost comments often are is that if they design register, is that they can't even recoup their costs before they've even produced one product. They're already behind the eight ball before they start with it. They're had manufacturing. They've had tooling. They've had prototyping, if they haven't gone that far yet.

People are able to then sit on social media or probably go to a design fair and then just pick off the one that becomes more clearly popular. Social media has accelerated this problem because it's very easy to tell

which product is getting all the likes and all the feedback from consumers. I think that's why this has suddenly popped up into the forefront so much more now. Things like Instagram are a tool to be able to just go, "Well, what's best?" These people that can rip it off haven't spent that time on 15 other products. They've just picked the one they knew worked.

There's the cost there with that that the replica companies are taking the concept without the cost structure behind it, whereas the original designer had to pay not only their time and energy. To be honest, a large amount of the designers I've spoken to are not design registered and that is twofold from what my discussions are; one, the cost of registration; two, some designers aren't the best bookkeepers in the world and that's not part of this discussion because there's nothing we can do about that. Lastly as well, it's the fact that it's complex so far as it being the fact that they need to test products. It's not something that's published and finished. A chair needs to be sat on. A carafe needs to be used and they need consumer feedback. The problem now is that they actually can't get that consumer feedback and then register it, because they can no longer register it if it's in the public domain. The two are the battle that the designers are facing and the two don't go together.

I quite distinctly believe that design protection should fall under a normal copyright pretence, where it's about there's been discussion about first to market or first to product. First to market might create a race to throw it to the market and the person spending a lot of time in R & D. So I think that has its issues too. First ownership of a concept and idea and that being registered, I think that the fact that whether it's in the public domain first or not should certainly not be part of that equation because it actually hinders innovation. I think that's probably my big concern with that design registration process.

MS CHESTER: There's two issues there that you raise then. Firstly, there's kind of like this period of grace to allow the product design to settle down after market testing, without jeopardising or the clock starts ticking on the design protection period. That's kind of issue number one.

MS WITNER: Yes.

MS CHESTER: Then the other issue is, I guess, the term of protection. I guess from your experience in the industry, Terri, and I know there'll be a huge range, but within original design space, so looking at those that have been successful and not so successful, what's kind of like the average commercial life? And commercial life in terms of still making a real commercial return on that item?

MS WINTER: I've got several Australian products in my collection that we've had since we started 15 years ago and they're still steady. They obviously have their popularity period originally, but often that resurges when we publish it or do something with it or it gets used in a new context. That can go on and I think that that debate about where it has a commercial life is not necessarily the point. I don't see why anyone has the right to take someone's idea because they don't get the chance of another round of appreciation or resurgence and things like that. My dad's a builder. He built our family home. After 15 years no one's got the right to come and take that from us and keep that value. A designer's stuff is not as tangible. It's not as physical as a house but it's just as real. Just because there's a commercial right, there are other options available to people. I don't see why a timeframe realistically - I know ultimately there probably has to be one, but I don't think the debate of a timeframe of 10 years or 15 years at all is the point here at all. A designer's tangible asset is their IP and yet in another industry that seems to be obvious to everybody, but I think that people seem to miss that point with designers and think that they just draw pretty stuff.

MS CHESTER: I think what we're trying to do though is we've got to balance the interests of periods of exclusivity to return the creative endeavours of the designer.

MS WINTER: Yes.

MS CHESTER: But across the whole intellectual property arrangements, terms range from sort of five years through to life plus 70 years. You should have been authors, guys, life plus 70 years for authors under copyright.

MS WINTER: I do think that there is that aspect of an entire career choice. You're raising a family, you have children, and I don't understand where this isn't that right to be able to pass that value of your work that you've done even to your children, even if it's outdated by that span.

MS CHESTER: Is there anything kind of unique about the Australian legal or legislative settings that change the dynamic for replicas coming to market here. If we set aside the issue of what's a pure, as I understand it, infringement of a designer's right. If it's during that period of five plus five, then that's an infringement; it's an enforcement issue.

MS WINTER: Yes.

MS CHESTER: Beyond the 10 years, is there something peculiar about the Australian legislation that changes the dynamic for replicas?

MS WINTER: Yes, I think it's largely cultural. It's this aspect that we have a right to it, but I think that's also because enforcement has been complex in Australia because of the large grey areas. I think that if there was a really succinct policy in place, the grey areas wouldn't allow people to get away with things. So I think here it's become a cultural aspect of the fact, "Well they can get away with it, so other people can get away with it", and the whole thing has snowballed. Suddenly everyone has gone, "What happened?" We are largely becoming a dumping ground for the world in replica. The rest of the world has seen that this is a bad path to follow and in a moment we're going to be the only place left with it all. It's a hugely disturbing direction. It's not a viable thing to chase.

MS CHESTER: Why is it that Australia's become a dumping ground for replicas if replicas are still considered to be - - -

MS WINTER: Because they're allowed.

MS CHESTER: But only outside the design period.

MS WINTER: Not entirely.

MS CHESTER: Okay, well we'll come on to that.

MS WINTER: Maybe Richard can touch on that because from the stories I've heard and, as I've said this is all experiential based, there are plenty of designers. In fact, I reckon half of what you've got in that booklet in front of you now, they've been producing in the last year. Now some of them may or may not be under design protection. In fact, I know of several designers that actually couldn't go on the public record as part of this because they're actually in litigation. Realistically, they kind of go with the threat of litigation more than the follow through in most instances because they can't afford the time. They're small practices; they're individual designers. They can't afford that time and that cost to follow through the litigation. So they do hope that the warning letters are enough.

The other thing I've seen an increase of and I think this is using the loopholes, is companies actively doing a one-off run of a hot product. So our mainstream retailers are doing it. Our mainstream big department stores are doing it. They'll do a one-off hit of a product and it's a copy and a lot of them are in those pictures. By the time the designer sees it and actions on it and gets to it and contacts them with a letter and things, they say, "Okay, well we won't produce it any more", or "Yes, okay. Well we won't have that in production". They're knowingly doing one-

off runs of product because it is a way of avoiding that follow through, because the enforcement is an issue. Enforcement wouldn't be so complicated if the law itself wasn't so grey.

MS CHESTER: Maybe one final question on this issue of consumer confusion and I guess for some folk it's pretty obvious that there's original design and then there's replicas and they're very different things.

MS WINTER: Yes.

MS CHESTER: One source of reducing that confusion that's been suggested to us is the use of trademarks, that that's one way for consumers to distinguish between an original design or an authorised copy of an original design and a replica or an unauthorised copy. What other mechanisms do you see that the industry might avail themselves of to sort of address that uncertainty or confusion about whether something's - - -

MS WINTER: Personally I don't believe that the consumer should have to be the one to be educating themselves on whether something's an original design or not. I think that that's our job and the government's job and as a responsible body of designers, that's a job that we should all be doing for the consumer. They can't be versed in every kind of their area of design and just muddying up the term "replica" and allowing replica over short periods of time, so within somebody's lifetime. If we talk about the time period, 10 years does mean that - there are designers in this room that have their first work now out of that 10 year period, regardless of whether they registered or not. They now have the replicas coming out now, while in many cases they're actually just starting their career if they've been lucky enough to do that. Some of those products could have been done very early on in their career and 15 years and 10 years' protection is not very long. It's very easy for 15 years down the track. If anything, if that designer does become well known and established, those early works are definitely prey for the replica industry because of course they are.

MS CHESTER: You mentioned the industry needs to do something to help consumers with confusion and you also mentioned government. I'm kind of struggling to see what we can do with the intellectual property arrangements to address consumer confusion, given there are design rights and there are trademarks. Is there something else that you've got in mind?

MS WINTER: I think it's unusual that there's a separate design-rights process at all. I think that people should have ownership of their own ideas regardless. I mean you don't have to design register something that you've built and created and lived in for someone to have the right to

come and take it off you. I think that that's my main point there about that.

MR COPPEL: Are you arguing there should be no term, that it should be indefinite.

MS WINTER: No. I think it should fall under automatic copyright. If someone's created something, they own it. I think that that should be extended. I think I've pointed out on several of these things here, I would be very in favour of an expert panel being put together to have a look at the mistakes and the wins that other countries overseas have achieved in this area and to assess moving forward and the next step. I don't think that it should be a series of individuals that are informed in some areas and not others, making that final decision without a roundtable discussion on the pros and cons. In this kind of environment here, I am sure there are many people here that have felt that there are many moments that they could have interjected to either back up or clarify something I've said and they're not able to. So I think an expert panel situation would create a proper way forward. I'm not attempting to even sit here for one moment saying I know what the answer is. But I know that at the moment, the livelihoods of people, they're moving overseas.

MS CHESTER: One of the advantages of our inquiry process is we can try to gather the threads, even though it's still post draft report, getting evidence through public hearings and post-draft submissions.

MS WINTER: I know and that's exactly my point.

MR COPPEL: Can I just ask you, you've talked about as one option copyright being the model for registered tool for design. Can I talk about or ask you about the actual registration process as it is? Are there changes there in terms of fees or timing?

MS WINTER: I think I've covered that already. I am not an industrial designer myself and I haven't registered something personally. I think that the fact that they can't put it into the marketplace first in any way, shape or form I've already covered off. It is the fact that I think that that negates the whole merit of the system in the first place and I think that the timeframe is far too short.

MR COPPEL: Okay.

MS CHESTER: Great. Thanks very much, Terri.

MS WINTER: No problem. Thank you very much for your time.

MS CHESTER: What do we call the collective for a cluster of designers? I'd like to call three designers to come and join us: Adam Goodrum, Tom Skeehan and Tom Fereday. Welcome and thanks for joining us this afternoon. We were able to listen to some of your colleagues in Sydney yesterday. If you could each just respectively state your name and who you represent or if there's a firm name behind you, for the purposes of our transcript recording, and then if you'd each like to take a couple of minutes just to make some opening remarks, that would be welcome.

MR GOODRUM: My name is Adam Goodrum. I am an independent designer based in Sydney. I work with local manufacturers. I also work with international manufacturers and I also work at University of Technology in the design department.

MS CHESTER: Thank you.

MR FEREDAY: My name is Tom Fereday. I'm an independent designer from Sydney as well and I also develop products for manufacturers distributed in Australia and Asia Pacific and are predominantly made in Australia.

MR SKEEHAN: My name's Tom Skeehan. I'm a Canberra-based furniture designer. I also teach here at the University of Canberra and a design studio. I'm focusing on furniture design and distribution in Australia.

MS CHESTER: Thank you. Did one of you or all three of you want to make any opening remarks about the issues you wanted to bring to our attention?

MR GOODRUM: Yes. I'm just going to I guess make a bit of a holistic comment about the designer base in Australia and then I think more individually we might have some comments. I'd like to start with a quote from Anne-Maree Sargeant. "There's never been a better or worse time for Design Australia".

In 2006 there are approximately 4000 companies listed as furniture manufacturers in Australia. That has declined substantially. Of those left, fewer than 50 are design-led. From my point of view, it doesn't support design to the level that warrants international attention. For many years I trekked off to Milan to find manufacturing deals with companies who put the designer at the forefront of their business model. There are two central figures that most enable design-led companies: the entrepreneur

manufacturer and the designer. You cannot have Alessi, Cassina or Herman Miller without the combination.

After the financial crisis, my career pivoted back to Australia. My studio is now largely supported by investment from local design entrepreneurs. Companies such as Cult and which Richard Munao, the owner, is here today. He spoke yesterday. Tate, which is a company based in Melbourne and Broached Commissions. A major incentive for local manufacturers to distinguish themselves by investing in new design is the legal protection of that investment of the IP. Without that, it's hard to build a commercial model around the investment in new design.

Sydney, along with places like Bilbao and, more recently, Hobart, are cities that know the power of architecture. The Opera House, the Guggenheim and MONA have all transformed the image of the city in which they reside, yet a lot of what gets built in our cities is filled with copied furniture. Australia has for a long time understood its strengths: great outdoors, a relaxed, safe urban life, beautiful fresh food and wines, but we must keep inventing what makes our vision of these experiences distinct. We cannot rest on the existing reputation. Designers update the story of daily life with objects, furniture, indeed entire buildings that come to define the best version of the present.

I have recently started working at an Australian company, Cult. Cult is primarily known as a distributor of quality European brands but also a great supporter of Australian design. A few years ago they approached me to design their first in-house collection. It has this month expanded to a 50-page catalogue, which I think you have. We're ready to take orders afterwards.

Our products are being placed in buildings and homes throughout Australia. Our timber factory has doubled its staff in a year and a half. We are stimulating local industry. By commissioning local design, we are building our creative industries and encouraging others. Secondly, commissioning local design encourages the pressure on local designers to develop the Australian design vernacular, a sensibility to enhance our culture and something we can sell to the rest of the world.

The entrepreneur who invests in new design takes a big risk. They must walk the tightrope between creating what is desired and what is unexpected between the known and the unknown. In doing this successfully, the entrepreneur delivers product that is exciting rather than banal. This is a real skill, one that has elevated the great fashion and furniture houses of Europe, Japan and America. For that risk to be worth it in the investment for me and Cult, it needs to be protected. Without that

legislative protection, fewer entrepreneurs will enter the space. It can take four years for a collection to move from sketch design to the design showroom floor and can take a further three years for the momentum in the market to build. That's a seven-year turnaround and then the legislation only protects the product for another three years.

The 10-year protection is clearly not an accurate representation of the amount of work done to achieve profitability. It does not reward the risk taken. Real innovation takes time. Where is the incentive to invest in expensive, clever technologies and production to bring down the price point of a product, if in 10 years your product can be legally copied? The reward for it needs to be longer than the law currently allows. If the Australian government wants a more profitable manufacturing sector, enabling longer IP protection and creating incentives for investment in design would be a good start.

Making illegal replica furniture will hopefully shift the accepted culture of stealing ideas. Architects and interior designers are now pushing retailers to provide Australian-made options. The persistent strength of the Australian economy gave local entrepreneurs the courage to expand existing or create new locally-made furniture collections. Australians are obsessed with creating new homes with eating out and outdoor activities. These are all experiences that require furnishings. We need to transform the appetite into a much larger competitive market for intelligent design-led manufacturing. We need more of those listed furniture manufacturers to step up to be innovative, design-led manufacturers.

Whilst my career has started to prosper from the activities of a few local entrepreneurs, this will not widen until the IP loopholes are tightened and the parasites are flicked off the back of these genuine innovators. Designers and entrepreneurs can define the future experience of Australia's built environment: sustainable, prosperous and easy-going, but never cliché. Only ongoing investment at every level of the society from government to business to the consumer will allow this to happen.

MS CHESTER: Thank you. Did either of you want to make any other opening remarks?

MR FEREDAY: Yes, I mean maybe I could just put some perspective from my point of view. I'm an independent designer which means I have to invest and develop prototypes and products which involves large capital before I can have any potential of a distributor or a financial return on the product. So I take a very long period of time to develop products. It's generally up to around two years to a product. In that stage, I've got no

protection for my designs. Dealing in a tangible industry, I have to get feedback on a design and present it to someone, (a) for them to consider selling it as a distributor, or (b) for someone to actually want to buy it say directly. In both those cases, if my product's not registered then I fall into the line of being copied.

So it's a very difficult industry, unlike say the arts industry where you're somewhat presenting a finished product. It takes us what may look to be the same product, even after that development time, many years to refine and get it critical to production. So all of that investment and IP can be what is most commonly just directly copied from a physical sample and we don't have any protection for that or what you call "grace period". For me, that's the critical area as an independent designer. In other countries that exists.

The other point is that long term our protection falls short compared to other industries and other countries. So the 10 years, as Adam said, is for myself, I consider myself an emerging designer but I've been in the industry for 10 years and that means that every time a product I could launch, if I run on an operation of getting a royalty basis, I could be constantly chasing my tail where I'd have to continuously launch product to generate, rather than a growth of income over time. So for me it's a really challenging point that isn't covered in this industry. The fact that it is so easy in this country, compared to others, to do a replica and to term it a replica is really challenging for us.

MS CHESTER: Thank you.

MR SKEEHAN: Yes, and to follow on what Tom said, I'm in a very similar sort of position. My concerns are around that grace period and allowing me to protect a product as an idea early on and get that feedback from industry and consumers and test it. Then that way I can justify the large personal capital investment in getting that product to market.

MR GOODRUM: In regards a little bit as to what you were asking Terri as well, we're not endeavouring to make trendy products that have a use-by date. We're endeavouring to make timeless products that people want to purchase and will last a really long time. So it's obviously in our best interest not to do a trendy product that will only have a five-year life span but to create products here that have longevity.

MS CHESTER: Yes, and the challenge that we've got is the way the intellectual property arrangements work and how we're bound by international agreements and such that you don't differentiate with design rules or registration processes and the term of protection, and similarly

with copyright. For us it's trying to understand is the term of protection afforded designers today appropriate. One underlying piece of evidence we try to have a look at is what's the typical commercial life, knowing that we're dealing with a vast spectrum of designs.

MR GOODRUM: I guess then maybe it's interesting to look at the amazing design houses of the world, such as Denmark, and their most iconic chairs from the 1960s and so forth that are still purchased very strongly, and unfortunately are ripped off so heavily as well.

MS CHESTER: I guess we have to get the balancing act right between granting a period of exclusivity to reward innovation and to actually getting an appropriate return on it, but not making that period of exclusivity too long such that other following innovations can't occur or people can then - - -

MR GOODRUM: But why should that stifle more innovation? I think only that encourages innovation because you're trying to innovate for a product that's going to last a long time. I don't understand why.

MS CHESTER: No. So you're just trying to get that balance right to make sure that the incentives that you face are appropriate to encourage you to keep doing what you're doing but that the period of exclusivity doesn't go too long.

MR GOODRUM: But what would be the negative side of that? I don't understand. If it's a long time, what's the negative part of that?

MS CHESTER: Well so a couple of things. So then firstly people can't leverage off your ideas and effectively do unauthorised copies or follow on - - -

MR GOODRUM: Why should that be? I don't understand. What's the positive side of that?

MS CHESTER: With a period of exclusivity comes a pricing benefit that you can sort of have control over what comes to market. So it is a balancing act. Maybe if we can come back to better understanding the two or three key issues that you've raised, the first one being around the concept of a grace period or the like. It would be good if you could point us to some examples in international jurisdictions. I know yesterday we touched on some recent policy changes in the UK, but if you can point us to other jurisdictions and practices where you think that the policy has catered better for that.

MR GOODRUM: Sorry, if I could comment. Places that have a culture of design, like Denmark, like Italy, in which there is a component which is a pure copyright thing that once you design something you have ownership of it. I think that has created a culture in which the innovation and designers absolutely inform their business which they've sold to the rest of the world. So it's obviously got to be working in some sense. Then I think that the - - -

MS CHESTER: So it's become part of the copyright system, as opposed to a separate design right, and that's what addresses this issue of you don't need a period of grace because you've got the right as soon as you've commenced the design.

MR GOODRUM: That you have some ownership of it and you know someone's not going to take it, yes.

MR COPPEL: How does that stop someone copying a design which is a UK design, treat it like copyright you say, making a copy and selling it in another jurisdiction?

MR GOODRUM: That's the whole incredibly challenging thing for people who represent those companies here. That's the challenging part of it for sure and a little bit I think what Terri was touching on. Because it is accepted, it's become this cultural thing that it is okay to do which has sort of integrated into every part of society. So it's got to be that change of mind set for culture that you can't be doing that.

MR FEREDAY: I'm not opposed to design registration in any way. So as an independent designer, I've done it in the past for other companies and on a very few occasions myself. But what a grace period allows for is a period to test to actually work it if you can actually afford to develop this product. The current fees for design registration I think would be one of the first ports to address. So as an independent designer, the cost is inhibitive and as such it's something I can't afford to do, because you're working on a number of products and projects to cover all of those bases. It wouldn't be possible in the current way that the practices work for myself.

MR COPPEL: Do you have any ideas on how changes could be made to that design registration process and the fee structure?

MR FEREDAY: Yes. I think the ACIP acknowledged that the current fees for multiple design registrations is turning people away from offering to do it. Currently each registration is an independent fee per product. If you design register a product which has a variation, say an armchair

versus a lounge, you must register them. My understanding is that the point is is that if you have multiple products, there's no incentive to get a cost reduction to do that. The second thing is there's a very big point of difference between an independent designer and a large supplier. So for an independent artist to be able to register it, perhaps they could look at the differentiation between that.

MR COPPEL: In terms of the level of the fee?

MR FEREDAY: Potentially, yes.

MS CHESTER: So there's the registration and then there's the certification, as I understand it. It's not until you get to the certification stage that you can then enforce your rights during the design period.

MR FEREDAY: Yes.

MS CHESTER: What's the cost of the certification?

MR FEREDAY: There's each stage is done so your initial application fee, depending on how you do it, whether it's by mail or online, starts at around $250, just to lodge that you're going to do it.

MS CHESTER: Yes.

MR FEREDAY: There's then an identification fee that they must go and identify that what you're doing is original and that you can do it, another fee of around the same price. You've got then if you do want to enforce that product, I think it's at least around $420 to have it examined and prove that you can actually protect that. So the whole point as well is it's not just cost. You've got obviously a renewal fee after five years as well, which is around 320 minimum. The whole process also is very time intensive. So for people like us who have very little time as independent designers, the whole process is very convoluted and it's very challenging and so it's a big turnoff to people to actually invest the time to do it. The process is expensive and it's convoluted.

MS CHESTER: I'm just wanting to make sure that we kind of have got it right ourselves in terms of how it works with unauthorised copies versus replicas during the design protection period. I'd understood, and maybe I've got this wrong, but during the design protection period that you have of the 10 years, assuming you've gone to a register and then certified, no one can make unauthorised copies or bring replicas to market, less they're taking a risk of infringing your rights and then you can enforce against them; is that right?

MR GOODRUM: I think so, yes. I think as a small player, even with a design registration, I guess this is a bit of a different thing now. So how much value does a registration hold? Quite often against the big person he still just does things and for the small person it's a challenging thing to do. I think it comes back a little bit to that cultural thing that they think they can do it. It exists in the culture of copying the developers and so forth. They copy furniture all the time.

MS CHESTER: Is it something the government's done in terms of how the term "replica" can be used today that's contributed to this cultural issue or confusion? I'm just trying to work out what role the government has her?

MR GOODRUM: I absolutely think so. It's become a genre, as Terri was saying. It's this accepted thing that exists that it's kind of an okay thing to copy other people's furniture. Like the amount of stores that pop up, some of them are unbelievable.

MR FEREDAY: The repercussions for doing this, it's much lower in Australia than what it is say in the UK where there's a potential prison sentence. So the incentive is more encouraging by having less of a repercussion and so that obviously means that there are better potential financial risks to do it.

MS CHESTER: But in the UK it's an infringement of their rights because they're covered by copyright terms, as I understand it, whereas here in Australia during that 10-year period, assuming that you've protected your design rights, you still have enforcement options. But it would be good to get an idea as to really how they can be used and are they being used by the industry to sort of protect the design rights during that 10-year period from unauthorised copies or replicas.

MR COPPEL: Passing-off laws, for example. Passing-off laws exist and they could potentially be used to protect a design that is being copied. Trademarks potentially are another way of at least being able to identify an authentic product from a non-authentic product.

MR GOODRUM: It could help.

MS CHESTER: We're just trying to work out how much of it is an enforcement problem.

MR FEREDAY: It could make I think one really positive, it would make more of a stigma towards replica furniture and I think the word "replica"

could really be looked at and addressed at. Like in the egg industry, for example, they've changed the way that they're allowed to use terminology for what are cage eggs essentially. That could be done much stronger in the furniture industry to add a stigma to what you're purchasing, especially if it's in the short-term period. As a current designer, the word "copy" to me would be much stronger than the word "replica" or something along those lines.

MR GOODRUM: Or "fake".

MR COPPEL: When it's authorised, do you use the words "authorised copy" or just "authorised".

MR FEREDAY: The term just says "replica".

MR COPPEL: There are producers of designs that are out of the term that are being authorised in some way that are typically of a much higher price. I'm asking what the term is that's used for those products.

MR FEREDAY: An authorised supplier do you mean?

MR COPPEL: Not so much a supplier, like I thought there might be an "authorised copy".

MR GOODRUM: Or "under licence" I think would be the correct term, yes.

MR COPPEL: "Under licence."

MR GOODRUM: If Richard got an opportunity to speak, I think he'd probably be able to enlighten us on some of that.

MS CHESTER: I guess I'm still trying to work out what role for government then?

MR GOODRUM: Definitely the grace period in the time that you've got to register your design would be very, very advantageous. Then that your ownership of the registration, 10 years is definitely too short and that's got to be increased substantially.

MS CHESTER: Apart from the countries that you've mentioned in Europe, are there any other jurisdictions globally that have moved towards changing terms, understanding the need for a grace period?

MR GOODRUM: I think what was brought up yesterday with Anne-Marie, that the UK have had similar laws to us previously and have seen it as a very important thing to address, and originally saying that they were going to address these things we've talked about by 2020 and they've moved it forward and it's already in place. There's a six-month grace period at the moment that they're eliminating replica furniture. I guess England, being the Commonwealth and so forth, it's obviously - from my point of view I think that it's fantastic that they're doing that.

MS CHESTER: I hadn't assumed the Brexit vote. I was still considering them as part of Europe at the moment. So I was just wondering if there was anywhere else globally that you can point to.

MR GOODRUM: Well we obviously have problems with Asia but I think we have to lead by example as the country down here to try and change a bit of that thinking.

MS CHESTER: Is there moves afoot within the industry to try to sort of address the consumer confusion? I'm thinking of examples of when the film - - -

MR GOODRUM: I guess this is it now. We're trying to voice our concerns.

MR COPPEL: What is the grace period in the UK?

MR GOODRUM: The grace period now, as I understand it, has become two years.

MR COPPEL: Two years?

MR GOODRUM: Yes.

MR COPPEL: ACIP had a report on design a little while back and they had a recommendation to introduce a combination of a grace period with a prior-use rule. Do you have any - - -

MR GOODRUM: Can you explain that a little bit more?

MR COPPEL: Well it would be having a grace period and I think the prior-use rule is when the period at which the term of protection begins. So if you can sort of demonstrate - - -

MR GOODRUM: That it's been sold?

MR COPPEL: - - - prior to the original point of registration, that the prior use, I think, then that would be normally then considered as being a legitimate use. But if you combine that with the grace period, then it would sort of bring it back again and therefore it would not be necessarily consistent as a legitimate use of the product. So it was a way that they had come up with to address some of those issues. I'm not sure if you're familiar with that, but if you are - - -

MR GOODRUM: No, I'm sorry; I'm not familiar with that.

MS CHESTER: It would be great if you could have a look at it and see if it's workable from your perspective.

MR GOODRUM: Yes, sure.

MS CHESTER: Because I think what they were trying to do is to make sure the grace period actually really tailored to how it was used.

MR COPPEL: Yes, I think it effectively makes the effective length of term for a registered design, rather than the distinction between the legal length of term and the effective length of term.

MR GOODRUM: And the first of the public to know. Yes, we could follow up on that. It would be great to try and get a little bit more information.

MS CHESTER: That would be good because we've been given such a broad terms of reference here to cover all the intellectual property arrangements. We're more than happy to sort of leverage previous work that's been done by people like ACIP and the ALRC. So if we can get your feedback on the workability that would be really helpful, and sooner rather than later, given we've got to report to government in the not too distant future.

MR GOODRUM: Okay.

MS CHESTER: Did you have any other questions or issues?

MR COPPEL: No.

MS CHESTER: That's it for our questions. Is there anything else we haven't covered that you did want to cover off this afternoon?

MR GOODRUM: No, thank you.

MR FEREDAY: Thanks for your time.

MS CHESTER: Great. Thanks for being here this afternoon.

MR COPPEL: Thank you.

ADJOURNED **[2.57 pm]**

RESUMED **[3.09 pm]**

MS CHESTER: Okay, folks, we might resume our hearings. I understand we've got our next participant, Tomek Archer on the line; is that right?

MR ARCHER: Yes.

MS CHESTER: So, I think we met yesterday.

MR ARCHER: Yes, we did.

MS CHESTER: Terrific. So look, just for the purposes of the transcript, if you could just say your name and the organisation you represent or are associated with?

MR ARCHER: Sure. My name is Tomek Archer and I'm an architect and director of Archer Office.

MS CHESTER: Okay. Thanks very much, Tomek. I know that you did give us some initial evidence during our public hearings in Sydney yesterday, but if you'd like to take a couple of minutes now to make some opening remarks, and thank you also for your post-draft submission.

MR ARCHER: Thank you. I take it you would've read that submission?

MS CHESTER: Yes.

MR ARCHER: So I'll only provide some commentary around it. Basically, I'm an architect. I'm also a co-founder of NOMI, an Australian online furniture company. My furniture design work has been recognised with various accolades, including Australian Design Mark with the Australian International Design Awards and held – is held in collections including the permanent collection of the Art Gallery of Western

Australia. I've also previously been actively involved in the music industry as a performer and recording artist. So I just provide that as a little bit of background to some of the points that I raised in my submission.

I basically put down five points, so I'll just list those briefly. The first is that I'd like to suggest that the design industry should match the music industry model, as well as the model of writing and authorship and other creative industries such as architecture, through free copyright protection, that is intellectual property protections that do not require registration or fees to be payable. The key thing with that is that that protection is provided on creation and for free, notwithstanding the opportunity to upgrade that with various registrations.

The second point I'd like to make, or suggest, is that we should recognise the value of design with protections that match those in the UK and EU. Without being an IP lawyer, necessarily, my understanding is that the protections now afforded in the UK and EU are substantially more resilient and robust than those currently offered in Australia and in a global market. I think it's important that we benchmark our model against others that we trade with, to protect ourselves from our talent moving overseas.

The third point I'd like to make is that due to social media and all kinds of new forms of media, I think it's critical that all media platforms should be held accountable for copyright infringements that are presented on that platform. This is a complex issue that I can't probably fully comprehend, but I think that it should be something that might be considered whereby advertisers shouldn't be able to, or might potentially present guarantees to the platform that the material they're submitting as part of their advertisements are not infringing on anyone's copyright.

My fourth point was related to my personal experience and it outlines a personal experience of mine whereby I had a work of mine that was announced that it would be produced by someone else, unlicensed, and that was announced shortly after the expiry of the design registration. That design I did register at considerable expense for myself when I was 19. I was only 29 when it expired. So it was particularly disappointing, given that it actually took seven years before that piece was acquired into a collection and it actually took three years before it was given awards. I'd just like to outline that it does take quite a long time to get traction with a product, even after it's been shown publicly.

The final point in my submission was related to this conversation around substitutability. I understand it's something that is a requirement in any

free market situation. However, I think it's important to recognise the maturity of the furniture market and, just as in writing there are many ways of telling a story, there are equally many ways of telling – or designing a chair. Anyone who's very literate in design would be able to see the difference between a certain chair that's successful and the multitudes of others on the market.

So this idea that substituting a popular design with a cheaper version of the same design seems to fly in the face of all other copyright conversations that seem to happen. Just because a book isn't copyright doesn't mean you can't sell a similar story and as a result there are many, many, many books on the market as opposed to with chairs. Sometimes we see there are just so many versions of the same chair being sold as copies.

So I'd just like to start on this point about copyright. The Productivity Commission's draft report, at the top of the very first page announces its claim to copyright before listing the required attributions should it be referenced. The Australian government clearly places value on original work. These protections afforded to that document were neither registered, nor was a fee required. To suggest that the copyright protection afforded to this draft document would prevent others from saying similar things in different ways is not correct. Rather, this document makes a contribution that may inspire alternative interpretations and different conclusions that triggered this conversation, by example.

Design is a value commodity in Australia. You only have to look at social media and the volume of design media produced each week. If the Productivity Commission wishes to increase the productivity in this arena, protection of design IP should be automatic on creation so that creators can share their work openly encouraging more discussion and evolution of ideas, in the same way that it encourages the sharing of its own report, without relinquishing its claim on the IP it contains.

The fact that all published writing is protected by copyright and does not place limitations on others to communicate. It simply protects against the unauthorised publishing of someone else's work. Without IP protection the dissemination of all design is reduced to a competition for who has the biggest factory and who has the cheapest labour and if we're talking at the geo-political scale and Australia loses outright under this model.

I'd just like to flag that Anne-Maree Sargeant, who is in the room in Canberra at the moment, has documentation or evidence which she will table. One of those is the Facebook comment stream related to the

announcement of the products which I had copied. Another one is an Australian Financial Review document that listed that product as a significant work of design in Australia. There's another document from House and Garden which was published recently talking about the longevity of that design.

Then another one is a document from a website announcing the fact that Denmark has banned UK sites that are selling replicas from being available to be seen in Denmark. So that point is around the media platform point that I made, which is that we should also try to place some enforcement on the way that copyright infringements are presented in the media as well. I'd just like to close with a question because – well, perhaps it's better to finish and we can have a conversation afterwards.

MS CHESTER: Okay.

MR ARCHER: Thank you.

MS CHESTER: All right. Thanks very much for those opening remarks, Tomek, and for being available again this afternoon for our hearings. I might kick it off with just an initial question, you're suggesting, as have some other designers, that there's merit in rethinking whether or not design right protection in Australia should follow the lead of the European jurisdiction in terms of incorporating it into copyright.

I guess, design rights, kind of, covers a very broad church of designs. So I'm just wondering what you have in mind there, is it more, sort of, design rights around items like furniture, high end furniture where that there are substantial some costs up front that might warrant a longer term of protection, or they may have a longer commercial life than some other sort of design rights?

MR ARCHER: Sure. That's actually around the question I was going to ask you because I'm not an expert in all the differences, but my understanding is that patents protect the way something works or is assembled, and it's typically related to a high investment industrial process. So therefore it makes a lot of sense for that to be applied for at a cost, and it gives it a more ironclad, if you like, protection that might be very clear if it was ever to go to Court. Trade marks protects brands and that, sort of, makes people feel more confident about developing brand awareness in advertising.

At the other end of the spectrum, my understanding is that copyright has generally been used to protect individuals and artistic works, whether it be writing, whether it be musicians that are writing songs, whether it be

architects, whether it be artists. It's not necessarily a printed work, because my understanding is that the recordings are also covered by copyright. So I do have a question about what exactly copyright can protect, but the language used for the UK has been around copyright.

My understanding of design registrations is that they fall somewhere in between, because they protect the way something looks which is potentially more similar to copyright, but they require – in Australia they require registration and it's a registration that needs to be renewed. I can appreciate that that probably provides more certainty and reduces the risk of infringement. In copyright, because everything is immediately copyright, there's perhaps the potential for many people to make claims over the top of each other or something like that.

So my question to you is whether you think if, for example, there are so many songs that are able to be created every day in music protected by copyright, why something like that would not be appropriate for design, as a base case, notwithstanding the opportunity to then register to provide more protection?

MS CHESTER: So I don't have an answer to that question. We're sort of at the stage of gathering evidence and getting a better understanding around the design rights issues that the designers and the industry are raising with us at the moment.

I guess I was just trying to clarify design rights to cover a broad spectrum from the design of a widget through to a fine piece of furniture and whether or not, in terms of what's occurred at least in Europe, whether the design rights that have carried across to the copyright system there have covered the full plethora of design rights from widgets through to fine furniture. That's something that we can look to get a factual evidence base on ourselves, but I just was enquiring as to what it was that you were proposing be covered. Was it all current design rights or was it just design rights attached to individuals for, sort of, more creative endeavours?

MR ARCHER: Yes. I suppose, because I'm not a lawyer I can't comment specifically, but from my experience I guess the intent of what I'm trying to say, which is potentially more important than a legal suggestion, is that I think it's better for productivity for people to be able to share their ideas with confidence that they haven't given them away to the public domain. So that happens in many other forms. Just because you show someone something, doesn't necessarily mean that it's theirs. Currently, it seems to me that that is the situation of design in Australia, unless you register something. So I think it is very much worth

considering some kind of automatic protection, or a grace period, or both. Then, potentially, people can still apply for more serious and expensive and structured registrations.

MS CHESTER: So I think one of the issues we have with copyright is because there is no automatic registration, it then becomes quite a messy world of finding the copyright owner, and then we enter ourselves into a world of people infringing. So the degree of infringement in the copyright world is, to a large extent, a function of people being able to identify who actually owns the copyright and tracking them down and getting authorisation or a licence. So there are some advantages for the creative rights holder in having a registration system where at least it's very clear who – where that ownership resides.

Coming back to the other issue then around, sort of – and I've, sort of, loosely referred to it as a "grace period", the example, Tomek, that you mentioned from your own experience of by the time you hit 29 you were outside your design right period and then somebody else was able to do what then becomes an authorised copy because it's out of the design right period. It would be just good to get, from your experience, a sense of that period of time. So, not the commercial traction period of time, but the period of time where you, sort of - you'd come up with initial design and you're sort of finessing that design, you're finessing the prototype, you're sort of testing it before you actually go to a commercial production run. It'd just be good to get a sense of what that sort of time period has been like from your experience?

MR ARCHER: Okay. I'll give you that example. Obviously, it's often different, but in that case the first piece was developed for an exhibition. It took a lot of foresight to even consider registering the design at that point and a huge leap of faith. I mean, this was pretty much the first piece of furniture I'd designed, 19 years old, and I was at uni and this was a university subject.

So I don't think it should be the case that everyone has to go and spend money on lawyers in that situation. However, I did and it cost several thousand dollars to obtain this registration because of the way that was done. I'm not even sure how ironclad that registration actually would've been anyway because the sketch that I provided was potentially pretty loose. So that's one thing to consider is how easy it is to register something and how clear that – how well that would protect it anyway. Then, it was renewed - I don't recall exactly the mechanics around.

But so following that exhibition it was published. I felt confident that it was protected. Then I started producing themselves myself. I adjusted

the design a little bit in terms of the mechanics of how it works, but it looked the same. Then it was being sold locally, and then those sales went well. I sold it more broadly and passed on production to a manufacturer who was contract making on my behalf. That continued for a while and over a few years later it received an Australian design market, received a few awards and, kind of, gradually gained traction. Then it was acquired by the Art Gallery of Western Australia. At some time in that period it was renewed, the registration.

Then I also licensed that design to a manufacturer in Europe. That manufacturer in Europe didn't request that design registration, but I guess it would've been useless to them anyway because it was only an Australian registration and I don't think it would've been possible at that point to protect it overseas anyway and it would've been hugely costly. But in Europe they have, notwithstanding their legal situation, they seem to be much more respectful of IP and when I spoke to that manufacturer they said that they wouldn't go with a formal registration anyway, possibly because they have some other model which discusses copyright or something, I'm not sure, just as a base protection. That was in 2010 that was launched in Milan.

Since then, that protection has lapsed and I saw those copies. Those copies didn't come out, but it was more because it was going to be a marketing disaster for that company. That's the decision that they made rather than because I would've taken to them with lawyers. To be perfectly honest, there were several other cases where questionable products appeared in the market in that – within the design registration period and I couldn't afford to protect myself from them. So, even with that design registration, in addition to that money is required to defend yourself and it would've been better if to find some other way to make that process a little easier.

I know that in my experience in the music industry we have an industry body called APRA who are responsible for representing individual song writers and then they go and collect royalties, but they also act on infringements as well.

MS CHESTER: I'm assuming there's no similar body for design in Australia?

MR ARCHER: Not currently, and I don't know if this is the platform to raise it, but I think it would certainly be beneficial if there was – there are several industry bodies in Australia but I don't think that any of them take it as part of their mandate to look after their members in terms of defending copyright infringements or design registration infringements for

that matter. It's, kind of, left to individuals and companies. I think it's important to recognise that many of the authors of design are individuals as opposed to companies, and many of the companies that are proposing to manufacture unauthorised copies are far bigger organisations. So the prospect of entering into litigation with any of those is daunting.

MR COPPEL: I've got two questions, one drawing on your experience of a design you had that was then copied, did you, following that period, continue to sell your product, the original product, and what was the impact from that point that your product was copied, impact on you?

MR ARCHER: I should say that they decided not to produce it because there was an industry backlash. They made their announced through social media. That stream has been tabled as evidence, or will be tabled as evidence to you. You can see that many people in the Australian design industry reacted to that saying, "This is not a generic design. This is a world recognised design by an Australian designer and it's a real shame if you would decide to produce something like that and claim that it was somehow something that you found overseas".

MR COPPEL: Okay. The second question is, have you heard of The Hague Agreement, which is an agreement from the World Intellectual Property Office which is aimed at harmonising the registration process for design, that's one aspect of it. The idea is if you register in one jurisdiction, it would give you coverage in all signatories to The Hague Agreement, not yet up. The second aspect of it, where the maximum was a period of protection of 15 years for design. I'm interested if you have heard of it, if you've got any views on this proposed Hague Agreement?

MR ARCHER: I only became aware of The Hague Agreement recently and I can't say that I know it very well but, yes, my understanding is that if you register a work it's registered in all the countries that subscribe to that agreement, Australia not being one of them. That sounds like something that would be pretty helpful for anyone that was looking to export their products out of Australia, or export their IP. So I certainly think that from the perspective of a designer, if we're talking about exporting intelligence as opposed to commodities, it sounds like something that we should really look at.

MR COPPEL: Okay. The view that we had in the draft report, and I think it's the same view that ACIP as an advisory body on intellectual property matters was to, sort of, build a case for joining The Hague Agreement. Our position on that was there are gains from streamlining the - sort of, the administrative processes linked with registering the

design, and they should be kept distinct from decisions relating to the length of protection but, essentially, sort of, echoed the ACIP view there.

MR ARCHER: Sorry. Just was the ACIP's view to join or to not join?

MR COPPEL: They saw merit in joining, but they saw a number of costs associated with it. I think they identified some of the transitional costs that would be linked to changes in the processes that IP Australia would need to engage and because of those costs they had suggested that there would be further work needed to establish whether there was a – you know, a net benefit overall from joining.

MR ARCHER: Just so that I understand, are those costs that are related to administrative government costs, or are they costs that might be borne by individuals working within this industry or companies?

MR COPPEL: Both.

MR ARCHER: It sounds like they might be more government – right, okay.

MR COPPEL: Both.

MR ARCHER: Yes, I - - -

MR COPPEL: Companies and consumers and also in terms of the administrative agency, in our case IP Australia.

MR ARCHER: Yes. Look, I understand that the net benefit – the Australian government is responsible for understanding the net benefit and our terms of trade in terms of IP protections. Of course, we import a lot of material and that includes a lot of IP, so looser copyright and looser IP protection mean that Australian companies are able to get into the market easier. But I really think that we should be encouraging the development of new work in Australia that can then be exported. Without something like The Hague Agreement it sounds like exporting new work and encouraging new work out of Australia might be difficult, particularly in the longer term.

MR COPPEL: Yes.

MS CHESTER: Tomek, we didn't have any other questions for you this afternoon. But thank you for being able to join us again for our hearings. We've got a couple of other participants we need to hear from this afternoon. So we might bid you farewell.

MR ARCHER: Thank you very much for your time.

MS CHESTER: Thank you.

MR COPPEL: Thank you.

MR ARCHER: Good afternoon. Bye.

MS CHESTER: Bye.

MR COPPEL: The remaining people are all by phone.

MS CHESTER: Yes.

MR COPPEL: I think we're on.

(Announcement made over loudspeaker)

MS CHESTER: Good afternoon. Is that David Trubridge?

MR TRUBRIDGE: Yes, it is.

MS CHESTER: Hello, David. It's Karen Chester, one of the Commissioners at the Productivity Commission. I'm joined by my colleague, Jonathan Coppel.

MR COPPEL: Good afternoon.

MR TRUBRIDGE: Hello. Good afternoon.

MS CHESTER: David, thanks very much for being available to talk to us this afternoon and thank you also for your post-draft report submission. As you've heard from our colleagues, we are recording a transcript here. So, perhaps, just at the outset you could just state your name and the organisation that you represent, and then if you've like to make some briefing opening remarks?

MR TRUBRIDGE: Yes. My name is David Trubridge. I have my own company, David Trubridge Limited and we design and manufacture designer lighting here in New Zealand.

MS CHESTER: David, we've had the benefit of reading your post-draft report submission, is there anything in addition to that that you wanted to share as part of the hearings this afternoon?

MR TRUBRIDGE: I don't think I put in one of the issues I think I'd like to discuss is the WTO TRIPS Agreement, spelt T-R-I-P-S. If I could add that that would be great?

MR COPPEL: Yes. Do you want to explain?

MS CHESTER: Sorry, do you want a copy of it?

MR TRUBRIDGE: No, do you want me to explain why I want to add it in?

MR COPPEL: Yes.

MS CHESTER: Sorry, I misunderstood what you were saying. So, yes, sorry, please explain what the issue is to do with TRIPS.

MR TRUBRIDGE: Yes. Well one of the problems with registering designs is that it's very hard to know – I mean, I might register – I might create five, six, seven, eight designs in a year. You don't know which ones are going to run. Very often what happens is that you end up, almost inadvertently sometimes, having it published on a website or something and then you can no longer register it under the normal Australian laws. Overseas you do get a grace period, but sometimes you might even miss that grace period.

Now what the TRIPS Agreement says is that if any intellectual property has been seen on – what they call – tangible media, a book or magazine, which is dated, that is effectively all the proof you need to identify your ownership of the IP. So we have actually defended breaches of our copyright in Europe and in America purely using the TRIPS Agreement where I did not have registration of design, and that is enough for small young companies, which is a wonderful tool, but it's not any use in Australia.

MR COPPEL: So this is the point that I think has been made by a number of other participants relating to copyright protection in the EU for designs. Is that the point?

MR TRUBRIDGE: It's not just EU. It is actually worldwide. It's a WT - World Trade Organisation ruling that was – I think it came out of a conference America (indistinct) 1994 and all the major countries have signed up to it, including Australia.

MR COPPEL: Yes, I think we have to look into that and - because if we're a member or if we are a signatory to TRIPS, we would be obliged by that agreement. So I think that's something we have to clarify in our work going forward.

MR TRUBRIDGE: Yes. What I was told was that Australia has signed it, but local laws override it.

MS CHESTER: That's not how the TRIPS Treaty is meant to work. So we will look into that, David, and look to address that in our final report. Okay. So, David, just a couple of questions then if we may? One of the key issues that you've raised in your submission to us is around unauthorised copies or replicas undermining the commerciality of your lighting designs. I guess, if we could just get a better understanding of those unauthorised copies and replicas, is this occurring during a period of design protection that you have or is it following a period of design protection?

MR TRUBRIDGE: The two issues are related. I mean, you can't really have one without the other, but both of them have hurt us. The grace period has hurt us. But probably worse than that, is the issue of being able to sell a replica design. Even if we haven't got design registration, which I haven't had for a number of my designs, my early designs when I was a small company. I wasn't able to spend the money on it. I wasn't sure enough of the – how much we would sell. I started off really small. So it's very difficult when you're small starting up. You have no big companies if you don't allow the small ones to start. But to get through that early stage, is very difficult without having recourse to either the WTO thing or proper IP protection.

We employ 20 people in the company here and we deal with 100 different – over 100 different other companies locally. So there's millions of dollars swirling around as a result of our activity, all of which is because we manufacture in New Zealand. If the stuff was made by a third party overseas and imported against our will, all that industry, all that money in our local economy would be lost.

MS CHESTER: So, I guess, that raises two issues, the first issue being, I guess, awareness amongst young designers of, if you're looking to protect your design rights you do need to go through a process of registration and ultimately certification and, I guess, to the extent, that you still think that that's an issue in the industry.

MR TRUBRIDGE: Sorry, could you say that last sentence again please?

MS CHESTER: Sorry. I think there's two issues that you've just, kind of, raised there. Firstly, the awareness amongst young designers of the importance of having some form of design protection in place through design registration and ultimately certification to afford yourself that 10 year window of protection which, obviously from what you've said, you weren't aware of at the time as a young designer. Do you think that's still an issue amongst young designers today of awareness of the need to get design protection through registration?

MR TRUBRIDGE: No, I think people are probably much more aware of it than I was 15 years ago when I started doing this. I think that awareness is less of an issue. I think the problem is more being able to handle it. Even though I didn't have the design registration protection, in every other country that we challenged it I was able to stop it through the WTO program – ruling. So I think it's not so much awareness, it's just that in Australia there are not the – there isn't sufficient protection for them to be able to defend their IP.

MS CHESTER: I guess the second issue you raise, which we've discussed to some lengths this afternoon and touched on a bit yesterday, is how well the current term of protection works in a situation for designers of lighting or furnishings where there does need to be a period of initial design, market testing, prototypes, before you finally go to commercial production, and how much of that clock starts ticking within the 10 year period before you actually get to commercial production. From your experience with your lighting designs, David, what sort of, on average, is that sort of initial period of market testing and prototyping before you go from "I've got a design" to "I've got a final design that's ready to go to commercial production"?

MR TRUBRIDGE: It's several years. I mean, conventionally what we do is we'll have a few new designs which we will show at trade shows in Europe and America to get feedback before we invest any further in them. One of the big hindrances with developing new lights is the cost of certification. It can be tens of thousands of dollars to get your electrical standard certified for the right to be able to sell it into the market legally.

MR COPPEL: How many thousand did you say?

MR TRUBRIDGE: So we need to be sure that that light is – I'm sorry?

MR COPPEL: How many thousand did you say? You mentioned - - -

MR TRUBRIDGE: I'm not hearing that very well.

MR COPPEL: You mentioned a figure of, I think, several thousand dollars for – I don't think it's registering the design, but for the – for a lamp?

MR TRUBRIDGE: No, that's for certification, in order to get it electrically certified so that it's legal to sell it. If it's a whole new sort of light - you can certify families of lights for – if it's a whole new light you have to certify it as a separate typography and that might be $20,000 to do that. So you have to be sure before you put that onto the market that it's going to sell before you invest in all that. You can't sell it until you have the certification.

So, inevitably, and this is standard amongst big European design houses, they all put rough prototypes up on show in design shows to get market feedback before they go ahead and finalise the prototype. So it is a several year process, two, three, four years to actually get that thing selling in the market when you're confident you're going to make some money out of it.

MS CHESTER: In terms of dealing with unauthorised copies or replicas during the period in which you have design protection, David, you touched on before the issue of protecting your rights. Are there any, kind of, impediments or the way that the current intellectual property arrangements are structured such that there are impediments or obstacles for you being able to enforce those rights?

MR TRUBRIDGE: Are you specifically talking about Australia?

MS CHESTER: Yes, because that's what we're meant to be looking at. As part of our inquiry, we're focussing on Australia's intellectual property arrangements.

MR TRUBRIDGE: Well, the fact that after 10 years, even if you've gone through the registration and you remember to renew it after five years, then you've no longer got any protection. I mean, now if you've spent 10 or $20,000 on the certification and more on development, you need to be able to sell it for more than 10 years. In no way is that protecting you enough.

MS CHESTER: So your primary concern then is really the term of protection that's afforded under current design right arrangements in Australia's IP arrangements?

MR TRUBRIDGE: It's two things, it's the making it easier to protect it in the first place, you have a grace period, you have time to assess, and the

second thing is that time, yes. I'm sure you know, in Britain it's 70 years after the death of the designer. That's an enormous difference, and that's fairly common amongst other countries.

MS CHESTER: So we've heard some evidence to date that certainly amongst EU countries, design rights have been dovetailed into the copyright system and therefore much extended the term of protection. Are there other international jurisdictions, David, that you're aware of that place design rights into the context of copyright protection?

MR TRUBRIDGE: I mean, China is a world of its own. We don't even try to get design rights in China because it – they just laugh at you. But other countries - I cannot say what the figures are, how long you get protection for in the States. I think it's 30 or 40 years, but whatever it is it's an awful lot longer than Australia. There is no other country that we sell in – and we sell in over 50 countries around the world – there's no other country which has such a short protection time as Australia. Most years are out to 30, 40, 50 years.

MS CHESTER: David, thanks very much. We didn't have any other questions for you this afternoon. Is there anything else that you wanted to add before we move on to our next inquiry participant?

MR TRUBRIDGE: I don't think so. I'll have a quick look through my notes. You've got the message, which I gave you, about the royalties. I mean, this is – designer's income is entirely from royalties. In the design world people come out of design school, they go and – they set up their studios and they basically licence work to other companies and that's their – that's the way they earn their living. Royalties are a good – over time, once you've got the design up and running and the company is selling it, that money keeps on rolling in and it's a really good way of having a good regular income. That's the lifeblood of designers.

If you're not getting the royalties, if you're not able to commission your stuff, because other people are taking those designs and having them for free without paying a royalty, without paying a commission, then that's going to pull the rug out of your – under the feet of designers within Australia. That's the critical difference between Australian markets and the rest of the world where this commissioning royalty situation is the standard, the norm, and the rules protect the designer so this has – it's possible to work. In Australia, that can't happen the way the rules are at the moment.

MS CHESTER: All right. Well, David, thanks very much for being able to join us this afternoon and providing us with some more evidence as part

of our public hearings on the IP arrangements as they affect design rights. Thank you.

MR COPPEL: Thank you.

MR TRUBRIDGE: Thank you very much for giving me the opportunity.

MS CHESTER: You're welcome. Bye-bye.

MR TRUBRIDGE: Thank you. Bye-bye.

MS CHESTER: Okay. We have one final inquiry participant.

(Annnouncement made over loudspeaker)

MS CHESTER: Good afternoon. Is that Chris?

MR SNOW: Yes, it is.

MS CHESTER: Hello, Chris. It's Karen Chester here and I'm joined by my colleague, Jonathan Coppel. We're the two Commissioners on the Inquiry.

MR SNOW: Sorry, immediately I'm having a bit of trouble. I can hear you, but it's a little indistinct.

MS CHESTER: Sorry. I'll try again. I have to keep remembering the microphone for our call is up in the ceiling and I'm vertically challenged. So, it's Karen Chester and Jonathan Coppel, the two Commissioners on the Inquiry. Good afternoon.

MR SNOW: Good afternoon.

MS CHESTER: Is that better, Chris?

MR SNOW: It's okay. It's very distant. You're sounding very distant, that's the only problem.

MS CHESTER: Okey-doke. We might just see if we can get IT to dial up the volume a bit and I'll try to project my voice a little better. So, Chris, first of all thanks very much for both your initial submission to our report. If you could just, sort of, state your full name and the organisation that you represent for the purposes of the transcript and then if you'd like

to make some opening remarks of a few minutes, three or four minutes, that would be most welcome.

MR SNOW: Okay. Right. Yes. My name is Chris Snow. I am a journalist, a public relations practitioner, and a social and market researcher. I'm also a trained political sociologist and, as I said, a trained survey researcher, social and market researcher.

I put in a submission, particularly as a journalist and my principle issue that I wanted to raise was that of aggregation. I'll say initially that in the past few years I've been heavily involved in consumer advocacy in a number of areas, particularly legal regulations, residential tenancies. Currently, I'm involved in – participating in the Open Government Partnership Project, which is being run by the Department of Prime Minister and Cabinet.

One of my great concerns is the lack of the participation available to members of the public. You probably have a chance to read the submission I put in yesterday, would that be correct?

MS CHESTER: No, I haven't, but I've had a quick briefing from our team who have had a chance to read it.

MR SNOW: Yes. Okay. Well in that I did make the point that I am becoming increasingly concerned at the lack of public participation. It just seems to me, in what I've been able to read of the report, that there seems – doesn't seem to have been great public participation. As in many inquiries it is really the public interest groups, if I can put it that way, private sector interest groups, that get the running. I am just concerned that the public have not really been involved in this. As I say, it's not peculiar to this particular inquiry. I think it's general and it's something that I just suggest that you might like to take a look at.

MS CHESTER: Okay. Well, Chris, maybe if I could address your second point first, if that's okay? So as you're aware with our inquiry processes, we do make sure that there is a broader knowledge via website and media of our inquiries as they come to us. We put out issue papers. We hold round tables. We accept submissions, pre-draft report submissions, post-draft report. Then we also do media when we release our draft report.

I think the Intellectual Property Arrangements Inquiry is a good example of where we conducted quite a wide media program to ensure that the broadest group of stakeholders who would have an interest in this would avail themselves of getting involved in our processes, if they

wanted to, such that we're now in receipt of over 500 submissions from a very broad range of stakeholders. We've held several round tables.

Having now gotten through day 2 of public hearings, I think you can rest assured that we're hearing from folk that weren't involved in the early stages of our inquiry and that's largely to thank the media for the coverage that they've provided of our draft report. So I'm not quite sure what else we could've feasibly done to ensure public participation in our inquiry process.

MR COPPEL: Could I put it to you because, I mean, this is an issue that is a challenging one. We often think about ways in which we can get a broader reach. Part of our Act requires us to, in our thinking about the Terms of Reference that come to us, look at it from a community wide perspective. So if you have any ideas on how to engage those that typically are not representing a particular, sort of, industry perspective, that would be helpful?

MR SNOW: Sorry, I am still having – I'm picking up the gist of what you're saying, but that last point I - - -

MR COPPEL: I was asking you whether you have any specific ideas that we could use to better engage the broader community in our inquiry processes, consultation processes?

MR SNOW: I'm glad you asked. I have, for some time and I've certainly been pushing this with the Open Government Partnership movement, and I'm not alone in this, in advocating that there should be a public interest advocacy council that would be responsible for gathering public opinion about specific issues in government activities and semi-government activities. That's it in a nutshell.

That arose from a similar idea, in terms of – when I was dealing with legal regulation, where there was absolutely no public participation whatsoever, no client participation whatsoever. It's a (indistinct) monopoly and I proposed the same thing there. I do think that that concept does have – it is worth exploring and I'm certainly pushing it through the Open Government Partnership movement.

MS CHESTER: So, Chris, if you were to have a public interest advocacy council, what sort of folk would be on it, and how – what things would they be doing? So one of the things that we're very keen to do, given as Jonathan mentioned the obligations under our Act, is to make sure that we do hear the unheard voices. So we tend to go through particular social advocacy groups, those that represent consumers like the

choices of the world. What do you see this council doing in addition to that, and who would be on it?

MR SNOW: I think there would need to be a very – a council would be selected from a fairly wide range of occupations and industry. For starters, simply, you could do random probability sampling to locate particular people. But then you'd be looking at – excuse me, sorry. You'd be looking, I think, at people like you, economists, accountants, philosophers, ethicists.

I mean, you'd cover the whole gamut of society and try to pick a high level panel that would be able to direct – and I'm looking at – obviously it would have to be a staffed organisation and it would be able to detect issues that are worthy of public participation and then seeking those organisations and those people who do have a specific interest in it, but then simultaneously going out to the general public, those people who are not involved in specific interest groups. So, in essence, I guess, it'd be a high level panel.

MS CHESTER: Okay. Thanks, Chris. Chris, I just have one other question on your submission and it was a little unclear when you talked about the role of aggregators when it comes to media, whether or not you felt that they were breaching current copyright arrangements. As I'd understood it, the aggregators enter into licensing arrangements with the media agencies and, indeed, the way that they, sort of, reformat and represent on a tailored basis - - -

MR SNOW: Sorry?

MS CHESTER: Sorry. And the way that they represent and reformat on a tailored basis actually creates greater demand for media content.

MR SNOW: Yes. Look, sorry, I couldn't pick up any of that.

MS CHESTER: Okay. So my first question was, it was a little unclear around the issues that you raised with media aggregators whether or not you felt that they were breaching current copyright laws, that was the first question.

MR SNOW: I don't think they are, from my little knowledge of copyright law. They're not breaching the law according to the common law that has been determined principally, I think, by the Federal Court. That has ruled that a single line of text is too short to be copyrighted and therefore that enables aggregators to post those – to post headlines and then a lot of them also do post summaries of the stories on – in their

newsletters. They can do that quite legitimately. I call it legitimised plagiarism. It's a bit of an oxymoron, but I guess that's what it's - - -

MS CHESTER: But as I understand it those aggregators, in doing that, then link you through to the underlying media content, and to get to the underlying media content if you don't then have a subscription you don't have access. So I'm not - - -

MR SNOW: Sorry, could you - - -

MS CHESTER: The feedback that we've had on aggregators were that they – the way that they formatted either through linking through to the underlying media source, media content, or by providing an excerpt, a full excerpt from the media content, were actually creating greater demand for media content.

MR SNOW: Yes. Look, I'm sorry, Commissioner, I really couldn't pick that up.

MS CHESTER: Okay. So look, Chris, I'm conscious of time and obviously it's not a great line. We've done a couple of other calls today, so I suspect it might be something to do with the line at your end. If it's okay with you, we might close the public hearings now, but we might give you a call after today and hopefully we'll have a better line. I'm just conscious we've got transcription services happening here. Perhaps we can get a better line and we can have a bit more of a chat with you about your concerns on the aggregators. Is that okay with you?

MR SNOW: Yes. That's fine. Because the other issues, I think, the fair use and length, duration of copyright, they've been covered off by other people pretty well, I think, and – so I don't have anything to say about – anything more to say about those.

MS CHESTER: Great. Thanks very much, Chris, and we'll be in touch with you shortly.

MR SNOW: Yes, okay. Apologies about the line if it was this end.

MR COPPEL: Thank you.

MS CHESTER: Okay. So, ladies and gentlemen, that now concludes today's schedule proceedings. But for the record, I am meant to ask if there's anybody else in the room who'd like to be heard? Speak now or forever hold thou peace. Okay, I've got - - -

MS SARGEANT: (Indistinct) myself (indistinct) Terri Winter has got – myself, I've got some comments to follow on that will fill in a few gaps from the phone calls today. Richard and I have got a couple of points he might like to cover off and Terri Winter would like to speak on The Hague Convention, just two points.

MS CHESTER: Okay. So this is a chance for people that haven't had a chance to speak to the Commission to speak. We kind of allow five minutes for anyone else to come from the floor. If there are follow up issues you want to raise with us, we're more than happy to hear from them, but I am kind of also conscious of time and we've got public hearings starting again tomorrow. We've got to jump on a plane. So if it's okay with you two options - - -

(Announcement made over loudspeaker)

MS CHESTER: - - - two options, so there is no one else who hasn't been heard today or yesterday who would like to be heard, so on that basis we'll close the hearings, but happy to chat and also to see if we can accommodate some other way to get the additional information you'd like to share with us, if that's okay?

MS SARGEANT: Thank you.

MS CHESTER: All right. Great. On that note, folks, we'll close today's hearings. Thank you. We resume tomorrow in wet Melbourne. Thank you.

MATTER ADJOURNED AT 4.05 PM
UNTIL THURSDAY, 23 JUNE 2016

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 PRODUCTIVITY COMMISSION, MELBOURNE
ON THURSDAY, 23 JUNE 2016 AT 8.49 AM

INDEX

RESUMED **[8.49 am]**

MS CHESTER: Good morning, and welcome to the public hearings for the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements. My name is Karen Chester. I am the Deputy Chair of the Commissioner at the Commission, and I am one of the Commissioners on this inquiry. My fellow Commissioner is Jonathan Coppel. This inquiry started with a reference from the Australian Government in August 2015 to have a look at and 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 help inform our inquiry and, with the benefit of those consultations and around 150 initial submissions, we released our draft report in late April of this year which included over 20 draft recommendations, draft findings and a number of information requests.

We have received a large number of submissions in response to our draft report with the total number of submissions now well over 500, and we also held a further two post draft report round tables, one on copyright, in particular fair use, and the other one on patents, and in particular looking at pharmaceutical patents. We are very grateful to all the organisations and individuals that have taken the time to prepare submissions, to meet with us, to attend our round tables, and today to appear at these hearings. The purpose of our public hearings is really to provide an opportunity for interested parties to provide comments and feedback on the draft report; in short to tell us what we got right, what we got wrong and what we might have missed.

Prior to this hearing today, hearings have been held in Brisbane, Canberra and Sydney where we have already heard from a very diverse range of interested parties - authors, academics, legal practitioners, designers, publishers, collection agencies and other stakeholder groups. A further hearing will be held in Sydney next Monday, and we are also in Melbourne again tomorrow.

We will then be working towards concluding our final report for Government, having considered all the evidence presented at the hearings and in submissions, as well as other informal discussions. The final report

will be handed to the Australian Government later this year. Participants and those who have registered their interest in the inquiry will be advised of the final report's release date by Government, which may be up to 25 Parliamentary sitting days after completion.

Turning to today's public hearings, we try to conduct our hearings in a reasonably informal manner, but I do 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.

Now, participants are not required to take an oath but are required under our Act to be truthful in their remarks. The transcript will be made available to participants and will be available on the Commission's website following the hearings, and as many of you will know submissions are also available on our website.

For any media representatives attending today, some general rules do apply, and please see one of our staff for a handout which explains what those rules are. Now, to comply with the requirements of the Commonwealth Occupation Health and Safety legislation, or perhaps just good old common sense, you are advised that in the unlikely event of an emergency requiring the evacuation of this building you should follow the green exit signs to the nearest stairwell. Lifts are not to be used. Please follow the instructions of the floor wardens at all times. If you do require assistance please speak to our inquiry team members here today. Unless otherwise advised, the assembly point for the Commission in Melbourne is at Enterprise Park, situated at the end of William Street on the bank of the Yarra River.

Now, participants are invited to make some brief opening remarks of no more than five minutes. We do really like it if participants can keep their opening remarks to five minutes. It does really give us the opportunity to ask some questions and to have a pretty good discussion. Now, participants are also welcome to comment on the issues raised in the submissions of others.

I would now like to welcome our first participant, Amanda Lawrence. Amanda, if you would like to join us at the table here. Just make yourself comfortable, thanks, and Amanda if you could just state for the transcript your name and the organisation you represent, and then if you would like to make some brief opening remarks, thank you.

MS LAWRENCE: Great, thank you, Karen. Yes, my name is Amanda

Lawrence. I am the Research and Strategy Manager at Australian Policy Online, APO, based at Swinburne University of Technology. Thank you very much for this opportunity to present to the Commission today. I will be representing myself and my colleague, Professor Julian Thomas, who made a submission - together we made a submission on behalf of Australian Policy Online. Australian Policy Online was established in 2002 by researchers at Swinburne Institute for Social Research at Swinburne University of Technology to bring together and make discoverable research and resources on public interest issues, particularly digital grey literature. This was in response to the growing use of the internet by many research centres, interest groups and government to publish material on line, freely accessible but largely difficult to discover.

It is now the largest open access repository for public policy related documents, data, audio, video and other resources from Australia, New Zealand and internationally. National investment in APO amounts to over $5 million, and I am here today to support a number of key recommendations put forward by the Productivity Commission in its inquiry. Not all of them, particularly recommendations 4.1, 5.3 and 15.1.

So I would really like to initially just put the problem and then why we - hopefully that will make understandable why we have the position that we do. So vast amounts of valuable, non-commercial, public interest and often publicly funded research information is now published online. It has grown exponentially since the earliest days of the internet, however there are also vast amounts of print material that have been produced over the last few centuries. Most of the substantial publications of this type, known as grey literature, are produced by organisations. This includes academic research centres, civil society organisations, interest groups such as associations, charities, advocacy groups and think tanks, government departments and agencies such as the Productivity Commission itself, industry and corporations. As they are not professional commercial publishers, a great deal of these resources are managed in a very ad hoc way. A great deal of it is now missing. It is estimated 30 per cent of online content disappears every year, and a large portion are orphan works.

They are very difficult to find, evaluate and manage effectively as most people engaged in public policy related research will attest, and our own research conducted in conjunction with Professor John Houghton, the National Library of Australia, the Australian Council for Educational Research and the Eidos Institute has also proven, which I would submit in our paper that we reference in the submission, is the evidence. This content is produced and managed in a very different way to professional and commercially published content where publishers have an investment

in continuing to extract value from their products, and therefore it is hoped take precautions to ensure they are preserved and available for future generations.

To support access to resources for all of society and ensure knowledge is able to function as a public good, as well as a private one, the organisations in society with the skills, expertise, infrastructure and audience for discovery and access to information have traditionally been libraries. In the digital age they now include digital libraries, institutional and subject repositories, clearing houses, databases and online archives and observatories. Their job is to identify resources of value to the community and make them discoverable now and into the future. This involves evaluating, curating, cataloguing and preserving.

Unfortunately, they are not able to effectively carry out this role for digital content due to the limitations of the current copyright law. The current exceptions are so restrictive and convoluted it is very difficult for libraries and collecting services to address the management of online resources. This means a loss to the community of hundreds of millions of dollars' worth of research, not to mention the value of access to those resources for public policy, the commercial and innovation systems.

In our research we estimate a productivity dividend of $17 billion per annum should this material be effectively managed and made available to the public. Therefore in the interests of access to knowledge as a public good, APO advocates that draft recommendation 4.1, that the current terms of copyright protection apply to unpublished work, be endorsed. We endorse draft recommendation 5.3, that Australia should replace the current fair dealing exceptions with a broad exception for fair use, and draft recommendation 15.1, which we would suggest be worded as, "All Australian and State and Territory Governments should implement an open access policy for public funded research and resources in any format, not only publications." The policy should provide free access for a stable, long term, open access repository or similar managed digital curation system.

MS CHESTER: Thank you very much, Amanda, and thanks for your submission and appearing this morning. You raise an important issue of how the current intellectual property arrangements deal with grey literature, unpublished works, and making sure that others can benefit and readily access them. Perhaps if you could just elaborate a little bit on how the current intellectual property arrangements, so if our recommendations weren't adopted how the current intellectual property arrangements impede the access to what you refer to as grey literature?

MS LAWRENCE: Sure. So it operates on a number of levels. So at the moment if an organisation produces material and makes it publicly available, if they don't make any sort of explicit, creative comment or statement on it then it is automatically all rights reserved. In our experience many organisations still are fairly unaware that they could use creative commons, even though what they are generally intending is for their material to be open and as freely accessible as possible. So their aim is not to make money from it. In our research many of these sorts of organisations, only ten per cent were looking to actually make any income whatsoever. Their interest is in wide dissemination and yet an organisation such as APO or any other library has to get permission, either blanket permission from those organisations or individual permission, for every single item in order to be able to make either a preservation copy or a copy accessible. Usually when we have approached these organisations they readily agree to that, but that is a very time consuming process.

If you are then dealing with something that may be a few years old, there is a lot of churn in this industry, so many academic research centres come and go. There is a grant for a three year period, a centre is established, it closes and who is going to be responsible for making that content available? So if you are only linking to online content you end up with a lot of what is known as link rot. So you have a collection that actually goes nowhere.

In a similar way you have a lot of reference rot. So you have publications that are saying that the evidence lies here, but there is a high chance you will no longer be able to find that report on line any more. So in a society that is aiming for evidence based policy we are sort of undermining that system, and I think it's the effort required by many libraries to be able to manage these materials - it is just a huge cost in time to be able to get permission for every single article.

MS CHESTER: So at the moment two thoughts then. So the way that you described it, this grey literature for libraries or educational institutions that are wanting to access it, there's a level of uncertainty in terms of establishing whether or not the copyright actually exists.

MS LAWRENCE: Yes.

MS CHESTER: Then alternatively we have been hearing evidence around how the statutory licensing arrangements currently work and whether or not they are effectively picking up creative commons or grey literature. Is that something you are able to comment on?

MS LAWRENCE: I am not as much familiar with the statutory licensing

arrangements of universities, but certainly it is the case that should a university library have in its collection a publicly accessible report that then does come under - and it's copied on a photocopier - they are then having to pay a copyright for that material that is actually freely accessible and perhaps even has a creative commons licence on it, but it automatically comes under that copyright regime.

MS CHESTER: Okay, and from the way that you have looked at our recommendations it sounds like they need to be sort of taken up collectively to comprehensively deal with the issue of grey literature, so firstly the treatment of unpublished works. Talk us through moving from there, through to fair use and why is that important or what different role - how would that better facilitate ready access and follow on use of grey literature?

MS LAWRENCE: Well, I think the way I see it - I certainly think that there is a role for copyright and I actually have - in my previous career I was heavily involved in the literary industry so I am very sympathetic to the needs of authors and for people to be able to make an income from copyright of works. I think in this case the advantage of fair use is that it allows us to make clear and broad categories of perhaps an institution or a collection that could be suitable charged to collect a certain type of material that has been deemed to be of value for the community and for research purposes, and so you are able to make, I guess, decisions about the management of resources based not on the copyright of specific items but perhaps on the use case, and the authority of a particular library. So it might not be that every online collection or every website is able to make a copy of an item, but that a reputable research collection is able to be established under the guidelines of fair use. So it would be a much more efficient way of looking at what is a reasonable and useful way of legislating the copying of materials rather than necessarily on an individual item basis.

For me the advantage of fair use is that it doesn't mean that anything can be copied willy nilly, it's about saying for reasonable purposes, for research and public policy purposes, certain organisations can be charged with ensuring that we have ongoing access to certain materials. Other materials where companies want to have copyright and sales of those materials, then the law also covers those things. So I guess the point is that it's flexible, but that doesn't mean inappropriate or completely open.

MR COPPEL: In your submission, Amanda, you give a use value in the order of $30 to $40 billion per year on grey literature.

MS LAWRENCE: Yes.

MR COPPEL: Can you explain how you get to that number?

MS LAWRENCE: Sure. So I was working with my colleagues, Julian Thomas and Professor John Houghton who is an economist and has done a lot of work in this area of valuing public access to - initially journal material and data and also now looking at grey literature. So what we did was we did three online surveys, a survey of users of information and research for policy and practice where we got 1000 respondents across government, education, the NGO, civil society and commercial areas. We also did surveys of producing organisations and collecting organisations. And on the users many people - overall people suggested they were using grey literature at least 60 per cent of the time in their week, so that's a very high proportion of sort of annual salary costs. So we took - where these users told us how much did they use material, how important was it for their work, and so we combined actual calculations of hours of work, average rates of pay, we brought it up to a national population of around 3.5 million professional people. We then reduced the number actually by about a third, presuming that the general level of interest would be a third, two-thirds less than perhaps our community was suggesting.

MR COPPEL: That is just by assumption.

MS LAWRENCE: Yes, and then we combined that with the contingency valuation, so we asked people to estimate how much grey literature meant to them and how much they would be willing to pay and how much they would be willing to accept in return for not having access to grey literature. So it was a combination of those two methods and I can provide more details if you would like to know more about the whole process.

MR COPPEL: In your opening remarks you mentioned two factors, one is sort of ignorance relating to public documents that are available online and the other linked to various obstacles you explained with respect to the Copyright Act. Are you able to disentangle those two factors in terms of their contribution to more limited use or the value of use associated with these materials?

MS LAWRENCE: I'm not quite sure - - -

MR COPPEL: You mentioned there were two factors.

MS LAWRENCE: Yes.

MR COPPEL: One is the general sort of lack of appreciation that many

of these documents are available openly, and you also mentioned that there are factors which limit access due to the copyright laws and provisions. I'm just wondering whether you've got any idea of the relative importance of those two in terms of ability, or in terms of actual access of these sorts of materials?

MS LAWRENCE: Right, well we were able to ask people, for example, how much time they spent trying to find resources. Is that the sort of thing you mean?

MR COPPEL: It's an example, yes.

MS LAWRENCE: Yes. So for example people were estimating that they - I think it's about five or six hours a week on average that people were spending trying to find material that had gone missing. So while we do have Google and a lot of these materials are freely available online, you have the needle in the haystack sort of issue which is why - I mean, an individual can and does take copies of these materials. So even though that is also a breach of copyright, but that is generally - the general sort of behaviour of I think all of us, that we see something online and we take a copy for ourselves. And a collecting organisation is subject to that same copyright and they can't take that copy of that document without permission, and so they can't help those people who are spending hours and hours and hours trying to find the relevant material or something that has gone missing. So I guess that's where the connection is, to me is that we have a lot of resources, they are put online in order to be accessible.

People struggle - even with the material that is still there they struggle to find the relevant material, they struggle to find the high quality especially in the public policy area where I am mainly focussed, but equally it affects technical reports and so on, evaluations - incredibly difficult to find. So that's where then the connection is, our inability to effectively provide solutions to the wild west of online publishing, and that has a direct cost in terms of anybody pretty much engaged in some kind of professional position that requires finding information, especially reputable information, that that's having a cost in terms of time and access. I'm not sure if I've answered your question.

MR COPPEL: Partly, I think. May I just come back to a point that has been submitted to us with respect to fair use, that one of the factors or one of the illustrative uses should be Crown copyright as a fair use, which is not something we have explicitly in the report. Do you have any views on that in terms of providing greater access to what you call grey literature?

MS LAWRENCE: In terms of Government material?

MR COPPEL: Crown copyright, yes.

MS LAWRENCE: Government material is one of the biggest problems really. So everybody, and certainly engaged in public policy, what we found was all sectors of society are trying to find Government material, including Government itself, and while there have been memorandums to say - up to the Gov 2.0 Task Force that all Government material should be published as creative commons, in our experience at APO still a large amount is not being explicitly published in that way and a large amount is explicitly being published all rights reserved for no explicable reason. So yes, I would certainly endorse - and I guess I was presuming that fair use would also cover that Crown copyright material. I mean, yes so I would certainly say that it's a key issue, is access to that sort of material.

MR COPPEL: Thank you.

MS CHESTER: An interpretation of various factors might get you there, but using the illustrative examples where we haven't yet identified Crown copyright work may also - so we're looking at the relative merits of something along those lines.

MS LAWRENCE: Yes.

MS CHESTER: Amanda, you also in your opening remarks and in your submission to us supported draft recommendation 15.1 which is about all levels of Government to adopt open access policies for publicly funded research, but you have suggested some areas or nuances where we should expand upon that recommendation, and in particular you mentioned in your opening remarks about any format.

MS LAWRENCE: Yes.

MS CHESTER: Are there other areas where our recommendation there is too narrow from your perspective and could you just elaborate on why?

MS LAWRENCE: You mean particularly with 15.1?

MS CHESTER: Yes.

MS LAWRENCE: Yes. I would support the submission made by the Australian National Data Service as well along these similar lines, and I guess the point is to avoid the problem we currently have which is product and format specific legislation. We know now what kinds of material - I mean, we kind of know now what kinds of material but actually even now

I think we're - I mean, the point of my research is that we're not really cognisant of the range of resources that are now being produced online in so many different formats, and that's just in terms of publications. So we have a tendency to focus on traditional publications of books and journal articles, even though there's this huge other variety, but then there's data, a clearly exceptionally valuable area that is going to grow.

There's also videos, infographics, images, and who knows what might be coming with the creativity that is possible with the internet. So I guess my point would be we have to - in the research area, protocols, depending on what sort of discipline you're in there are all sorts of resources that you might want to make available, particularly with the movement for reproducibility and so on. I don't even know what the range of those materials are, and I think we must make sure that we are open both to the kinds of formats and to the method in which we store them. At the moment we live in a world where repository is the sort of term that's used - that may or may not be the future of digital curation so I would also be careful about how we prescribe the solution for the way in which those things should be stored.

So the principle of the recommendation I thoroughly agree with, it's ensuring we don't limit that again and find ourselves in the same situation in ten years' time saying well, we're not allowed to put these items into this other digital system we have because it says we need a repository, for example.

MS CHESTER: Okay, thank you. Did you have anything else? Amanda, that covers all the questions that we had for you this morning so thank you very much for your submission and for appearing.

MS LAWRENCE: Thank you.

MR COPPEL: Thank you.

MS LAWRENCE: Thank you very much for the opportunity.

MS CHESTER: You're welcome.

MS LAWRENCE: Terrific work.

MS CHESTER: I would like to ask our next participant to join us at the table, Paul Noonan.

MR NOONAN: Good morning.

MS CHESTER: Good morning, Paul. Once you have made yourself comfortable if you wouldn't mind just stating your name, the organisation you represent for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks.

MR NOONAN: Sure, thank you.

MS CHESTER: And thank you for your submissions.

MR NOONAN: Thanks. So my name is Paul Noonan. I am on the board of Music Australia and I am appearing in that capacity as a board member. Music Australia, as you said, made a submission and so I'd like to speak around that as much as to it, briefly. So we are grateful that we've got this opportunity to speak to you. Music Australia is the peak music organisation representing the Australian music community. We are Australia's representative to the International Music Council which is based at UNESCO headquarters in Paris. We are a 50 member national umbrella body and our membership and activities cover education in the community and the professional industry. We deliver campaigns, information, resources, sector networking, community engagement, a national school music participation program called Music Count Us In, and demonstration projects and we also engage in advocacy. A number of our members have made separate submissions to this inquiry, both in the initial phase and in response to the draft report.

My expertise, and the reason I'm on the board, is that I am a copyright lawyer or intellectual property lawyer and also a professional musician, and was a professional musician for my entire income for a number of years up until the mid-90s when I graduated from Monash with Law. I just mention that because I think that gives me some insights into the issues that you are examining that some other people may not have.

We really welcome this debate. We think it's important and we also want to be clear in acknowledging the role that the Commission and its predecessor has had in developing and shaping the modern Australian economy. But - and there is a but, some significant buts - we've got some deep reservations about a number of the key recommendations that you would have seen from the submission. And I would just like to briefly touch on some of those now.

The draft finding that the term of copyright should be between 15 and 25 years not surprisingly has caused a lot of agitation in sectors of our membership - I would say within the majority of them. We think we have given some compelling, if anecdotal, examples in our submission that demonstrate that we don't think that the evidence that you considered

supports that sort of radical finding. And although those examples are anecdotal, we think they're easy to replicate and I could give you a personal example of something that has just come up that illustrates that in a personal way, but I won't go into that.

What we are concerned about is that although you have sought to clarify that finding, our view is that the rationale behind it demonstrates your philosophical approach to the subject and our view is that that actually is a mistaken view of the nature of copyright. We think you have taken an overly utilitarian approach that treats copyright works as though they're part of some sort of finite commons that needs to be carefully guarded in case someone or a group of rights holders get a corner of the market in a finite number of works, and we don't think that's how copyright works at all. It's the result of intellectual labour and craft, and it's personal property, and there really is no finite number of expressions of ideas. And to the extent that a particular idea can only be expressed in one way, it probably won't or most certainly won't be protected by copyright anyway. So we think this idea that a lot of the proponents of reform have got that there is a crisis because we're running out of expression or we're hampering innovation because people - because of the term of copyright is largely fallacious.

That is not to say that there aren't issues that clearly need to be addressed in the Act, and we have just heard an example of that. And the language of the Act is archaic in some respects. There are inconsistencies even within the current fair dealing and educational exception provisions that we accept should be addressed. But we think, given the nature of the subject matter and the fact that it is personal property, that change should be incremental and evidence based, and we don't think that that is a feature of some of the recommendations you have made.

I could illustrate that with the fair use recommendation. You have largely adopted the recommendation of the Law Reform Commission report and an unremarked feature of that report, which is very clearly stated in the executive summary if I could just quote, is that "around the world the need to quantify the contribution of copyright exceptions to non-core copyright industries, including interdependent and support industries, is under discussion. Stakeholders referred to the need for proper evidence before law reform is introduced, however the available economic evidence is incomplete and contested. The ALRC considers that, given it is unlikely that reliable empirical evidence will become available in the near future, law reform should proceed based on a hypothesis driven approach."

Now, we think that's really important because the exercise that the

ALRC undertook on their own submission is to recognise that they don't have empirical evidence but to come up with a hypothesis about what they think or what they thought was the best approach, and you've adopted that. We don't think that that's appropriate in a situation where copyright is personal property, it underpins business models that are very important in our economy. To introduce a radical change like fair use into a legal system that it is not adapted for we think is overreach. It would be overreaching and that the approach should be to address issues like the speaker before me raised by targeted exceptions to the general rule of the exclusive rights of the copyright owner.

The other benefit that that would have would be to give libraries, cultural institutions and others that we think have demonstrable issues the certainty that they really need that they can go about their business without being threatened with law suits. Which, by the way, is a justifiable concern in theory but practically is not something that really is a feature of our copyright landscape. People aren't being sued for digitising works in cultural institutions. People aren't being sued for forwarding emails despite the press releases being put out by some of the proponents of fair use. I don't know if I am overreaching myself on time here.

MS CHESTER: A tad, but that's okay.

MR NOONAN: Okay. So look, we think the fair use is something that should be approached with a great deal of caution. We don't think that the legal status of fair use in America even is at all settled. I have seen academic articles that have spoken about the different approaches that the different Federal Circuit Courts there are taking to the question. The clear expansion of the concept and scope of fair use over the last 20 years since the Campbell v Acuff decision is of concern, and we think that the way in which Google is taking advantage of fair use - and I think you will have other submissions from rights holders about concerns with Google's treatment of copyright works - we think that that is something that needs to be considered as well. And from a personal perspective I would submit that Google's role in this debate through organisations that it supports is something that you should, if you are not already, approach with some - I'm not sure what the word is - scepticism perhaps.

There are other things that we have dealt with in our submission and that other members of our organisation will deal with. I don't need to go into those in any detail here. If you have got questions that you would like to put to me I would be happy to try and answer them.

MS CHESTER: Thanks very much, Paul, for those opening remarks. I

thought it might be helpful just at the outset, particularly given that we have folk here and we are on transcript, just to make a few points of clarification. As you rightly point out, it was a finding and not a draft recommendation, around copyright term. Indeed we make no recommendation to change the term of copyright. The finding that you refer to is one where, based on ABS analysis and statistics - so this is data from the Australian economy and looking at the commercial life across all forms of copyright - that if you were to have an optimal term of copyright based on the commercial life of those works it would be 15 to 25 years, and that was the purpose of that finding, that observation. The Government asked us to look at the copyright arrangements and the intellectual property arrangements from the perspective of balancing the interests of a vast group of individuals from the creative rights holders through to follow on users and consumers, and that was really the motivation and the purpose there. But I don't think anyone has provided us with any evidence to challenge the methodology or the data underpinning the ABS statistics upon which we formed that view. I think a lot of people, like yourself, will cite outliers where the commercial life extends well beyond the average and that's something that we note in our report as well. There is a distribution around that 15 to 25 years.

MR NOONAN: Can I just say something with respect on that point, because I believe I have seen the section of the ABS report that you are referring to and I found it quite incredible that you could make that finding on the basis of the evidence that is referred to in that report because my understanding is, for example, for the film industry it was a book about making films, that the ABS did not even make any comment about who the author was or the expertise of the author. If that is the ABS information you are referring to then I just don't accept that it is credible evidence on which to base such a radical finding. But if I could also just say that one of the reasons this has caused such concern is that it's seen by rights holders, and particularly by authors, as an assault on something that is very precious to them, particularly in the case of authors. The fact that you say it's a finding and not a recommendation I don't think is something that should be really treated seriously because someone picking up a 600 page report and looking at the headline issues and recommendations and findings is quite entitled to treat that, from a Government body, as a serious thing. And many people would think that a finding by a Government body is actually more potentially binding than a recommendation. And I think that explains a lot of the angst that this is causing. And that, coupled with what I perceive to be a deficiency in the evidence - and I might be wrong about that because I haven't seen all of that ABS evidence - I just feel that you're probably getting a lot of this but I think that as a practitioner myself as well as a lawyer, that's where a lot of this is coming from. And I'm really picking up a lot of it in my

practice as a lawyer and in my position on the board of Music Australia. And I think it's a serious issue for you to consider, if I may say so.

MS CHESTER: And we have heard that loud and clear since the draft report was released, and it's a shame that a lot of people have relied on media reporting and not actually even looked at the executive summary of our report which made it very clear that, given our treaties and obligations, there is no way we could recommend a change to copyright term. But anyway, let's park that issue because there's a few other issues that we probably need to work through. On the issue of the ABS statistics though, we are yet to receive any evidence of folk that have actually looked in detail at the original ABS work and challenged the methodology, but we would be more than happy to receive that evidence.

MR NOONAN: Okay.

MS CHESTER: And review that finding in the light of that. On the issue of fair use, we were able to benefit from a lot of the work that had been done by the ALRC, you are correct. Indeed, we have had legal practitioners and academics that were involved in the ALRC work involved in our round tables and they have presented at our public hearings. I think one of the things that they did was bring a legal lens, being the ALRC. What we have tried to do now is look at fair dealing versus their use and bring an economic lens, and in doing so we found that there was a case, using an economic lens, in moving from fair dealing to fair use largely because of the inability of fair dealing, because it's very prescriptive, in dealing with adaptability over time and did we have a substantive evidence base that suggests that as technology has changed that the fair dealing arrangements have not kept up with that pace. Indeed, VCRs came in - by the time the legislation was changed ours was mothballed and in the attic. So you're right in saying though that the empirics have not been done, or where they have been done to date they've been very poorly done, and it's not a very easy area to lend quantitative analysis to. In fact, we need to do a cost benefit analysis.

MR NOONAN: No.

MS CHESTER: That said, a lot of those previous analyses have been commissioned by parties with particular interests and thus you can get some interesting results. The Department of Communications has actually commissioned a cost benefit analysis and we are hoping that that will be made available to us before we finalise our report. And to some extent that would put us in the fortunate position of having had some form of an empiric analysis or quantitative analysis done and commissioned by an independent party such as the Department of Communications. So we're

hoping that we will have that and be able to draw on that for our final report to Government.

MR NOONAN: Okay.

MS CHESTER: So address that issue for you.

MR NOONAN: Sure.

MS CHESTER: Turning then to the issue of fair use, maybe we could go through a few questions around that. Given we are kind of struggling in the world of trying to inject adaptability, governments have moved to principles based law as, given your legal background, you would be more than familiar with. Particularly a good example would be Australian consumer law. And a lot of folk have suggested to us that moving from fair dealing to fair use would actually increase uncertainty, and then we hear from others who say well actually it would increase predictability because at the moment a lot of the uncertainty with fair dealing comes from the fact that it doesn't deal with the changes in technology or the changes in business models and uses. Can you just sort of explain to us why you feel that fair use would be sort of systemically - would give rise to greater uncertainty than fair dealing, given we are sort of getting conflicting evidence on that?

MR NOONAN: Look, you're right about the difficulty of finding evidence in this, and I think the only way you can really do it is to go to the cases, and particularly some of the more recent ones in the US. And we have spoken in our submission, I think, about the Prince v Cariou case, the photographer whose work - artistic photographer whose work taking portraits of Rastafarians was appropriated by Richard Prince without consent and without remuneration, and Prince made thousands out of each painting, each appropriation, and the original author made I think royalties totalling $8,000. We think that that actually encapsulates the uncertainty because there were 30 original photographs in the litigation. The Court at first instance found that the treatment wasn't fair use, and on appeal it was found that 25 of the 30 paintings were fair use and the other five weren't, and the consideration of those was remitted to the Lower Court. And that shows when you've got one appropriation artist dealing with a series of underlying works from the same photographer in the same series of works, the difficulty - what I feel personally, and so I haven't consulted our organisation about this - is that it's always a matter of where the boundary is, and there are always going to be these hard cases. And that really what you're doing is expanding the scope for uncertainty because you're taking away specific exceptions that are there for specific purposes, and opening up the whole field in a way that is bound to increase

uncertainty.

It is true that the Copyright Act has never really kept pace with technology, and I don't see that fair use is going to be a magic bullet for that. If the alternative is to have targeted exceptions that need to be adapted over time to deal with technological change, well then I think that's the price we may have to pay because that's how the Copyright Act has always worked and it's an imperfect system, but at least we know what it is and we know what needs to be done to make some of the fair dealing and educational exceptions work more effectively than they do at the moment.

I do think it comes back to this question of what your conception of copyright is. Is a copyright work just a widget, or is it something that's - and in some cases they are, and I think your report touched on that division between non-commercial or artistic merit works and those that don't have that merit but it's not really explored further in the draft report. I'm going off on a tangent here so I will - - -

MS CHESTER: Yes.

MR COPPEL: The report covers all forms of intellectual property and a common element with intellectual property is that there is that period of exclusivity that is granted to recompense the effort and the costs in the development and the creation of a work, whether it's a book or whether it may be a particular variety of plant, or whether it's a technological innovation. And then as a counterpart to that there's an understanding that after that period of exclusivity it would be in the public domain, there would be dissemination of the ideas that lie behind, in the case of a patent, the innovation so that it would have a broader public value. Those terms of exclusivity can range from ten years for a design to the life plus 70 for copyright, 20 for patents, 15 for plant breeder rights. And in your submission you seem to be suggesting that copyright is a bit different from that, that the notion of the property is one that potentially goes into perpetuity. Is that what you are advocating?

MR NOONAN: Our submission isn't that copyright should have a perpetual term. We did mention in passing that in considering the term you were prepared to make the radical finding that the term should be much reduced, but given your remit to conduct a root and branch review you have started at a point where you have just accepted the current approach and we were just pointing that you could have actually, if you wanted to be radical, examined whether or not copyright - whether there's a justification for a perpetual term, given the nature of the material in a lot of cases. We don't have a view on what the term should be. We were

really reacting to the radical - what we regard as a radical suggestion, finding that you made.

But just to take your first point, there's always been a distinction between the so-called industrial property rights of patents and designs and trademarks and intellectual property rights, or copyright. So I don't think that's anything new, and there's no reason why that distinction couldn't be explored. And there is a reason why the term of copyright is so much longer and always - well, not always but has in recent times been a lot longer than the other forms of intellectual property.

MS CHESTER: Paul, your submission also touched on the issue of statutory licensing arrangements, and again this might be an area where a point of clarification might be helpful. So in moving from our draft recommendation to move from fair dealing to fair use system with respect to the handling of copyright exceptions, we do not recommend any changes to the statutory licensing arrangements. We see them still continuing to operate in parallel to the fair use or fair dealing exception regime, dissimilar to the other countries which have been sort of confused with what we're recommending. So Canada, for example, remained with fair dealing but did make changes to educational licensing arrangements. So I guess I'm trying to get a better understanding of what your concerns might be around the licensing arrangements with a move to fair use, given we're not recommending any changes to the licensing arrangements?

MR NOONAN: That was really just - I think it was directed at the clarification that you have just made really. We didn't have particular concerns about that that we had considered in putting together our submission, it was just something we noted that I think the ALRC report was clearer about. And I suppose to the extent you're adopting the recommendations of that report then maybe we could have seen that.

MS CHESTER: Well, we do alter the ALRC recommendation slightly, although some have now suggested that sometimes lawyers do get things right and economists don't. So in terms of being able to better leverage off jurisprudence and how things have worked in other jurisdictions, I guess the fundamental issue though is to try to understand the concerns about fair use. Are there examples that you can point to of things that, from the perspective of your association, examples of works that are remunerable today under fair dealing that would not be remunerable under a system of fair use, given we're trying to take the principles of fair dealing and just put them - take the concepts of fair dealing and put them into a principles based system so they can adapt and evolve over time?

MR NOONAN: I think the example of hip hop music and use of

sampling might be one. There's a healthy hip hop culture in Australia and at one end of that movement there's some very commercially successful work being put out. With any of these things there are grey areas where perhaps remuneration that should be paid isn't being paid, but there is a clear culture of people licensing beats and samples for use by artists, and I understand in most cases that's done, particularly in the commercially successful areas, by the producer of the recording who is pretty much required to make sure that any beats and samples that are used are cleared and remuneration is paid where that is necessary. So I think the expansion - if fair use was introduced I think the tendency would be to regard that as an option that you could pursue, but that the likelihood would be, especially based on the jurisprudence that's coming out of the States, that you would not need to get a licence to use samples. And to the extent that samples are the underpinning of the work, or a recognisable section of a pre-existing work is used, and even if it's transformed, I don't see why the original composer or recording company or publisher shouldn't be remunerated for that.

And I think the concern is that what's happened in Canada in the education sector with the expansion of the fair dealing exceptions there would flow across into other areas if fair use was introduced. And we don't really accept the critique that you made of that PwC report. There's not time to go into that now, but we don't think that you have appropriately considered the experience there, and that some of the logic in that refutation in the breakout box doesn't stand up. I would be happy to follow up with that if you wanted.

MS CHESTER: And we would be happy to get some evidence from PwC to suggest that our challenges to their methodology don't stack up, but we're yet to receive anything that suggests that we have gotten that wrong.

MR NOONAN: Sure, okay.

MS CHESTER: But as I did mention earlier, we will have hopefully the benefit of an independently commissioned cost benefit analysis which - with perhaps some simple robust assumptions and methodology underpinning it.

MR NOONAN: So that's just one example. But could I just say this about fair use? I mean, it's been described - I don't know who by, but I saw recently as a solution in search of a problem. Now, there are clearly issues that need to be addressed with people's ability to access material in the digital realm and so on, but I'm a technology lawyer and I've had three clients base themselves in Silicon Valley and other parts of the US in

the last couple of years. Not one of them has said we've got to get out of Australia because we don't have fair use. That issue has not even come into the radar. You can look back over the last six months and Fairfax has had a number of articles about innovative entrepreneurs basing themselves in the US. Not one of those people has mentioned copyright or even patents as a reason why they're going to the US. It's all about the market. It's all about access to capital. I really think there's some conflicted sort of concern being generated here by people who want fair use to be introduced for other reasons.

MS CHESTER: Fortunately our evidence base goes broader than those people that have issues around business models to sort of use as librarians, archivists, schools.

MR NOONAN: Absolutely, absolutely but dare I question whether fair use is the answer? I mean, you're bringing a sledge hammer in where what you probably need is a scalpel to address those people's concerns, because otherwise there's going to be litigation and that's great for me.

MS CHESTER: I think those might see it a little bit differently. I didn't have any - did you have any other questions?

MR COPPEL: No.

MS CHESTER: Paul, thank you very much. I think that covers all the questions we have for you this morning.

MR NOONAN: Okay, thank you.

MS CHESTER: Thanks very much for joining us.

MR NOONAN: And thanks for the opportunity.

MS CHESTER: You're welcome. I would like to call our next participant, Professor Andrew Christie, to join us. Good morning, Andrew.

PROF CHRISTIE: Good morning.

MS CHESTER: If you wouldn't mind just stating your name, the organisation that you represent for the purposes of the transcript recording, and then once you're comfortable if you'd also like to make some opening remarks.

PROF CHRISTIE: Thank you. Andrew Christie from Melbourne Law

School, University of Melbourne although I suspect strictly I'm here in my individual capacity. The Law School hasn't given me a mandate to speak on its behalf, nor the university. Look, thank you very much again for the chance to engage with the Commission. I have been privileged to be involved pre issues paper, post issues paper and now post draft report and I'm very grateful for that. I will briefly focus on I think three matters. In principle every aspect of the report is fascinating, fundamentally important, challenging, difficult but unfortunately my day job isn't responding to every aspect so I will focus on three.

The first two are the two on which I made brief submissions to your issues paper, and I just want to make some brief observations about where you're at in the draft report. That is institutional arrangements and governance on the one hand, and compliance and enforcement on the other. And then briefly I will turn to a third issue, one that is the subject matter of a submission I made recently to the draft report, which came late so you may not have had a chance to see that. If you haven't I will sketch it for you. If you have seen it I will just talk about that.

Firstly, on institutional arrangements and governance I am very encouraged by the Commission's current position. I share the concerns that it has about the lack of a champion, about the lack of separation of policy administration, about the lack of expert independent input - not economic in general - and about the need for oversight of IP Australia. So where you put them up as four possible matters to address, I would suggest you address them all. If I can just use, at the risk of sounding as if I'm trivialising and I don't mean to in any way, but to highlight the significance here that I think you would see but maybe not everyone would - we know that with respect to patents 90 per cent plus are foreign owned. There's nothing inherently wrong with that, but if 90 per cent of our real property in Australia was foreign owned that might be seen as something that required some additional review and oversight.

Now, in real property and investment we have a Foreign Investment Review Board which occasionally seeks to act in the public interest to change the market settings, if I can put it that way. There is absolutely no equivalent in intellectual property. And if intellectual property is the 21st and 22nd and 23rd (inaudible) version of real property, I wonder if we have indeed enough oversight. I'm not suggesting we need a Foreign Investment Review Board for intellectual property, but I am suggesting that we need to think about what are the sorts of additional oversight we would have, given the significance of IP and the fact that, amongst other things, it's incredibly foreign owned. That is not inherently bad, but it does I think cause us concern about whether we're looking at the matter fully.

On the Commission's draft report statement about compliance and enforcement I candidly have to say I am less enthusiastic. Put bluntly, I fear, as the Americans would say, you have drunk the Kool Aid of lawyers. Now, I'm a lawyer and I'm not offering you their Kool Aid. The reality is that lawyers involved in litigation are thoroughly understanding of the system and they know its strengths and weaknesses, and they can recognise that change might be required but unfortunately, and it's a human characteristic, they are unable to break out of the paradigm. Their recommendations for change will be from within. Let's tweak this. Let's have slightly greater expertise. Let's have a national system here. Let's have a this, that and the other. All of which will tweak and assist, with litigation. The trouble is litigation is the problem itself. It's fine if you've got a very high value intellectual property asset that you need to have determination about where the matter is roughly 50/50. Litigation is basically about resolving 50/50 matters. The trouble is the vast majority of intellectual property, either alleged infringements or inappropriately alleged infringements, aren't 50/50 and yet our legal system doesn't easily or at all provide a mechanism for those types of matters to be dealt with.

In essence, what we're told is we have a Rolls Royce system called the Federal Court. You go there. The starting price will be $200,000 minimum. That's just a fact. It's just an absolute fact. That's just your starting price. Take it from there. $400,000, and then you might be up for costs of the other side, et cetera, et cetera. It is simply not appropriate. And I have to confess that I saw the draft recommendations which were that it's basically fine, leave it to the Federal Court to keep modifying its procedures. We don't need anything else. I vigorously disagree with it. I have heard those lines and I've been on the Law Council of Australia for a long, long time. I'm a practising lawyer as well as an academic. I've been involved in litigation and still am. I've heard those lines from the Federal Court and others for decades, and we're in a situation that's not vastly different, if at all, from what we were decades ago.

So my exhortation to the Commission is to recognise that some sort of radical circuit breaker is required. I would suggest set up, or recommend that Australia look at how it could set up some alternatives, not take away jurisdiction from any court. Look at alternatives and let the market decide. And if small players decide they want to go to the Federal Court at $200,000 to $500,000 plus, let them. If they decide that there is some other better way of having their disputes resolved that has validity and enforceability, let's see that happen.

So my summary is, with respect, I think the Commission has listened

too hard to those who would say the Federal Court is fine, we just need to tweak, and I think something vastly more radical is required. On the matter in which my initial submission didn't address but which my subsequent submission has, that is to say patents and pharmaceutical patents - so this goes to both chapter 9 and chapter 6 - I've had the chance to send you some data which you may or may not find useful. I take it you probably haven't had a chance to look at that, is that the case, in which case I will sketch it for you?

MR COPPEL: I haven't, no.

PROF CHRISTIE: So one lot of data which is now publicly available, and certainly I made it publicly available to the Commission yesterday, explores how patent examination works in three jurisdictions - Australia, the European Patent Office and the United States, USPTO. Basically we take 500 patents that have identical claim one going into examination. The claim is identical in all three jurisdictions. We observe what change examination makes to that claim. We have a typology classification. You can read the methodology at your leisure. We observe how often the claim is amended as a result of examination. And of course you can't amend a claim to expand its scope. There are only two ways you can amend a claim, to narrow its scope or to fundamentally change it. What we observe in all offices is the court - and not surprisingly the examination does have effect, more often than not the claim that is granted is different from the claim that was sought and most of the time that difference is a narrower claim.

The significance of the study is that we observed that Australia narrows claims upon examination much less than Europe and much less again than the US. And this is statistically significant, so it's observable. The facts are Australia amends 57 per cent of the time, the EPO 68 per cent of the time, USPTO 79 per cent of the time. Statistical tests tell us that's a real difference, not a fanciful one.

Therefore if you take the view, as most commentators do, that if there's a problem with patents being granted it's that they're too wide, not that they're too narrow - and I think you won't find people saying the problem with the patent system is we don't grant patents wide enough - so if the problem is the patents are granted too wide rather than too narrow, and if that is seen as a measure of quality, if your definition of quality includes let's not grant patents that are too wide, then the data clearly suggests that Australia is the laggard here. It is significantly under modifying claims upon examination and hence if you adopt those assumptions I made a moment ago you would conclude that Australia's examination lacks quality. Now, there is plenty of people around who say

that, but I think this data would show it in a rigorous way.

It also shows through logic and observation that what's happening here, again not totally surprisingly, is that the prior art grounds are driving change, narrowing of claims in Europe and the US much more than they do in Australia. You focussed, and I will come to this in a moment, on inventive step. I would exhort you to not forget novelty. In fact there is another study which I haven't even made reference to in my submission which will come out in due course, but it looks as though novelty is equally as important in those other jurisdictions in narrowing claims, as is inventive step. So not just focus on inventive step, but think about novelty I think would be the message from that study.

And the second study that I have sent you is the second phase to the so-called Evergreen Study. You are familiar, of course, with the first phase. I know that. The second phase looks solely at secondary patents. The first phase looked at all patents. Now we just take the subset of the secondary patents and we use two - we will look at two characteristics. Duration of patent grant, i.e. how often it's renewed. We do that because, and you will be familiar, it can be seen as a proxy for private value. A patentee logically will hold a patent for longer the more private value it has. And we look also at when the secondary patents were sought - timing. Because, as you also know, application for a patent - and these are all granted patents in the end, these aren't spurious applications - application for a patent is a proxy for innovation occurring. People don't apply for a patent unless they think they have innovated.

On duration what we found is - so this is for the same 15 high cost drugs that you are familiar with - that the secondary patents are held for longer, statistically significantly longer, by the API originator than by the other two categories of patent owner, which is the other originator - you can conceive that to be the other big farmer - and non-originator. You can conceive that to be research institute, generic, whomever. Which suggests that the private value of the secondary patents surrounding the high cost drugs is greater to the API originator. Now, that may not be surprising. There's all sorts of potential reasons for that, but it does confirm. So the extent to which you are concerned about secondary patents - brackets, I'm not sure you should be - but to the extent to which you are, you would I think conclude the data shows these secondary patents have higher private value to the API originator. These are the so-called evergreen - that's what other people would call them.

On timing we observed that all categories of patent owner, the API originator, other originator and non-originator, apply for patents at all stages during the life of the API patent. There is absolutely no sense in

which the original patent blocks innovation. It doesn't block because they innovate and they apply for patents. So even non-originators applying for patents well before - the patents that surround the drug well before the original patent on the drug expires. So there's no sense in which there is blocking by the API patent. That's logical, but data now confirms it.

So we looked at timing in terms of API expiration, patents applied for before, at and after expiration of the API patent by all categories of owner. Then we looked at that timing with respect to Therapeutic Goods Administration approval, the ability to bring the API to the market, and what we saw there, probably not surprising, is the API originator applies for its secondary patents at all stages during the life of the drug, including before TGA approval, but the other two categories not surprisingly don't. Why? Because there's no sense in which you're going to have a ready market for your secondary innovation until you know the primary innovation is going to be going on the market. So you might say all of this is intuitive, which I think it is, but the data confirms it.

I think the policy conclusions, or the conclusions of the policy makers about that data are that secondary patents have greater private value to API originators than others. Is that a problem? I don't think so. It seems logical but you would observe that. Secondly, API patents - and this is prior to having a clear experimental use defence in Australian law - does not block innovation. So no sense in which these patents are stopping others innovating. And thirdly, that if you wanted to speed up the bringing of secondary innovations to the market by those other than the API originator, one of the key things you could do is speed up Therapeutic Goods Administration approval, i.e. speed up market approval because once market approval is given that's a signal to others you innovate around and that's what we see. They are my comments.

MS CHESTER: Thanks very much, Andrew. I might start with your second point first, which is around enforcement, and maybe a helpful point of clarification so you don't go away today feeling that we have sucked the Kool Aid of only one stakeholder group. So we did make a finding with respect to enforcement, but there were also a couple of very important information requests in our draft report. Jonathan and I and the team were very mindful that we actually wanted to go and have a look at international jurisdictions, and indeed we have done that since our draft report. So we have gone across the great pond and we've had a look at what's happening with enforcement, particularly in the UK, also in Germany and we were very fortunate to meet with Judge Hacon, who is the judge who is running the IP Enterprise Court in the UK which is sort of the low cost stream of dealing with IP matters. So I just thought I would mention that first.

In that regard then, if we were looking at alternative mechanisms within the Australian court system to, as you say, not the 50/50 cases but maybe the 70/30 cases or 80/20 cases, to have access to a lower cost enforcement or litigation outcome, it would be good to get your thoughts and feedback on transplanting the IP Enterprise Court model in some way, shape or form to the Australian system, and in particular we're trying to give some thought as to if we were to do something like that which court would it best belong in. And this is an area where we're sort of weighing up pros and cons of you've got a lot of good justices in the Federal Court that have a lot of detailed and long standing IP expertise but a high cost DNA. In the Federal Circuit Court perhaps you don't have the immediate expertise in the justices there but you do have a low cost DNA. So it would be good to get your thoughts and feedback on that.

PROF CHRISTIE: I think yes, I certainly do. I had the pleasure and the privilege of bringing Justice Birss here last year to speak exactly about all that, and so not only did I hear him speak about it three times when I took him around Australia but I also spoke with him privately as well, so very familiar. So the short answer is I think we definitely should be trying to transplant IPEC to Australia. I can't see any downside. Yes, we're a smaller market. Yes, the number of cases will be smaller presumably, although there's always that sense in which - it's a bit like build it and they will come. If you offer people a chance to resolve their disputes, if they want litigation to do it - I will come back to it's not always the case - then at the moment a large number just simply can't take advantage of that. Presumably there's this below the tip of iceberg litigants, potential litigants, who would.

In which court should it reside? I think the UK experience suggests that not putting it in the superior court - they had a couple of goes at this, as you know, two or three times. The third time around they got it right. I think we can learn from that. Not putting it in the superior court makes sense, but the problem is it was difficult to attract a high quality calibre of person. Before Judge Hacon it was Judge Birss, now Justice Birss - and Justice Birss said publicly and also privately that the only reason he took the job was because it was made clear to him that the potential for him to advance up the judicial ladder was not precluded by taking this job. And I think that would need to be made clear.

Yes, there's plenty of knowledgeable judges on the Federal Court who deal with IP matters. There's also plenty who are cutting their teeth, if I can put it that way, at any one time. Who didn't come to the Bar with IP in their DNA. But there's plenty of capable people who aren't on any court at the moment who could, I think, do the excellent job that Justice

Birss and now Justice Hacon are doing. I don't think you should be concerned about Australia having a lack of ability to provide at least one person who could radically reform IP litigation in Australia. I'm sure we could find such a person.

My related observation is but don't think just about litigation. That solves the litigation side. Many times people have disputes and just want to know, get an outcome, and it doesn't even have to be a binding observation. Litigation is binding. It's great, determinative, final so long as you exhaust all your appeals. It's final eventually. ACIP in its post-grant patent enforcement review suggested some additional mechanisms that could be considered. They included non-binding tribunal determinations. A lot of lawyers said to me, "If it's non-binding why would you go there?" And I said, "Let the disputants decide. Do they need a binding decision or do they just want a decision that they can go wise people have told us this is the position." And with costs enforcement issues if you then decided to ignore that and go to court. We can be creative. There's all sorts of options here.

MR COPPEL: Is that different from arbitration or mediation?

PROF CHRISTIE: Yes it is, because arbitration is binding.

MR COPPEL: Mediation is binding?

PROF CHRISTIE: Mediation is non-compulsory but binding. Once you've had a successful mediation you sign a settlement deed. Arbitration is binding because you've gone there under a contract saying that we agree to have this arbitrated and it's binding and enforceable by courts. Don't think arbitration is your solution to litigation. Arbitration is privatised litigation. It can be as long and as expensive as litigation. I know this. I'm involved in this as well. I am exhorting us all to think about additional mechanisms that can be brought to bear. So I'm not saying it's the only set of solutions, but solutions were canvassed and discussed in some detail in the ACIP report, and they are about including non-binding determinations.

They are also about having, if you like, the shop front, the first port of call for the very uninformed disputant, which is IP Australia itself stop saying "nothing to do with us". IP Australia says, "we grant the rights, nothing to do with us whether in fact you can enforce them in any meaningful way." Now, I won't be facetious. Countries that have a relatively decent legal system and rule of law like the United Kingdom have decided that their shop front, their IP office, rightly has to provide assistance with resolving disputes. They have the ability to have internal

expert determinations made so that potential disputants can see actually yes, I can see what's going on. I'm fine now. I would encourage us all to include that in our deliberations as well.

So to summarise, litigation must always be an option and remain there. It's just that we don't have a very attractive version of that for most potential disputants. We want litigation. IPEC provides a very good model. Secondly, we should look at in addition, complementary, other mechanisms for disputants to have their disputes resolved. They can be non-binding, expert determinations that are just determinations. They can be done through IP Australia. They can be separate from IP Australia, facilitated by IP Australia. The UK has this. Singapore has this. Australia seems to think that it doesn't need it. I would disagree.

MS CHESTER: Thanks Andrew, that's helpful. Turning then to your first issue which is the - and we haven't had a lot of submissions or evidence around this - but I guess from our perspective a lot of people might glaze over when we say governance matters but if we look at what happened with competition policy back in the late '80s and early '90s perhaps the most enduring changes that Government made there were actually getting the governance and policy settings right for competition policy. You have touched on a couple of issues. I guess we might look at it as a bit of a triage. So firstly there's the issue of policy consolidation. So at the moment we have a fragmentation of policy advice across intellectual property matters. We have copyright in Comms. We're meant to have much of the rest of IP arrangements within the Department of Industry, Innovation and Science but we also know that IP Australia is actually pretty much at the forefront of policy advice and policy consultation as well. So firstly on the issue of fragmentation versus consolidation, it would be good to get your thoughts on that?

PROF CHRISTIE: Okay, yes. So I stick by my original submission, brief as it was, for the issues paper which said that I thought that it was not coincidental that we've had in copyright, for example, sub-optimal, to put it politely, policy making given where it rested and in a moribund portfolio that removed all expertise from the matter, taking the view that a generalist can deal with anything. And this is unfortunately, I think, not true with intellectual property. It will be interesting in the Chinese sense of the word to see how it goes now it is wholly in communication and the arts. I observed the submission made by them. It was incredibly light, brief, and I think it reflects their ability to get their head around what responsibilities they actually have. A lot of people didn't even know it had changed, and I think it's the Australian Copyright Council says in its submission something like well, we can't even find out who is dealing with it. I know the Law Council of Australia can't actually work out

which person you would actually call if you wanted to talk with them about copyright. So copyright is a basket case in terms of its policy administration. I don't think I should mince my words about that.

My concern about industrial property rights is actually that we don't have a holistic view, so I think it is actually important that there be expertise that is across copyright and industrial property rights. They do overlap. You are concerned about protection for software, for example. That's the traditional example of overlap between copyright and patents. There are many others, that's just the headline one or one of them. It's not about administration as such. It's about policy making. Now, there isn't that much administration required of copyright. It's predominantly policy determination. Yes, we've got collecting societies that need to be regulated, et cetera. So in fact the consolidation needs to be at the policy level, and I think there is no downside to trying to put expertise about IP in one place. At the moment with the greatest respect I think it only resides in one place, and that is IP Australia, and there are challenges there because of the divide, or lack of divide between administration and policy making.

The Industry Department itself, I had the pleasure ten years ago of going up to speak to then I think it was a three member team. There's no point in mincing words. I was struck by the fact that they hardly even knew what they were supposed to be doing, let alone be able to tell me. No idea at all. I never bothered going back to the department, go straight to IP Australia if there's anything I need to deal with. That is because the only people who understand it are there. They're not necessarily wanting to accrete all power to themselves as some evil monster, but you do need to understand this stuff and basically that's where the only people are in Canberra who do understand it live.

MR COPPEL: Can you elaborate on - you mentioned there are challenges with IP Australia being both the administrator and the policy adviser? Can you elaborate on those challenges?

PROF CHRISTIE: I can, but I agree with the way you have sketched it out in your draft report. So have I observed challenges, actual ones? So the theory is there, fine. Look, I think I have because it uses the slightly pejorative, and I don't think it is a pejorative thing I have captured, but IP Australia is very focussed on how you do examination and it's not that focussed on - and yet it needs to be because the policy expertise on this issue doesn't reside elsewhere - is on whether they're examining - and not examining the right way, but whether the things they're being asked to examine are the right things. So to put it crudely, IP Australia is very good at reacting. It's very good at reacting to the High Court's decision in

Myriad and modifying its examination guidelines, okay. What was it doing for the last 20 years on that? Well, of course it was examining under the law as it stood, absolutely. Who was getting the law in Australia sorted out on that? Nobody until Yvonne D'Arcy and Cancer Voices decided to pitch in and do it on behalf of the public. Where was the equivalent of the environmental defender there? Who is the IP defender here? If gene patents are such a problem, and I'm not sure they were that much in practice, but if they are - they certainly generate a lot of heat - who was doing the defending? Nobody. IP Australia certainly couldn't because it was examining exactly the way it thought it had to. That's a real example.

Modified slightly with now the other currently contentious issue in patenting which of course is computer implemented inventions. We have been doing this for at least 25, 30 years the same way we're doing now. This time IP Australia finally thought, actually we've got to do something about this. So it rejected the application then fought the matter through first instance and then Full Court. Now, that's good but a lot of people would say I'm not quite sure the Patent Office should be fighting on matters of legal principle when it struggles - whilst at the same time it has to apply them in an administrative way. So I think we can see with gene patents at least the problem with having the policy expertise reside with the administrator is sometimes the inability to recognise whether what they're administrating now needs some policy review, is how I would put it.

MS CHESTER: Okay. So that then leaves us as we go through the triage of good policy governance around intellectual property arrangements to where should it belong? Where will we find the right government agency separate to the administrator who will bring the right lens to good policy making for intellectual property arrangements?

PROF CHRISTIE: Well, I don't claim all wisdom here so I don't say look, you must do what I suggest I'm sure it's right. I would simply - I have some casual views about it, if I can put it that way. My casual thinking is that first and foremost what matters is you actually have to have the expertise there. Secondly, to get the expertise you have to resource it. Now, it makes a lot of sense to have the expertise in IP Australia because it generates lots of revenue, a couple of hundred million dollars a year. You can easily fund lots of policy people with that. But you don't need them too close. I know IP Australia are separating it out. My casual observation is along the lines of I suspect the industry portfolio which has a - to which IP Australia is an administrative agency, but in the policy making portfolio. It should be easier to transfer the expertise there and presumably transfer the revenue required to support

the expertise if you're all in the one portfolio. But that's not my area of expertise. I don't claim great wisdom there. That's my casual thought.

MS CHESTER: The other issue that you have raised around governance that we didn't go into in much detail in our draft report, Andrew, was around who is oversighting the administrator and it's quite a unique arrangement. It's not an independent statutory authority or agency like our other rights administrators, or sorry, our other regulators. So is that an issue that you have given some thought about? Is it the way that we've sort of legally structured IP Australia that has implications for what sort of oversight it's subject to?

PROF CHRISTIE: Look, yes given some thought but again I would just insert the caveat I don't claim that this is based on great data or knowledge or expertise. It's casual views, for what it's worth. But I've been in the space for a good couple of decades. Let me answer by saying this. So I was appointed to the Advisory Council on Intellectual Property for a total of eight years and one of the notional responsibilities of ACIP was oversight of IP Australia. Now, it never actually was able to discharge that for structural reasons, which I can explain in a minute. But when I was on ACIP and we were doing all our, I like to think, good work at the micro level I was always thinking about but we are supposed to be oversighting IP Australia more generally, and we weren't. Now, why weren't we? Well, because we were completely resourced by IP Australia. The Secretariat came from IP Australia. All the funding for ACIP came from IP Australia. All the directions from the Minister to ACIP first came from IP Australia to the Minister, down to ACIP. The response went from ACIP to the Minister. The Minister handed it back to IP Australia to draft the Minister's response, back to - it was - it's not a charade. I mean, I have the highest respect for IP Australia. Don't get me wrong, I really do think it's an excellent office. But I'm sitting there thinking I'm not sure if this is right on the oversight bit. So firstly we don't have it. We didn't even have it when we notionally had it, and we certainly don't have it now. And it troubled me, and I think that we should have it.

How would you structure that? I am open. I'm not a - on the one hand I'm not a big fan of statutory things because they're very hard to get rid of when they turn out to be wrong or past their use by date, but on the other hand statutory things give you that independence and that extra resource, that ability not to be just an arm of the person you're oversighting. So I think serious thought needs to be given to that. So I don't have the model, but I just have the exhortation because I hear this a lot, "Oh, it will cost." Yes, that's true. It will absolutely cost. It might actually cost quite a bit. But you know what? The cost of not doing it,

not regulating, not oversighting is potentially vastly, vastly greater. And that's my response to people who say that it will cost.

MS CHESTER: We might turn to patents and your more recent research looking at patent examination across several jurisdictions which is very timely for us given we're looking to finalise our report. And here I guess it would be helpful if we could sort of try to bundle the point that you make about what happens during the examination process and the potential to narrow the scope of the patent as a potential measure or a proxy measure of quality. If you're looking at what are then the characteristics in Australia's jurisdiction that are resulting in that structural difference in what happens through that examination process - we can look at the law being applied. You mentioned prior arts and novelty. I guess we've been focussed very much on the issue of obviousness in terms of whether we depart from the EU threshold for granting a patent. So there's the issue of the examiner applying the law. Then there's the examination process itself and the timelines and how that's resourced, and I guess I'm just trying to work out what characteristics are there about the Australian system apart from the differential in our patent thresholds legislatively that might be driving these examination outcomes?

PROF CHRISTIE: Okay, so the paper that I have summarised in the submission because that paper is not published would say the following. It would say that you're absolutely right, that examination is driving the difference in outcome. That's all it's driving. It's exactly the same claim going in, it's exactly the same patentee. It's the examination office that drives the difference. Logically it can only be two things that are driving the difference. A difference in the law and then a difference in the practice of the office in examining. The law you're making comments about in your suggestions for changing inventive step, which largely I am in agreement with, I would simply add that there's another study which I haven't even summarised for you in the paper, it's still in progress, suggests that novelty is as nearly as important as inventive step. It would seem possibly more so.

Now, that then suggests the other side of the equation from the law is also the practice, and that has two features. The procedure and also the rigour, if I can put it that way. The procedure being how do you actually do things in the office. The rigour being with what level of height, if you like. On procedure, the second work in progress study that I haven't made reference to in the written submission strongly suggests that searching is actually the problem here. Now, I know that it's true and IP Australia will rightly say they have now moved - because this is using data from the mid-2000s, late 2000s - moved to paying attention to other office's

searches, which is absolutely sensible. They benchmark et cetera, et cetera. So I can accept that they have improved, but it was absolutely necessary to do so because the data was suggesting that they weren't even identifying as much prior data as the other offices were. If you don't identify it then of course your novelty and inventive step application is going to be different.

And possibly the rigour, and the rigour does go back to your law point. But you can actually write into the legislation changes, but it has to be applied if that's what you want. And I thought the way you put it in your draft report was quite good, that is to say you were making suggestions about improving inventive step and then you're exhorting the office to make sure it actually follows it. And I think you're absolutely right because there is that bifurcation as well between the law and the application of the law.

So the short answer - the medium answer to your question is I think it's all. It's the actual legislation. It's the procedure within the office, especially searching for prior art, and it is the rigour of application of the procedure and the law within the office.

MR COPPEL: You mentioned that the procedures have since changed from the data that you used and the law has also since changed, the raising the bar act. Do you have any idea as to the impact that the raising the bar act will have on those findings?

PROF CHRISTIE: Thank you, it's an excellent question and I offer the following observation. I have no data. I have only intuition. Where does this intuition come from? It's reading patents, reading decisions, reading examiners' decisions, Hearing Office decisions, reading court cases, teaching this stuff, trying to know it back to front. My intuition is no. My intuition is no, it won't. So no. Why not? Because in some respects I think you're focussing on the wrong thing. I think this obsession with inventive step is somewhat misguided. Think about novelty, as I have exhorted, because the data on examination, albeit on earlier sets of patents, suggested that was equally important for why Australia produces less change, narrows less. But also think about the other levers that you have that aren't prior art based. Utility, for example. Now, raising the bar has changed utility but has it actually changed it in a way that's going to have an effect that those who want narrower patents would want it to have? We see in Canada at the moment that it's going to their highest court, an issue about well does utility bring within it some concept of a promise of what the invention is going to do. That's a social value promise. To be honest I don't think the raising the bar changes to utility will bring any of that whatsoever. Specific, substantial and credible. Nothing about a social

utility promise.

So I'm not asking or suggesting you should pull those levers. I'm not sure there's that much wrong with our patent examination other than we seem to do it differently from other offices. But I'm just saying to you as a matter of logic if you want to pull levers don't just focus on inventive step, (a) because I don't think the significance of the change is that great, and (b) it's not the only one, and possibly it's one of the ones that doesn't quite have the focus that you want it to have.

MS CHESTER: So Andrew, if I am interpreting your commentary you are saying it has a lot to do with the underlying characteristics and the nature of examination in Australia. You mentioned in our draft report we sort of exhort the examiners of IP Australia to implement in their examination process the amendments that we're suggesting to the patent threshold. What else should we be doing to make sure that the examination processes in Australia match those characteristics that you have seen in the other international jurisdictions?

PROF CHRISTIE: Look, possibly only two things, one of which I am sure does happen well in IP Australia and one of which we have already touched on and I don't think happens at all. So IP Australia I am sure does great internal benchmarking quality control, et cetera. I have no doubt that it is a quality agency. And don't get me wrong, it's not a - I don't doubt that one iota. But the issue of them checking, whether they're checking for the right thing in the right way - they might say yes, we're doing it exactly as we've been exhorted by the policy makers to do it but once you're in there doing it it's so much different from when you're standing back. It's easy for someone like me to stand back and draw observations. That's what I'm supposed to do when I'm not in doing the micro stuff. When I'm doing the micro stuff it's hard for me to get the bigger picture and others have to critique me on that.

So I think the short answer is the way you're approaching it, which includes recommending an objective statement in the legislation, putting all of that - making clear to everybody this is solely policy based - sometimes practitioners - I can be guilty of this sometimes myself - forget why we're doing this. We're so caught up in the doing of it, we know the intricacies of patent law and trademarks and copyright so well, all the nuances, we actually forget why we're doing this. It's as though it's a God-given thing that must be done this way and it always has and always shall be. But I think the way you're trying to say to all stakeholders, just remember there's a reason why we're doing this and it isn't necessarily what you think it is - that's a start. Putting in an objective statement in the legislation makes sense. Exhorting in other ways makes sense. And

having oversight of those who are doing it makes sense. So I would add to your list the thing that we've already touched upon about oversight.

MS CHESTER: Andrew, if I could be cheeky enough to add something to your homework list, given your propensity to be helpful with submissions to us, IP Australia like other Government agencies is now required under the PGPA to have a new sort of performance management framework, and particularly as a pseudo regulator there are some additional requirements there. It would be good to think of, if we're looking at that performance framework going forward in a meaningful sense, what would you want to see in that performance framework to make sure that they're having quality patent examination, contemporary best international practice? Because maybe that's one area we could look at being helpful there.

PROF CHRISTIE: Okay, I will do my best.

MS CHESTER: Thank you. Did you have any questions? Andrew, that's all the questions that we have for you this morning and I do appreciate the submissions that you have provided us and the help, the pre-issues paper and in the round tables. Thank you.

PROF CHRISTIE: You're welcome.

MR COPPEL: Thank you.

MS CHESTER: I would like to call our next participant to join us, Jack Burton, Daniel Jitnah and Paul Foxworthy. Good morning and welcome. Thank you very much for joining us this morning and for your submission to our inquiry. If I could just get each of you to state the name and the organisation that you represent in turn for the purposes of the transcript, and then if one of you would like to make some brief opening remarks that would be great.

MR BURTON: Sure. My name is Jack Burton. I am the chairman at Open Source Industry Australia, OSIA for short.

MR FOXWORTHY: I am Paul Foxworthy. I am a director of Open Source Industry Australia.

MR JITNAH: I am Daniel Jitnah. I am also one of the directors of the Open Source Industry.

MR BURTON: Thank you. Open Source Industry Australia, or OSIA as I will refer to it, is the industry body for open source software companies

in Australia. We exist to amplify the voice of the Australian open source software industry. I would like to begin today by thanking the Productivity Commission for this further opportunity to engage with the inquiry, and OSIA commends the Commission on what we see as the highly rational approach it has taken to the present inquiry to date, which we note stands in stark contrast to certain other IP reform processes we have seen elsewhere in the past.

By far the most important element of getting IP policy settings right is achieving the correct or the optimal balance, that is to say balancing the public interest in encouraging the creation of more new and useful works and inventions, which some argue calls for more restrictive IP regimes, against the public interest in maximising the dissemination of those new and useful works, which undoubtedly calls for more permissive IP regimes. Now, that message of balance came through loud and clear in the Commission's draft report and it's a message that we very much welcome at OSIA.

Our members' present concerns in relation to IP policy are chiefly in three areas, and those are patents on computer software, technological protection measures, or TPMs, and the negotiation of international treaties. Software patents stifle innovation and discriminate against open source software. The double regulation of computer software via patents and copyright in parallel is particularly inefficient. We support the Commission's desire, as expressed in your draft recommendation 8.1, to remove computer software from the scope of patentable subject matter. And we contend that the most efficient and effective way of doing so is by amending the Patents Act to provide that no copyrightable work may be patented.

In relation to TPMs, we note that prohibitions on the circumvention of TPMs have no possible public policy purpose. Infringement of copyright should, of course, be actionable and indeed already is, but incidental acts such as the circumvention of TPMs should not be prohibited. Not in general terms but especially not when the act of circumvention does not infringe on copyright. We support the Commission's desire as expressed in its draft recommendation 5.1 to ensure that Australians are free to circumvent geoblocking TPMs, but we seek to extend that freedom to the circumvention of all TPMs.

In relation to treaties, Australia's present processes for the negotiation of international treaties are, in our opinion, irretrievably broken. We support the Commission's desire as expressed in your draft finding 16.1 and in the comments leading to your information request 16.3, to see new improved processes for treaty negotiation put in place with a focus on

complete transparency, negotiation in good faith, and the development of model provisions for IP that are in the best interest of Australia's citizens and industry. The Commonwealth Government should not ratify TPP. The Commonwealth Government should never again negotiate in secret nor ever again accept IP or ISDS provisions in what are supposed to be trade treaties, nor ever again, as was the case in TPP, accept a negotiation process that is actively discriminatory against Australian industry in favour of foreign interests.

OSIA stands behind everything we said, both in our initial submission to the inquiry back in November and in our final submission of three weeks ago, and Mr Foxworthy, Mr Jitnah and myself are happy to take questions on anything and everything in either of those submissions, or indeed anything else of relevance to the inquiry today.

MS CHESTER: Okay, thank you very much for those opening remarks. We might turn first to the issue that you first raised in your three points, and that is around patents and software, and it is an area of the report where we have recommended some changes. Your submissions and your opening remarks suggest that perhaps we need to go further than our draft recommendations there. Before I ask you to elaborate on why you think we need to go further it would be good if you could give us some examples of where this overlap between patents and copyright, in particular with respect to software, does become problematic to innovation and follow on innovation?

MR BURTON: Okay, well the principal issue there I guess is one of scope. Copyright applies to the specific embodiment, and there are - computer software is a lot like literature in that it's the embodiment that really matters. When we want to enforce copyright it's a matter of not wanting - wanting to prevent third parties from using the material in a way that the original author doesn't approve of. With patents the protection is on the idea itself, which is difficult when it comes to computer software because it stops other parties from innovating around the restriction. With copyright it is always possible to create a cleaner implementation without copying any of the original author's work, without infringing on their copyright if the terms under which they're offering to licence that work are too restrictive to be of use to downstream innovators. That opportunity doesn't exist where there is a patent, and particularly when there is a whole thicket of patents around an idea or set of ideas.

We contend that copyright is a more effective and efficient vehicle for protecting software than patents for that reason. The development of software is very much an iterative one. Pretty much all software development today builds upon software that has been released before.

Not necessarily the actual code, but the ideas behind the code. When we as software developers write programs we're building upon the ideas of other programs that have gone before us, and that's how progress is achieved in the field of software. It is all pretty much iterative. Even in the early days of computer software much of that progress was achieved iteratively, and we feel that patents pose a threat to that sort of iterative development, particularly to those of us in the open source sector. Closed source software developers can take some solace in the fact that there are standards involved that patent holders will be subject to with brand obligations, et cetera so they can negotiate reasonable terms.

When you're a distributor of open source software you don't have the option to enter into brand negotiations because you have an install base of indeterminate size, so you can't calculate a royalty payment on an install base for indeterminate size. And you can't - well, you could go and negotiate a royalty free licence on a one-off payment, but that destroys the advantage, the competitive advantage in the market place that the original author has. There are many ways that open source software companies make the money out of their software, and it's usually not out of selling the software. It's out of selling services around that software. And the company which was the copyright holder, or the company at which the copyright holders work, has a certain competitive advantage in the market place because of the kudos of being the people who originated the software. They're likely to command higher rates in terms of services for that software than other organisations that offer those same services too. And even if the rates are the same they're more likely to be selected by clients because of their specific expertise there.

Now, having to pay royalties on a patent destroys that advantage because the third party organisations who are providing services around that software but who are not publishers or distributors of that software will not be subject to royalty regimes, whereas those who are actually downstream developers adding to progress in the field, adding to the benefit of the software, will be. So that's why we feel that patents, software patents discriminate against the open source sector as opposed to the closed source software sector.

But really the - to us it's most obvious because of the duplication. In principle we do not feel that any class of subject matter should ever be subject to multiple independent forms of IP regulation, and to us copyright is a far better vehicle for protecting the interests of software developers and for promoting the creation and dissemination of more and useful works than patent ever would be. I hope that answers your question.

MS CHESTER: It does. I guess it raises the issue of whether or not any

overlap of intellectual property rights is of benefit or not. Yesterday during public hearings we were speaking to some high end furniture designers who have design right protection but are also looking at using trademarks to distinguish their original works from future use of unauthorised copies and replicas once they're out of the design right period. So we've heard some evidence that there could be some legitimate recourse to using more than one form of intellectual property. Does trademarks enter the equation here with copyrights versus patents for software, and are you suggesting that software should not be eligible for the use of trademark protections?

MR BURTON: I'm not suggesting that at all. First of all I will say I am not going to comment on registered designs because that's outside of my area of expertise. We did comment on trademarks in our submission, and I think the distinction with trademarks - although you're right, there will on occasion be software to which copyright and trademarks both apply - there's a very, very clear distinction there. The trademark is about a word or a phrase. And trademark protection is only about that word or phrase when it's used as a trademark. It's a very clear test that the High Court established in Australia for that, and we think that's a good test. We don't have a problem with trademarks being applied within the context of the strict limits in which the Trademarks Act is interpreted.

The trouble with copyright and patent in parallel is that the overlap is very, very real. With copyright and trademark you are regulating quite different things. Trademark regulation is really about protecting reputation and about preventing fraud. And our members support a fairly restrictive trademark regime at the same time as supporting a fairly permissive patent regime, and ultimately a balanced copyright regime. That's where we sit in the market.

MS CHESTER: Now, that's helpful Jack. So clearly you are differentiating between where a form of IP protection overlaps, i.e. they become sort of substitutes, versus one which is complementary in the case of trademarks.

MR BURTON: Complementary, exactly. Now, if I might just add. The first question you asked about where we went beyond your recommendations, we did do that in some places. I don't think we actually went beyond your recommendations in terms of patents. We support your recommendation to remove business information in software patents from the scope of patentability. We're merely suggesting a different way of implementing that recommendation because of the issues that you raised in your draft report around things like the definition of embedded versus non-embedded software, the definition of trivial versus

non-trivial contributions of software. In order to avoid all of those difficulties we think it would be much more appropriate to use the existing body of law, which is centuries old and very well tested, around what is copyrightable versus what is not copyrightable, in terms of defining the exception, the new exception in the Patents Act. So rather than get tied up in all these knots around defining software, defining embedded, defining trivial, if we simply introduce that exception, the exception that says no copyrightable work may be patented, we think that will provide a means to implement your recommendation in a much more certain and much simpler manner.

MS CHESTER: And Jack, are you aware of any international jurisdictions that you can point to that may have - the method that you're suggesting for removing that overlapping IP rights, have been implemented in that way or is this just an innovative idea that you guys have come up with?

MR BURTON: This is an innovative idea that we have come up with. We're not aware of any jurisdiction that have used that terminology in their drafting. There are, of course, jurisdictions who have removed software from patentability, most notably New Zealand, but it's been done there in a fairly narrow manner, in a similar manner to that being explored in various European jurisdictions. We would suggest that a broader exception in line with what the Commission has recommended should be pursued here. We're not aware of any class of copyrightable work other than computer software that is currently subject to both patent and copyright, and therefore we think the most sensible way in terms of achieving certainty and in terms of ensuring that the exception is not too narrow, is to draft the exception as an exception for all copyrightable works.

MS CHESTER: Okay, thank you. You didn't touch on this in your opening remarks, but it was in your submission with respect to our draft recommendation to move from fair dealing to a system of fair use. It would be good if you could elaborate on what you see might be the potential benefits. We've heard a lot of folk who don't see the potential benefits in moving from fair dealing to fair use, so it would be good to see it from your perspective.

MR BURTON: Thank you, that's a very good question. The principal benefit of fair use as opposed to fair dealing is that it's more adaptable. One of the biggest problems, and we've heard this from several of our speakers earlier today, with the Copyright Act over the years is that it has failed to keep up with technology in a timely manner. It does eventually get amended to keep up with technology to some extent, but that's a very,

very slow process and it is very much a reactive process that happens a long time after the fact. And that tends to have a bit of a retarding impact on progress within Australia, on innovation within Australia and new forms of business models being developed and new technologies proliferating. And we don't think for a moment that's the fault of the Parliament. That's merely the way Parliaments in any democratic system work. Legislative change takes time. It has to because there has to be sufficient public debate, independent review and Parliamentary debate and eventually changes get made.

The benefit of having a broadly drafted principles based exception as opposed to a narrowly drafted prescriptive set of exceptions is it allows the judiciary to step in and make those decisions in the High Court, in the Federal Court, in a way that keeps pace with technological changes a little bit more quickly. There is still some lead time in there, but nowhere near as great a lead time as if we wait for legislative change. And yes, many of the other submissions have raised the spectre of massive costs of litigation. Litigation is expensive. We don't dispute that, and the comments we have made around your recommendations on the Federal Court and Federal Circuit Court reforms go to that. But we don't feel there will be an explosion in litigation. We think there will be some cases, and those cases will be necessary and those cases are how the law in Australia will keep up with, or will better keep up with, technological and business change and innovation in the future. But you only need one or two cases on each new technology or new innovation or new business method in order for the issues that arise from it to affect the law in Australia. There are a lot of copyright lawyers in Australia, and I would suggest that most of them keep pretty up to date with the decisions that are made in the courts around interpretation of the existing exceptions and would be even more careful to do so once we had a broad US style fair use exception.

MR COPPEL: Can you point to any examples where the current copyright law has retarded the development of new business models or innovation as you have suggested it does?

MR BURTON: Okay, it's difficult to come up with too many specific examples there but if you look at some of the documented cases of intermediaries - one of the oft cited objections to fair use is the benefit that it will confer on search engine operators, Google and the like. Those organisations sprang up almost universally, at least in the English language sphere, within the United States. We don't think it's any coincidence that the United States was the only English language jurisdiction at the time that had a broad general fair use exception in their copyright act. Now, I can't honestly say that Google would have been in

Australia, happened in Australia first if that was not the case. Nobody can say that. It's completely hypothetical. But it certainly would have been a more conducive environment, regulatory environment, for those sorts of innovations had we had a broader fair use exception in the Act. There may well have been other drivers that were bigger factors. We've heard today about the greater availability of investment capital in the US market. Undoubtedly that has a big effect as well. But it certainly wouldn't have hurt to have a Copyright Act that was more conducive to promoting downstream innovation.

MS CHESTER: Did you have anything else?

MR COPPEL: I've just got one other point that relates to fair use and you make in your submission following the draft report, which you call for the ability for a Minister to be able to declare an additional fair use. Can you explain why you think that's necessary and what it would bring in terms of advantages over something which is enshrined in the legislation?

MR BURTON: Okay, the example where this is implemented as the Commission itself pointed out in the draft report is the latest iteration of the Copyright Act in Israel, and that's where we got the idea from and in fact your reference to that. The ability for the Minister to declare an additional fair use - now, we're not talking about prescriptive declarations here. We're talking about adding items to the list of examples. Under your proposal for the fair use there would be a list of illustrative examples in the Act. Presumably the Minister would be able to proclaim in the Gazette additional items to be appended to that list. Now, the advantage of enabling the Minister to do that is that it will short circuit the process. We have then three different ways of the law being able to keep up with progress. The slowest but most certain way is by legislative change. A more rapid but also more expensive manner is through the judicial system. And the fastest method would then be by the Minister simply proclaiming an additional illustrative example of fair use. So that would be one method by which we could reduce the cost of that litigation, or the frequency of that litigation, during the transitional period. And presumably the Minister is only going to declare an additional illustrative example of fair use after that has been endorsed by the Cabinet. I don't think you would see a Minister declaring ridiculous expansions to fair use. He wouldn't remain a Minister for very long if that happened. But it would be a way for the law to adapt very rapidly to changes, much more rapidly than through statutory amendments and more rapidly even than through judicial process, given the delays involved and the multiple tiers of appeal that are likely in cases where there is genuine expansion to the scope of the exception.

MR COPPEL: Thank you.

MS CHESTER: They're all the questions that we were hoping to cover with you this morning so thank you very much for coming along and participating in our public hearings, and thank you also for your submissions.

MR BURTON: Thank you.

MS CHESTER: As does happen, we're running a tad behind schedule. We're now going to take a little break to stretch our legs and avail ourselves of some caffeine outside, so please do so. I would ask if we could resume at 10 past 11, thank you.

ADJOURNED [10.54 am]

RESUMED [11.58 am]

MS CHESTER: We might resume our hearings and I'd like to ask our next participant, Dr Deborah Gleeson, to join us. Good morning, Deborah, and thank you both for your submission and also your involvement in our round table last week. Once you're comfortable, just for the purposes of the transcript recording if you could just state your name and the organisation you represent and then if you'd like to make some opening remarks.

DR GLEESON: I'm Dr Deborah Gleeson, I'm a lecturer in the School of Psychology and Public Health at La Trobe University, but I'm here representing myself today.

MS CHESTER: Thank you. Did you want to make some opening remarks?

DR GLEESON: Thank you. My training is in public health and health policy and my particular area of research expertise is international trade agreements and their impact on health, particularly in the area of pharmaceuticals and access to medicines.

My submission to the Productivity Commission, in December last year, focused on the implications of trade agreements for Australia's intellectual property arrangements for pharmaceuticals and particularly on

the Trans Pacific Partnership Agreement. I pointed out ways in which the TPP and other trade agreements lock in existing intellectual property settings that are not in Australia's interests.

My submission made five recommendations. Firstly, that the Productivity Commission should examine the potential impact of the provisions of the proposed TPP on Australia's intellectual property arrangements and also on developing countries, because it's also an issue that we should be concerned about here in Australia, what effect these provisions are going to have on developing countries in our region.

I also recommended that an independent impact assessment of the final TPP should be done. I'm certainly not the first person to make that recommendation, there have been a number of bodies that have recommended that. I think quite a big consensus that there's definitely a need for independent scrutiny of these types of agreements and provisions. I also think there need to be changes to the treaty making process, to make the negotiation of bilateral and regional trade and investment agreements more transparent and accountable and to improve opportunities for scrutiny of proposed provisions by experts and the public.

People like me were very reliant on leaked drafts of the TPP intellectual property chapter to see what the United States and other countries were proposing for the contents of that chapter and if we hadn't had access to those leaked drafts we wouldn't have even known what questions to ask of the Department of Foreign Affairs and Trade. Other chapters where we didn't have leaked drafts we had a great deal of trouble even knowing what issues were under discussion and what we needed to be asking about.

I also recommended that the Productivity Commission should consider the scope for implementing the recommendations of the Pharmaceutical Patents Review and I'm very happy to see that the Productivity Commission has really scrutinised those findings and recommendations and has picked up many of those in the draft report. I think the Pharmaceutical Patents Review made some very sound recommendations so it's good to see those having a further life. I think the pharmaceutical industry is attempting, through a number of different means, to lengthen monopolies on pharmaceuticals and particularly to lengthen monopolies on biologic products. Longer monopolies on these products are definitely not in the public interest and efforts to do that should be resisted. So it's good to see the direction of the Productivity Commission's recommendations looking at winding back monopolies in some areas and not extending them any further.

I also recommended that the Productivity Commission examine international initiatives to look at different ways of funding pharmaceutical research and development. There's a widespread acknowledgement that intellectual property an patents don't stimulate the innovation that we need to address the major problems that the world's facing at the moment and that we need to not just look at ways to tweak the existing system but also to look at alternatives and to make sure that we leave scope for pursuing alternatives in things like international trade agreements.

Overall, I'm very happy with the recommendations that the Productivity Commission has made, in relation to pharmaceuticals, particularly the recommendations around better targeting the extension of term. I think it's a very sensible approach to only include delays that are due to the actions of the regulator and only to allow extensions of term for new active pharmaceutical ingredients. There's certainly scope, within our existing trade commitments and the TPP to change the way that we implement patent term extensions in Australia and I'd like to encourage the Productivity Commission to consider going even further and reducing the length of the extension of term because there's nothing in our trade agreements that actually mandates the five year extension of term.

Some industry lobby groups might argue that the time taken for approval by the Pharmaceutical Benefits Advisory Committee, approval should also be taken into account in calculating an extension of term or the term of data protection but I think that doing that would provide a perverse incentive because if it's taking companies a long time to get PBS listing, then it's generally because they're not applying at a price that the Pharmaceutical Benefits Advisory Committee determines is cost effective. So if we allow them an extension of term to compensate for the number of years that it takes them to get a PBS listing, we're actually compensating them - we're actually incentivising them to ask for a high price.

I agree with the Productivity Commission conclusion that there's no justification for extending data protection and it's really very obvious that the costs of extending data protection, particularly for biologic products, would be very high. With Ruth Lopert and Hazel Moyer we wrote a submission to the Department of Foreign Affairs and Trade, in 2014, looking at 10 of the most expensive biologics on the Pharmaceutical Benefit Scheme and together just those 10 drugs took up around 14 per cent of the cost of the Pharmaceutical Benefit Scheme in 2013 to 2014. If we'd had biosimilar versions of those drugs available we would have saved over $205 million in that year. So because these drugs are very expensive and they're taking up an increasing share of the Pharmaceutical Benefit Scheme listings we need to really be very careful about not

extending monopolies on those drugs.

I also agree with the direction of the Productivity Commission recommendations around trade negotiations. I've argued, many times before, and many non-government organisations in Australia have also argued that trade negotiations need to be informed by more independent analysis and treaty text should be released before being signed by Cabinet. There should be health impact assessments done of proposed provisions before they're adopted and there needs to be a more systematic process for consultation, other than the ad hoc process at the moment, and real meaningful consultation about the contents of the text.

I think in some ways a model agreement for intellectual property, as the Commission has proposed, is a good idea but I also think there's a strong rationale for leaving intellectual property negotiations at the multi-lateral level and not including them at all in bilateral and regional trade agreements because what we end up with, if we include them in our trade agreements, is we end up with trade-offs between intellectual property settings and issues in other sectors and we end up with very detailed prescriptive rules that constrain our flexibility as we move forward, in a changing field with many very expensive drugs coming onto the market. Thank you.

MS CHESTER: Deborah, thank you for those opening remarks. I think when we got our terms of reference the government's asking us to revisit have we got the balancing act right and we look at patents, I think the public policy dimension, as it relates to health, is probably one of the most pertinent cases of making sure that we do get that balancing act right, given the costs that will be imposed if we don't.

A lot of your submissions and some of your opening remarks were really about the way Australia has entered into bilateral and multilateral trade agreements, and including IP arrangements in those. You've touched on areas where you think that the governance and transparency and accountability around those negotiations could improve setting aside whether or not IP arrangements should even enter those realms. One aspect that you didn't touch on in your opening remarks and would be good to get your feedback on is we do identify sort of a suite of reforms to wrap around those negotiations, in terms of greater transparency and accountability. At what point should some sort of net economic benefit assessment be undertaken and how that would be done, given that elements of the negotiations would be confidential.

We also mentioned the idea of a model chapter for intellectual property and this is an area where we've gotten some initial feedback.

Some folk, like yourself, think, "Well, there shouldn't even be an IP chapter in these trade agreements." Others have suggested, "Well, a model chapter shouldn't be very prescriptive, it should be about the principles." So if we sort of take a pragmatic view of we're in this world of intellectual property arrangements figuring as a chapter in bilateral and multilateral trade agreements or bilateral and plurilateral trade agreements, what are your views on how we might approach it, from the perspective of setting a line in the sand?

DR GLEESON: So if we were to take, as a starting point, that we were going to have a model intellectual property agreement that will be tabled in trade negotiations, I think that the TRIPS agreement is the best model that we have, in terms of setting a basic standard but also allowing a lot of domestic flexibility in how intellectual property settings are actually implemented in different countries. I think that it shouldn't be prescriptive, it shouldn't be set at the standard that we currently have, which is arguably too high for the size of our country, the size of our market, the changing context around pharmaceuticals. It also needs to take into account that many of our trade negotiations are with developing countries and so what we might see as an appropriate level of intellectual property protection here, it could well have a very negative effect on a developing country.

An example is, we're currently engaged in negotiations for the Regional Comprehensive Economic Partnership, which includes some least develop countries and a number of countries that are not currently members of the World Trade Organisation. So the level of intellectual property protection that we have in Australia at the moment is not what we should be going into that negotiation with. We need to be thinking about the needs of these very poor countries and the fact that large proportions of their populations already don't have access to the drugs that we take for granted here.

MS CHESTER: One of the themes of our report is that, effectively, our terms of reference were very broad in scope but they also made it very clear that we had to be mindful of our obligations in our existing treaties and trade agreements. From the work that you've done, where do you see, and I know you've looked at it from the perspective of how it might impact public health policy, where do you see the greatest constraints, the binding constraints that have been set that so narrow the window of what we might be able to do to change our intellectual property arrangements, going forward from the perspective of public health and which of the agreements do they tie back to, TPP, Australia/US Free Trade Agreement?

DR GLEESON: I think the Australia/US Free Trade Agreement really locked us into a lot of the intellectual property settings that we have. Things like patent term extensions, data protection, things like that. A lot of those settings we already had in our domestic law before the Australia/US Free Trade Agreement was negotiated, but now we have international commitments to keep those in our patent law. We also introduced patent linkage for the first time, following the Australia/US Free Trade Agreement. So I think that that really has, to the extent that we're locked in to certain provisions, it's largely the result of the Australia/US Free Trade Agreement.

The TPP really adds another layer of obligation on top of that. My analysis is that I can't see any areas where the TPP actually requires us to change our settings. The one area of real concern for Australia is the provisions on biologics, because they're so ambiguous, as I set out in my submission, and there is scope for Australia to not make any changes because of the ambiguity of those provisions. But the United States is applying a lot of pressure to other countries to clarify the arrangements that they're going to make to implement those provisions. Just a few days ago there was an article in the Wall Street Journal quoting Mike Froman, the US Trade representative, saying that countries have agreed to eight years' of data protection.

So the ambiguity of those provisions, it provides scope for us to maintain our current settings but, on the other hand, there's a lot of room there also for the US to pressure other countries. Because this is such a significant issue in Congress, where a lot of Republicans are saying they won't pass the TPP unless this issue is addressed, there are real risks for us there. Have I answered your question?

MS CHESTER: No. You have, thank you. Your submissions and your opening remarks also refer to the potential for Australia to pursue, through multilateral means of negotiation, any changes to intellectual property arrangements. Indeed, our draft report, perhaps a little optimistically so, suggested that it might be time for us to identify some like-minded countries who might be able to work with us to, over time, remove some of those policy flexibility constraints. It would just be good to get your thoughts on, I guess, firstly, how realistic is it for us to expect that to happen, given developments with the YPOs and WTOs of the word and then, secondly, what mechanism or what cluster of like-minded countries, or are there other ways that you think that we could achieve reforms over time, through multilateral means?

DR GLEESON: I think that's a very difficult question to answer and I'll have to give it some thought. I think that there are very powerful political

forces that work against any change at the global level. The pharmaceutical industry is very powerful, particularly in the United States and the European Union, which does make adjusting things very difficult. Then, of course, we have the whole spaghetti bowl or noodle bowl of trade agreements that do kind of tie a country's hands, to a certain degree. But I think that these are really important issues and that we need to be working towards change. There certainly are initiatives to look at how can we do things differently, initiatives at the World Health Organisation, there's a UN high level panel on access to medicines at the moment, looking at the high cost of medicines. Even wealthy countries are really struggling with the cost of some of the new drugs that are coming onto the market.

So there is a lot of momentum to look at ways to do things differently and I think that we need to be involved in that and we need to be very careful not to be moving in the other direction, by accepting more and more prescriptive obligations that lock us in.

MS CHESTER: You mentioned earlier on, when we talked about the idea of perhaps a model chapter on IP in trade agreements, using TRIPS as the benchmark. We learned recently, when we were meeting with some folk in Geneva, that within TRIPS there is an unused or unutilised clause for a review of TRIPS and a little ambiguously worded, unsurprisingly, as to what the scope of that is meant to be and the regularity of it. But if TRIPS is our benchmark could one mechanism be reviewing whether or not that benchmark has remained enduring as an appropriate benchmark for getting the balancing act of intellectual property arrangements right globally?

DR GLEESON: I'll need to have a look at that clause and perhaps I could take that question on notice.

MR COPPEL: It's article 71.

DR GLEESON: Thank you.

MR COPPEL: As far as we can gather it allows for a review after the first two years of it coming into force and then periodically after that. As far as we can tell, it's never been used in that way.

DR GLEESON: Right. Okay, thank you.

MS CHESTER: Moving to patents, Deborah, and you touched on pharmaceutical patents in your opening remarks and certainly in the submission that you've given us and maybe if we look first at the issue of

extension of term and the issue that's been raised with us, certainly, in submissions (inaudible) and roundtable discussions about not limiting the extension of term, that the five years' due to unreasonable delays by the regulator but, I guess, on the other hand, we've received evidence saying that delays by the regulator are incredible costly to pharmaceutical companies and to the government, indeed, so perhaps a role of healthy discipline there. A lot of the pharmaceutical companies are suggesting that the PBAK process also be included there, and you did touch on that. I want to make sure I understand what you were saying, that your understanding of the process is such that because the timeline is also a function of the commercial negotiation over price with the PBS listing, that effectively allowing that to be a basis for extension of term could see the Commonwealth government perversely commercially underwriting that commercial negotiation, on behalf of the pharmaceutical companies. Am I right in sort of that's what you were suggesting?

DR GLEESON: Yes.

MS CHESTER: Okay. So I guess for us to step back then and understand that tension against pharmaceutical companies suggesting that there are delays through the PBAK process, given your understanding of the PBAK process, how much of that negotiation really is a commercial negotiation and that's where the function of the timeline really rests? i.e. how much of it can be really influenced by the pharmaceutical company and how much of it is a regulator process that the pharmaceutical company really has no influence over?

DR GLEESON: I'll need to take that question on notice as well and get back to you on that.

MS CHESTER: That will be helpful. We've asked pharmaceutical companies and their representative organisations to come back to us on that as well, so it would be great to hear it from you too.

DR GLEESON: I don't know if data is available, but I will have a look. Thank you.

MS CHESTER: Great, that would be helpful.

MR COPPEL: Can I just come back to two points you made on international treaties, bilateral treaties as well, where you're calling for more transparent and accountable processes and better consultation methods; do you have any specific mechanisms that you think would be ways in which to achieve those goals?

DR GLEESON: I think a really important thing is releasing texts that are tabled in the negotiations and composite drafts of texts, at key points in the negotiations. Because, as I mentioned, it's very difficult to engage in consultations in any meaningful way if you don't actually know what's being discussed. When we did have leaked drafts of the text we were able to talk to the negotiators with very specific questions about what was Australia's position on key issues and where were things going in the negotiations, so that we knew what we needed to be looking at more closely.

I think we shouldn't have to rely on leaks, we should be able to get this sort of information to inform discussion. I think there needs to be much more systematic consultation as well. I know that DFAT has conducted a lot of consultations on the TPP, but it's been very much driven by people contacting DFAT about particular issues that they're concerned about. With the Regional Comprehensive Economic Partnership, the RCEP, it was only when we got some leaked texts, fairly recently, showing that Japan and South Korea were proposing some of the same sorts of intellectual property settings that the US had been proposing in the TPP that we realised that intellectual property was going to be an issue in RCEP.

Now, given that over the last five years I've had many, many conversations with negotiators about intellectual property in the TPP, it seems reasonable to expect that if the same sorts of issues are coming up in another set of trade agreements that there would be some sort of consultation process around that. But it was only fairly recently, when we became aware through the leaks, that these issues were being discussed and asked for consultations that that process started.

MR COPPEL: It may be put, as a counter argument, that such an approach could compromise the hand of the negotiators, what would you say to that?

DR GLEESON: I've heard that said many times over the last five years, in relation to the TPP and I think the reality is that the US knew so much more about our negotiating position in the TPP than I did, or any of my colleagues. These are issues that are about the public interest. When trade negotiations were just about market access for agricultural products and things like that I think the rationale for keeping these negotiations secret perhaps made sense back then. But now they span so many issues that touch on so many areas of people's lives, I think that the rationale for keeping things secret just doesn't hold water anymore. These are things that should be matters for democratic decision making and people should know about what's being discussed.

MS CHESTER: Deborah, the other jurisdictions that take different approach to text transparency, and from your kind of network of public health policy folk globally that might be doing what you're doing, say, in the US or Europe, do they get a different experience in terms of consultation with government around the texts in negotiations?

DR GLEESON: I haven't had a great deal to do with the Trans-Atlantic Trade and Investment Partnership negotiations, in Europe. I know that the EU has released a lot of the proposals that they have tabled in the negotiations and they have also released some drafts of text. So that's certainly a much higher level of transparency. I don't think that the US has matched that and I think that there are still a lot of issues, there's still a lot of dissatisfaction with the ways some of the health issues are being dealt with, but it's still a lot better than the process in the TPP.

MS CHESTER: Deborah, that covers all the questions that we were hoping to work through with you this morning, so thank you very much for joining us.

DR GLEESON: Thank you very much.

MS CHESTER: I'd like to call our next participant to come and join us and that's Renee Hindmarsh. Good morning, Renee, thanks for joining us and thank you also for your initial submission and your follow up submission, after our draft report. If I could just get you to state your name and the organisation you represent, for the purposes of the transcript recording. And then if you're comfortable if you'd also like to make some brief opening remarks.

MS HINDMARSH: My name is Renee Hindmarsh, I'm from the Australian Technology Network of Universities. Thank you to the Committee for the opportunity to speak today. The ATN is a network of five major universities, we have a presence in each mainland state. Here in Melbourne we have RMIT University, there's QUT in Brisbane, University of Technology in Sydney, University of South Australia in Adelaide and Curtin University in Perth. Our members are all young, very highly focused on research and innovation and we have genuine linkages to industry as an inherent part of both our teaching and research.

A point that differentiates the ATN, our network of universities is recognised as being industries partner of choice, with more than two-thirds of our research funding coming from industry and end users since 2010. Our ATN members are all highly ranked for young universities as well, which is a great achievement for young universities making a

significant impact on the international stage in a short period of time.

It's been well documented that businesses that collaborate on innovation with research organisations are three times more likely to experience productivity growth, improved sales and exporting activities. Yes, despite this, Australia ranks just 29th out of 30 in the OECD in terms of proportion of business collaboration with unis on innovation, a statistic highlighted in our Innovate and Prosper Report that we produced with the Australian Industry Group last year.

Australia delivers great research innovations but we recognise that IP is one of the major barriers when commercialising university research and taking it to market. We've learnt, through consultation with our partners, that businesses are often deterred from working with universities with a view that universities will always want to own the IP and that process of negotiating contractual agreements and IP ownership is often seen as too difficult.

Having recognised this problem, the ATN has been leading the challenge to improve university/industry collaboration and we're now making it easier for industry to work with our researchers and staff by reducing the barriers to commercialise research. I'm delighted to share with you the ATN National IP Principles with you today. Through these seven key principles we hope to send a strong, clear and proactive message to business that our national network of universities are agile, flexible and open to collaboration. Our Five Universities One Door approach provides industry with one easy entry point to five world class enterprising and dynamic universities.

So I'll just quickly run through what they are, if that is okay. So the ATN universities is based on the following principles. We actively encourage students and staff to undertake research that is relevant to challenges faced by society and in partnership with industry, government and community groups.

The second one is that as guided by our industry partners we encourage them to own and take the lead in commercialisation of intellectual property generated from industry-funded research, when they're best placed to do so. The third is where access to university owned or jointly owned IP is necessary or beneficial for commercialisation we support access to the IP, based on fair and equitable terms in a timely manner. The fourth, our interactions with industry will be governed by a transparent, flexible and user-friendly system that supports and encourages engagement, using a range of IP models. The fifth, each university will make public our IP policies and standard

commercialisation agreement templates, to provide a simple and transparent framework. The sixth, we encourage and promote an entrepreneurial culture for our staff and students. This includes a system of support to facilitate the creation of new ventures where our staff and students are appropriately involved. Finally, all partnerships and resultant commercial agreements will be developed and negotiated in a prompt manner and in keeping with these core principles.

There are many examples where our universities and industry have worked together to achieve significant outcomes for end users, and I'm more than happy to share some of these examples with you today. Our principles make it clear that our universities do not always take that blanket approach, that we draw on a range of IP models to best suit the given partnership. Our approach is pragmatic and flexible. It will hopefully make it simper, both for industry to approach ATN universities to solve their problems with new research and for innovations generated by research across our universities to be commercialised by industry. Most importantly, with our shared IP principles, we're committing to work in an agile and efficient way that represents the often tight timeframes and unique requirements of individual businesses. The core to the ATN approach is creating new opportunities and partnerships to generate new innovations and jobs that will increase social and societal wellbeing and secure Australia's future prosperity and economic growth.

We acknowledge that in order to make a lasting impact IP arrangements should be considered within the scope of related innovation policies and the national context. We know that in order to drive through change there needs to be a much-needed cultural shift in behaviour to improve the rate of collaboration between universities and industry and that's what our IP principles set out to do.

MS CHESTER: Thanks very much, Renee, for those opening remarks and for the submissions. In your opening remarks you make a point that kind of resonated with our attempt to approach the broad terms of reference by seeing that the intellectual property arrangements are just a component part of the eco system within which innovation occurs. To some extent, getting the balancing act right does mean that we do need to try to understand to what extent IP arrangements make a difference or what is the materiality in encouraging innovation to occur.

So I guess maybe an opening question would be, if you're looking at it from the perspective of universities licencing and partnering with business and commercialising ideas, what are the major barriers to that occurring today and to what extent do IP arrangements figure in that pecking order of things that get under foot?

MS HINDMARSH: Thank you. It's a really interesting question and obviously it's not just IP that prevents the collaboration between universities and industry. I'll tackle the IP issue first, because I think quite often, as I flagged in our opening statement, there is a perception in the community that dealing with universities is difficult, they're large, opaque organisations and people don't know even where to start sometimes and I think that there is a view, especially in the SMEs, that it's just going to be a difficult conversation and they don't even have that initial contact, because they just think it's going to be too hard.

So by having our standardised approach to IP we wanted to send that clear signal to say, "Actually, it might be easier than you think and please come and talk to us." So there's that. There's also the cultural issues that are very much apparent in the eco system and we certainly tried to flesh those out through our innovate and prosper report. Some of that is around IP but others is around mobility, the disconnect between industry and university, in terms of timeframes. There's a whole raft of reasons, but I do think, in terms of the IP, it is very much a perception issue and that once our universities do have the conversation with industry, recognising that industry often work on much shorter timeframes than universities as well is a really important thing.

MS CHESTER: So that makes it sound like it's more a meeting of cultural minds than a commercial negotiation, than the intellectual property arrangements getting in the way of commercialisation of innovation and ideas funded within our universities.

MS HINDMARSH: Speaking from the ATN universities and I can't, obviously, speak for other universities, but I think that cultural element is really important. IP is a really complex issue and sometimes the negotiations will take longer because there's more complexity to that particular arrangement and negotiation. But it's not just the IP arrangements that are preventing collaboration.

MR COPPEL: You mentioned the OECD indicator measuring collaboration between universities and industry entrepreneurs, which is one that's frequently cited as a metric suggesting that there is this disconnect between the intellectual property that's created in universities and a barrier to commercialising that intellectual property. That's sometimes led to calls for a use it or lose it clause. We're trying to get an idea of the nature of the problem, whether there is a problem and I'd be interested in your points whether that metric that you've cited is an appropriate metric or is it more of a smoke signal than really identifying a problem that needs to be addressed?

MS HINDMARSH: So in terms of the use it or lose it provisions, I note that that was one of the recommendations of the Watt Review and that it was referred to the Productivity Commission. There's certainly some concerns about whether or not it is too much of a regulatory burden on universities and also I note that in the United States, where they do have the use it or lose it provisions, they haven't been used since 1980. So I think that the use it or lose it provisions are probably adding an additional layer of bureaucracy to address a problem that's overstated somewhat.

MR COPPEL: Are there other metrics that give a different picture on collaboration between university and industry?

MS HINDMARSH: Definitely. I'll address the metrics in just one sec, but before I do that I would also make the point that in Australia one of the challenges that we do have is that something like 97 per cent of all businesses in Australia are SMEs and more on the S than the M side. We're dealing with a lot of really small companies and that, in itself, can almost be a barrier to collaboration, just for the reasons that I outlined earlier.

In terms of the metrics around collaboration, the Academy of Technological Sciences and Engineering did a significant piece of work around metrics last year and the ATN was involved in that process as it ran through. We also developed our own suite of complementary metrics, with input from our independent research and industry advisor reports, so industry telling us what they looked at, in terms of engaging with universities and how you might measure that. There's also case studies that the ATN has been very active in this policy space for a long time and even in 2012 we did a piece of work with a group of eight universities, looking at case studies that were quite similar to the REF approach in the UK. So, yes, there are lots of different ways that you can measure it and sometimes I think there is a temptation to take a quite simplistic approach to how we are collaborating. Sometimes collaboration doesn't involve any money so if you are using just a purely metrics based approach then I think that that can give you a biased view of what's actually occurring.

MR COPPEL: It would be helpful to us if you can pass on those alternative metrics and we can take a look at those.

MS HINDMARSH: Sure.

MR COPPEL: There have been a number of initiatives that have aimed to, essentially, reduce the transaction costs in licencing between, say, a university and industry, particularly small players. Source IP is one

instance of that. Do you have any views on the efficacy of these sorts of boiler plate type agreements or ways in which to reduce those costs of reaching a commercial agreement?

MS HINDMARSH: Yes. So the IP toolkit that the Department of Industry and IP Australia put together was quite effective and we've been big supporters of that as, I guess, being a really good starting point for the conversation and kind of reducing some of that regulatory burden and the open access IP can be quite effective as well. So one of the case studies that we cite in our IP Principles document is around Northcote Innovation, which is at UTS the university provided, through easy access licencing, some IP to create a step attachment for wheelchairs so people who are in a wheelchair can mount curbs without requiring assistance. So, yes, there's definitely options to do that and I think the government has already been looking at ways to do that quite effectively.

MS CHESTER: Coming back to the IP arrangements just for a moment than, and again it could be an area of myth busting that we're looking at, but the motive to publish or perish versus the motive to commercialise and therefore protect IP through patents, some have suggested that that creates a healthy or an unhealthy tension within universities. It would just be good to get your perspective on that.

MS HINDMARSH: Sure. I'll put the caveat that I'm not an expert on this but certainly in my experience that publish or perish versus the IP is not an insurmountable problem and there are examples where there's an agreement between the two parties that their publication might be delayed somewhat to allow the company to be first to market with their innovation. So there certainly are ways around it.

I guess there's also the issue that there's that slight tension between what universities are creating their IP for. So if we are being judged on metrics about how much we're commercialising compared to whether or not we're getting it out there and freely using it, there is a little bit of policy tension in that space.

MS CHESTER: Are these issues addressed, you mentioned before the IP policies within your network which, I guess, clearly articulate the ground rules for venture capitalists or SMEs looking to partner and commercialise with universities. Do those sorts of issues get addressed in those policy documents?

MS HINDMARSH: At an individual university level, yes.

MR COPPEL: One of the points you make in your post draft submission concerns the recommendation to exclude from patentability business methods and software and you say that it could compromise the ability for business to work with universities, in partnership. Can you elaborate the reasons for that perspective? I guess a follow up question to that would be, is it necessary to have business method and software patents to address some of those concerns or are there alternative ways in which those concerns could be addressed.

MS HINDMARSH: Sure, and I have just realised that I am having some technical challenges with my new laptop, so I might just need to grab the additional bit. Excuse me a moment. Our concern was, in relation to that particular recommendation, the proposed changes and its potential effect changes the current system. So the current system allows business to own software IP and to file patent applications, on behalf of the university researchers creating the new software. If those patents were abolished then the willingness to partner may be compromised because, as a public institution, we do need to publish but there's no protection then for the Australian market. So we were quite concerned that it would be an unintended consequence for partnership, at the software level. So if there is an ability for companies to protect their investment in software, through patents, then they're more likely to partner with universities that need to publish the research because you're putting it all out there, effectively.

MR COPPEL: Do you have an idea as to whether that ability to patent software is being used by these partners?

MS HINDMARSH: I would have to take that on notice. I don't, I'm sorry, but it certainly was flagged as a concern and we thought it was definitely worth raising and bringing it to the Commission's attention. But I'm happy to take that on notice and follow up with any examples.

MS CHESTER: If you are following that up it would also be handy to know, one of the issues that we're looking to address is the fact that you've got overlapping IP rights occurring between copyright and patents. I mean if you kind of step back and look at it, you could understand where some intellectual property arrangements might be complementary. A good example would be design rights and trademarks, but where patents and copyright are both forming an exclusive period of protection it's then are we dealing with that in an appropriate way, given the technology's advanced, should it just be one form of protection that they get. So it would be good to know of the instances where folks still think that that patent protection is required whether or not they also have copyright protection.

MS HINDMARSH: Sure, we can take that on notice.

MS CHESTER: That'd be great, thanks. Renee, that covers all of the questions that we wanted to work through with you this morning, so thank you very much for joining us.

MS HINDMARSH: Thank you for the opportunity.

MS CHESTER: You're welcome. I'd like to ask our next participant, Mark O'Neil, to join us. So we return to the world of copyright, I'm sure. Mark, thanks for joining us this morning. Also thank you for your initial submission and the post draft report submission. If you'd just like to state your name and the organisation you represent, for the purposes of the transcript recording and then if you'd like to make some brief opening remarks, and if you could keep them to under 5 minutes, that would be appreciated.

MR O'NEIL: I will endeavour to do my best. My name is Mark O'Neil and I'm from Cambridge University Press, Australia. Thank you for the opportunity to participate in this public hearing. In support of the written submission that you've already mentioned I'd like to discuss two issues in the draft report. Those are that copyright is a form of censorship and that US style fair use enables user rights.

So, firstly, the report asserts that copyright was introduced to prevent the dissemination of ideas. Copyright was not invented to promote censorship and control, in fact it was the opposite. It was invented to enable and promote creation and distribution of content, thus promoting education and the public good. In fact, the blueprint for modern copyright law, enacted in England in 1709, was titled An Act for the Encouragement of Learning.

Copyright is fundamental to furthering innovation and creativity. Without it authors would not have the incentive to write and publishers would not have the incentive to publish. It is therefore important not to take an overly short-term view of what is in the national interest. Copyright was created to guarantee continuity of supply of high quality content. That it has been so successful in that is evidenced by the plethora of high quality, a hundred per cent Australian content. In my industry this means Australian authored content, commissioned and published in Australia to meet unique Australian educational needs.

The draft report asserts that Australian citizens must be able to access this content, without any evidence that they are unable to do so at present. The fact is, they already can and the statutory licence provides a

mechanism for licencing excerpts of this content.

Secondly, I would like to express my belief that US style fair use will not work for Australia. The fair use doctrine in the United States is based on many years of case precedent, starting with the passage of the Copyright Act in 1976, well before the advent of digital publishing. American case law has therefore developed in parallel with publishing technology. To simply drop the doctrine into Australian law would unduly burden Australian courts and would risk over-broad interpretation in today's environment. Additionally, the case of Canada is illustrative. Following the adoption of fair use legislation to replace fair dealing educational institutions stopped paying licence fees, resulting in a loss of $30 million in revenue to content creators and developers. Australian publishing risks going the same way.

Without this 40 years of case guidance Australian courts would be burdened with developing a new area of law, miring the publishing industry in uncertainty and potential demise. As is the case in the US, the role of lawyers in making content use decisions will become far more prevalent than one suspects Australian educators, learners and creators would find desirable. During the intervening years, as Australian case precedent is developed, authors, publishers and illustrators will be less inclined to produce content because of a lack of confidence that Australian law will fairly protect their creative output. This reluctance is a very real threat to Australian publishing.

A move to a fair use regime, without the benefit of case precedent, has the potential to reduce economic incentives for educational publishers to enter the market and for existing ones to continue to innovate. This will, in turn, lead to a reduction in the number of educational publishers, fewer jobs in the creative industries and fewer educational products produced locally, for local curriculums. What responsible legislators need to consider is what a world looks like where there have been several decades where incentives to produce and disseminate wholly Australian educational content aren't there.

By contrast, a fair dealing regime, where categories of reuse are understood by all parties from the outset, reduces litigation costs, reduces the burdens on courts and brings necessary clarity to creative industries to help to enable them to continue to bring their innovative content to Australian consumers. Thus, consideration of an expansion of fair dealing categories would be a more appropriate and effective solution that will avoid the risk of a hollowing out of an Australian educational publishing industry that already meets the needs of changing curriculums, technological advances and teaching and learning needs of Australian

citizens.

Instead of replacing the doctrine entirely we urge the Productivity Commission to recommend changes to existing exceptions. In addition to exceptions for personal research, news reporting, judicial proceedings, print disabilities, and others, new exceptions, for example, for quotation and for text and data mining ought to be considered. These expansions have been implemented in the UK with good results so far.

The school resources that my company, and others like it, publish are a hundred per cent Australian. Authored by leading Australian teachers and tailored to meet the needs of required outcomes of state and national curriculums. To put this at risk, in the name of Australian consumers, is to risk future generations being educated from a much more limited, foreign authored, foreign published choice of resources. A future of homogeneity and devoid of Australian innovation. Thank you.

MS CHESTER: Thanks for those opening remarks, Mark. Just before we get into some questions, I thought it might be helpful just to make one point of clarification. In our report we do go to some lengths to talk about the important and critical role of copyright for creative endeavour, indeed, that it's fundamental to creative endeavour. I just wanted to make that clarification point, given some of the comments you made in your opening remarks, that some people may have misconstrued the role that we see for copyright.

Turning, maybe first, to the issue of fair use versus fair dealing, and you've raised a couple of issues in your opening remarks and your submission, firstly, around certainty and jurisprudence, secondly, on the Canada situation and then, thirdly, on whether or not we should follow the UK model. If I turn, first, to the issue of the Canada example, it would be good if you could explain how you think that's a parallel or would provide us with insights to what we're recommending. As stated in our report, Canada didn't move to a system of fair use, they remained with a system of fair dealing, and they moved to make changes to the licencing and statutory licencing arrangements. In our draft report we recommend going to a system of fair use and we don't recommend any changes to statutory licencing, particularly for education. So in our recommendations we would see the current educational licencing arrangements continuing to work in parallel but instead of it being in parallel to fair dealing it would be in parallel to fair use.

MR O'NEIL: If I can take those in reverse order. According to the fact sheets that you released each of these are examples of potential fair use. The first is a teacher copies a chapter of a book for inclusion in a set of

class materials and the second is, a teacher scans pages from textbooks to use in their lessons, via an interactive whiteboard. Both of these are currently allowed by the statutory licence. However, if, particularly the first one there, becomes fair use there's almost nothing left to be covered by the statutory licence. So what we are potentially looking at is a loss of $100 million to the industry. Regarding the Canadian authorities fair dealing guidelines, they say that fair dealing allows for - - -

MS CHESTER: Sorry, we're talking fair dealing for Canada now?

MR O'NEIL: Yes. So according to the Canadian Education Authorities, what they say their system allows they call a short excerpt means up to 10 per cent of a copyright protected work, or one chapter from a book or a single article from a periodical or an entire artistic work, including paintings, print photographs and that kind of thing. So that seems to me to be in parallel to what, on the fact sheets that I refer to, call fair use.

MS CHESTER: I think if we just go back for a step I guess one of my first questions would be, under the current licencing arrangements the educational institutions, to some extent, are buying a form of insurance. They go into a licencing arrangement knowing then that regardless of what's allowed or disallowed under fair dealing, once they have that licencing arrangement in place they're protected. So there's an element then of perhaps educational institutions paying for materials that might have actually been exempt, under the application of fair dealing. Similarly, when you move to fair use, the statutory licencing arrangements stay in place, educational institutions will have some form of insurance and they'll probably continue to pay for materials that could have otherwise have been exempted under fair use. It's a negotiation. So if we step back for a moment, I guess the key issue we wanted to get an understanding of is what, today, is remunerated under fair dealing and a statutory licence that would not be remunerated under fair use and a statutory licence? To try to get an understanding.

MR O'NEIL: Before I answer that can I say that, yes, it is possible that schools are paying for things that maybe they're not meant to be paying for but, conversely, they're probably not paying for an awful lot that they're copying that they should be paying for. I don't believe there have been any studies done on what those are, but anecdotal evidence suggests to me that the latter would be a far more common case.

MS CHESTER: Do you have some evidence upon which to - - -

MR O'NEIL: No, I'm saying it's totally anecdotal.

MS CHESTER: Are you aware that there's a survey underway in New South Wales to try to get a handle on usage?

MR O'NEIL: No, and we'll welcome the results of that survey.

MS CHESTER: Yes, we do too.

MR O'NEIL: The second part of your question was about whether we think that there would be a difference in licence fees that we might receive. To go back to the point of Canada, in Canada educational institutions have just blanket almost stopped paying licence fees entirely, so there's a $30 million loss to the industry there.

I think it's really difficult to answer the question, at this point, because until we see legislation it's not clear to us exactly what we'd have certainty around. I think, from Cambridge's point of view, what we are most concerned about is that uncertainty. The uncertainty around whether something can be copied, under a fair use regime, and whether - sorry, I just lost my train of thought there. The issue for us is around that uncertainty and the onus of proof, I suppose. Under US fair use legislation the onus is on the IP holder to prove that unfair use has taken place. So the uncertainty is around how often we would end up in litigation and how much that might cost the industry and the Australian economy.

MS CHESTER: So I guess the way that we look at the issue of uncertainty or what some other people perhaps describe as predictability, because with any form of legislation there's uncertainty, is both from the perspective of the rights holder and the user, both of them are looking to manage that uncertainty because nobody wants to have their rights undermined and nor do people want to infringe copyright as well, given that they could then have enforcement actions brought against them.

What's been suggested to us, though, based on the evidence and submissions that we've received is that because the current fair dealing arrangements are not technologically neutral and they're a prescriptive form of exemptions and exceptions that, in itself, introduces uncertainty as technology and business models and platforms change, in terms of, "Am I in or out? I don't know." The fuzzy area gets larger as things change over time and we know that that law has not been adaptable over time. Indeed, if we just look at one example of the VCR, by the time the law was adapted everybody's VCRs were mothballed in the attic.

Whereas, under a system of fair use, which is a principles based legislation, some have actually suggested to us that it might actually lend

greater predictability. The reason they say that is similar to what we now see in our Australian consumer laws, which are all principle based laws, that guidance is developed over time. Indeed, if we were to take the ALRC recommendations, which closely mirror the US wording around the fair use factors and the fairness factors, we would actually be able to leverage US jurisprudence, we'd be able to leverage the guidance material, the conduct policies that have been developed both by industry and by users. So I guess that's sort of the backdrop of the evidence we're hearing, I'm trying to understand the residual uncertainty that you're talking about and suggesting that there's greater uncertainty under fair use than fair dealing.

MR O'NEIL: Again, I think the uncertainty is around litigation and time spent in courts. There was no mechanism in US law to enable mass digitisation projects, like the Google Books project, for example. That's why the US Copyright Office recommended the introduction of a licencing framework. I think the example of the US is one of uncertainty, that the fair use legislation there, because it puts the onus on IP holders to prove unfair use, if you like, yes, the law has developed, yes, there has been this build up on case law, over the last 40 years or more, but all of those or the vast majority of those changes and those rulings have been made in court, at considerable expense.

MS CHESTER: So how does the move from fair dealing to fair use change the onus of proof? If, under fair dealing, there's an infringement, if under fair use there's an infringement, nothing's changed, in terms of where the onus resides.

MR O'NEIL: I think the big difference is, is the certainty that schools have of what they need to pay for and what they don't need to pay for. Yes, there are things that ought to be cleared up and I agree that if we were to stick with fair dealing there are issues that need renegotiation and that we should be tidying up.

MS CHESTER: So if we're not making any recommendations to change the licencing arrangements, then where does the additional uncertainty come from?

MR O'NEIL: Well, it seems to me that you are making - in the fact sheets it seems to me that you are making changes to the licencing agreements.

MS CHESTER: So they were illustrated examples of what might be in or out, under fair dealing versus fair use. Overlaid over that is the insurance policy of the statutory licences entered into and, as you've

rightly said before, at the moment people might be paying for things that would be exempted under fair dealing and we're assuming, going forward, that that will still continue to happen, as part of the insurance policy. Educational institutions might still pay for some materials that might be exempt, under fair use, as part of the licencing arrangement, that's the insurance policy, but fair use will inform those negotiations.

MR O'NEIL: Well, that's the big question for me. Will there be negotiations or will it be litigation? So in terms of whether, under fair use, the statutory licence stays the same, until we see that legislation then it's really difficult to see how that's going to work.

MR COPPEL: Almost all of the discussion in our draft report on the fair use recommendation gets into this interplay between the education statutory licence and fair use and how that plays out. Many other users which are being brought to our attention where fair dealing creates uncertainty as to whether it's legal or not, use by libraries, use by archives. We've had other examples in universities developing massive open online courses where to be consistent for their interpretation to be on the good side of the law requires many, many authorisations, sometimes in the hundreds. As a publisher of education materials, I suspect that you may be on the other side of those authorisations, can you talk us through your side of those sorts of relationships between universities and the owners of the copyright, in terms of authorisations and the time that's involved and the questions of certainty that's provided?

MR O'NEIL: Well, I can't talk you through university massive open resources because we're not part of that market at this point in time. In our publishing in Australia, the vast majority of what we do is for secondary school. We do some higher education publishing, very, very niche, I'd have to say. So unlikely that we'd be in a situation where a university was producing a, it certainly wouldn't be massive, open online course for that kind of content. So, no, I'm not able to comment on that.

MS CHESTER: Mark, are you able to give us a bit of a handle on of the revenue base that Cambridge University Press has in Australia, what percentage of that revenue base is attributable to the sale of textbooks and what percentage is attributable to the amounts that you get from education licencing arrangements?

MR O'NEIL: Yes, I can. I think it's going to differ wildly from publisher to publisher. In our case I would say for that piece of our business, which is educational publishing, it would be somewhere around 10 to 15 per cent.

MS CHESTER: Sorry, which one is the 10 to 15 per cent?

MR O'NEIL: Ten to 15 per cent would be from licencing. That's from the statutory licence only. I think it's important to note that we're not just a publisher of books, there has been a massive shift to digital publishing and so in terms of licencing we licence a lot of material on a subscription basis, because that's the way it's been built, and I haven't included that in that number.

MS CHESTER: Thanks. You mentioned earlier, and it might have been in your opening remarks, that you look to the UK model for the amendments to fair dealing. Jonathan and I were very fortunate in being able to meet, at length, with Professor Hargreaves, who wrote the Hargreaves Report, and it was quite illuminating in understanding why that report, which only had a very short number of recommendations, that didn't make any fundamental changes to their fair dealing arrangements, apart from adding some additional exceptions. And in speaking with Professor Hargreaves it was made clear that it was really because they were constrained by the EU arrangements. So he was working within a very constrained world and therefore there was no prospect of the UK moving from fair dealing to fair use, although who knows, tomorrow that might be a different story. So I think it's important that we acknowledge and recognise that those changes were made within that constrained world and that's not a constrained world within which we operate.

MR O'NEIL: Yes. I mean I was using the UK as an example and I'm using Canada as an example because I have to find examples somewhere and those are the possibly slightly more obvious ones but, yes, I take your point.

MR COPPEL: There are other examples of countries that have adopted fair use, Philippines, Singapore, Israel, South Korea and in those jurisdictions the issue of greater uncertainty, associated with that transition hasn't really come to the fore. In fact, in some instances there's been very little litigation to establish whether something is fair use or not fair use.

MR O'NEIL: It will be illuminating to see what legislation looks like if and when it comes. But the biggest example of this, and the example referred to in the Productivity Commission draft report, is the US fair use example, where litigation is how exceptions are made and how case law is built up.

MS CHESTER: It would be good for you to look at Israel because Israel did a pure transplant model, they took the US system and the

jurisprudence and the guidance notes are literally helicoptered in to their system and arrangements and, as we understand it, their creative industries are alive and well in Israel at the moment.

MR O'NEIL: I'm not suggesting that the creative industry will die. What I'm saying is I think there'll be a hollowing out of it. I think that, as was the case in Canada, some publishers will pull out, some publishers may not survive and the danger is that the smaller Australian publishers will struggle.

MS CHESTER: I think we've probably gone to lengths to establish that the Canadian model is not a parallel to ours and, indeed, some of those structural changes within the publishing industry in Canada were underway well before the changes were made to their fair dealing arrangements.

MR COPPEL: You mentioned that a better approach would be making adjustments to the fair dealing arrangements, I think you mentioned allowing text and data mining. As has been mentioned previously, one of the issues with the fair dealing approach is that it's sort of reactive and sometimes the period to react can be quite lengthy, the case of the VCR being probably one extreme of that. But would you accept that supposing fair dealing is kept up to date with technological innovations that, in essence, it could well approach something very similar to fair use, in terms of the scope of material that can be accessed without remuneration?

MR O'NEIL: I think, through negotiation, yes. I think the big difference for me is around whether we arrive at that point via litigation and a build-up of case law or whether we negotiate our way to that point.

MS CHESTER: I think that covers all the questions we had for you this morning, Mark. Thank you very much for joining us in the public hearings.

MR O'NEIL: Thank you very much for the opportunity.

MS CHESTER: I'd like to call our next participant up to join us, Dr Rebecca Giblin.

DR GIBLIN: Good afternoon.

MS CHESTER: Good afternoon. Thanks for joining us this afternoon, Rebecca, and for your submission, following our draft report and also your involvement in our round tables, it's been much appreciated. For the purposes of the transcript recording, if you could just state your name,

where you're from professionally, albeit we do know most academics are here in their private capacity.

DR GIBLIN: Dr Rebecca Giblin, from Monash University, here in my private capacity as an expert in copyright law.

MS CHESTER: Would you like to make some opening remarks, Rebecca?

DR GIBLIN: So we think there is really growing recognition of the problems that are caused by our existing international treaty obligations in copyright. We've got some prohibitions, elected prohibition on formalities, for example, that was actually enacted the same year the first Model T Ford started rolling off the production line and they don't fit particularly well in the world that we live in now. The reaction to this growing awareness has often been, "Well, perhaps these rules could be changed." The rules about formalities the rules about how long copyright should last, to fix some of these problems that have emerged with orphan works, neglected works and so on.

No, they cannot be and I think it's really important that we recognise that. Kim Weatherall and I have done the analysis that's in our submission, in our forthcoming book, that shows in fact we are inexorably locked in, in every possible direction. Because Bern requires unanimous vote to change it, which gives a veto right to some 170 countries with very different interests and development levels, which helps explain why it hasn't been revised for over a century. Also through this link, via the TRIPS agreement, that ties Bern membership to membership of the World Trade Organisation and world markets, which is virtually unamendable as well, and Bern's prohibition in itself against new treaties that could detract from its prohibitions and minimums.

So I think it's really important that we recognise these realities now, that we're stuck with them and that in our reform efforts we work as much as we can within the flexibilities we do have, within this international framework, to ameliorate the problems that it causes.

The second point I might just mention is about the rationales that we have for awarding copyright, which are really very different to other forms of intellectual property. It's not just about incentives. Of course we do have incentives rationales, we want to incentivise the creation of works in order to promote their dissemination of knowledge and culture. We want to incentivise ongoing investments in work to ensure the continued availability of them but, in addition to that, we are powerfully motivated to recognise and reward the contributions of authors and to recognise the

continuing interests in their creations, both economic and non-economic.

So there is this moral entitlement of authors to rewards in excess of that bare amount necessary to incentivise what we want. This does permeate Australia's copyright law, as much as it's often painted as being utilitarian in nature and that's why we've got statutory recognition, for example, of moral rights, resale royalty rights, performers rights. So there's lot of literature exploring that but I think perhaps the best practical demonstration of its validity is the power of author's interest. How consistently and successful they've been used to justify broader and longer rights and to fight off the kinds of reforms that we are talking about today.

So I think it's incredibly valuable that we're going through this exercise with you at the Productivity Commission because the way the debate has often gone so far is people are just talking about who are going to be the winners and losers but, of course, copyright is non-zero sum and we need to do more than - the debate's often been stalled about which interest is going to be worse off but the question, of course, we need to be asking is who loses, how much, in exchange for who gaining what. Changing how we divide up the rights could potentially result in an enormous increase of overall utility and that's why all of this evidence that's been provided to you I think is so important to finally move us past this impasse and provide a principled means of evaluating the claims.

The last point, just before I wrap up. I've talked about the incentives or the rationales for copyright. We've seen that there's a component that society pays to incentivise the creation and ongoing availability of the work and then there's this component that it pays to reward and recognise author's contributions. Logically it doesn't matter who the incentives go to, whether it's the author, an intermediary, whoever, as long as we get the work created, but that reward component, well, we're only motivated to give that to the author. So when we start understanding and disentangling these competing rationales I think it actually opens up some really interesting possibilities for reform that I'd be very happy to talk through today.

MS CHESTER: Thanks very much, Rebecca, and we might start where you finished, given we are living within a constrained world because of treaties and conventions and trade agreements. We've tried, within our report, to identify what we call the policy wriggle room (inaudible) where we feel that it may be needed to get the balancing act right.

If I understand what you're saying correctly, at the moment, with the term of copyright, we're trying to satisfy a whole bunch of different

objectives. A little bit of our focus has really been on, "Well, if you're looking at rewarding that creative endeavour it's about creating an incentive to do so." You're suggesting that there are other objectives that we should be looking at meeting, through the term of copyright, but wouldn't that then suggest that the way that exclusivity is afforded during that term might change over time, or is that something that we then just address through fair use or fair dealing exceptions?

DR GIBLIN: So there's a number of ways we can do this. I think the starting point is that at the very minimum we are locked into Bern's minimum of life of the author plus 50. But you're absolutely right, that if we start with this incentive rationale all of the economic modelling shows that once you take into account the time value of money with even a conservative discount rate, and rates of cultural depreciation, you can incentivise the creation of even the most expensive block buster thing with a term of about 25 years, absolute maximum. The difference between life plus 50 and 25 years is quite extreme.

Then if we think about the rewards rationales, the intermediaries, the cultural intermediaries that might have needed to be involved at the beginning in order to invest in making that possible, they've had everything that they needed to get in that initial 25 years of protection. So there's no rationale for continuing to give them anything any further. Bern does not require that the copyright stay forever with whoever it's been transferred to, it just requires that the author have the term of protection of life plus 50. So it could be, for example, that after an initial fixed term of protection that reflects that necessary incentive level that the rights could revert back to authors.

Now, that opens up some really interesting possibilities because, first of all, as I'm sure we're all aware, copyright does a really bad job at actually securing to authors much of the value of their works. There's lots of money in the copyright industries but when we have a look at the data about how much authors earn, very little of it is trickling to them.

If we were to have some kind of reversion system where, after that initial fixed term at the incentive level, it goes back to authors, it would give them another bite at the cherry, if you like. They would have the option, for example, to licence the work back to the original producer or original publisher, perhaps negotiating a higher royalty rate, based on the continuing value of the work. They might licence it to somebody else. Perhaps the work hasn't been exploited for a while and somebody else sees some value in it so the transfer of rights could then go to those who value it the most.

It could be, as well, that once authors start getting a greater share of the rewards that it opens up some greater possibilities for socially valuable collective licencing as well. One of the ideas in this regard could be for something like a digital public library. At the moment one of the big revenue streams for authors comes from the educational lending right and public lending right from libraries. That's a statutory scheme that directs the lion's share of the revenue to authors. So that's one of the biggest revenue streams for Australian authors and well over twice as big as they get from, for example, CAG distributions. It could be something similar where if, after this initial term of protection, that the rights go back to the authors, the authors might be encouraged to make them available to all public libraries to lend, in exchange for some equitable remuneration from that.

MR COPPEL: Why couldn't that be achieved through commercial agreement between an author and a publisher?

DR GIBLIN: At the moment it's completely in the hands of the publishers who are controlling these rights and I've just had ARC, the Australian Research Council, fund a major study we've got investigating this. But very few publishers are willing to licence the books in their control to public libraries for eLending, because eLending is the only form of lending that they do have any veto power over, and when they do do so, they impose some very onerous licencing terms. For example, Harper Collins will permit it to be lent only 26 times before the book is worn out and then the libraries have to buy a new licence. McMillian, I believe, generally requires you can buy the book but only if you buy 499 other books and they have this sort of bundling model. There's lots of other problems that are arising from that, at the moment.

MR COPPEL: I was referring to the example you gave of an author having the copyright returned after a period of 25 years, what would stop an author having an agreement with the publisher, that's limited for a period of 25 years?

DR GIBLIN: At the moment?

MR COPPEL: Yes.

DR GIBLIN: So there's a lot of literature that deals with this, particularly by Ruth Towse, who is an eminent UK academic. The bargaining power between authors and publishers is extremely uneven. The literature identifies a lot of reasons for this, including the fact that creative labour is often more attractive than other forms of labour, which means that authors might be willing to engage in it for fewer rewards than

they are other forms of labour. There's some really interesting research out there seeing how much people would need to be paid to paint a fence compared to how much they're willing to work on a novel for.

In fact, this phenomenon is so strong that the Screen Actors' Guild has to actually have something in all of the contracts for their members prohibiting them from working for below the union minimum, because everybody is so tempted to, in order to get the work, that the only way to have the possibility of a living wage for everybody else is to prohibit that and say that you can't work in this industry unless you agree to those rules.

So there's lots of reasons why authors are not in a position to hold back some of their rights and why they end up having to give it away in a whole big lump. But that's why this current lump based approach, I think, is really inefficient. Just having one bundle of rights that lasts this extraordinarily long time and that continues to subsist, regardless of whether it is, in fact, exploited, regardless of whether there are any investments being made in continuing to keep it available just seems extraordinarily inefficient.

MS CHESTER: This might be a little tangential, but I don't want to forget the thought while it's there. Some of the arrangements that you were just talking about then, that are enshrined in licencing agreements between authors and publishers and publishers and other parties, like libraries and such; one of our recommendations, which is about the repeal of section 51(3) exemption of IP rights, how they're afforded in the licencing arrangements, being subject to Australia's CCA, the Competition and Consumer Act, is that an area that you've given some thought to, in terms of what type of conduct might be occurring within those arrangements and whether or not there'd be benefits and advantages of having them subject to the CCA?

DR GIBLIN: I haven't thought about that specifically. I have done a little bit of work on the issue of contracting out of exceptions and the dangers of that, given how easy it is, particularly with electronic licencing agreements, for that to occur, which I'd be happy to send to you if that might be of assistance.

MS CHESTER: Okay, thanks. Perhaps one more point, while I think of it, just on when we're talking about the relative bargaining power. Cultural intermediaries don't tend to hold back and ask for just the thing that they need either. It's very common, particularly in contracts in the movie industry and the recording industry, for the rights to cover everything on this planet, but also to exploit any extra-terrestrial markets

that might emerge in the future, anywhere in this universe or any other. So there's really nothing left to chance. It's not that the publishers are taking what they need to incentivise their investment in a work, they are taking everything.

DR GIBLIN: So territorial rights to infinity and beyond, from what you're saying.

MS CHESTER: Yes. We might get into the world of fair dealing versus fair use and you'll know from the round table, but also from the public hearings, that we're still getting conflicting evidence and views from parties about which system provides greater certainty or greater predictability and I guess a suggestion by some folk that the fair use is not a fair deal, particularly for rights holders. It would be good if you could elaborate on some of your views around that, Rebecca.

DR GIBLIN: I think genuinely that that fundamentally misapprehends what fair use is about. This idea that fair use isn't fair is definitionally incorrect. A lot of the examples that I personally come across, the things that we can't do now that we could do, under fair use, might be helpful in explaining this. So I'm involved, at Monash University, as my faculty's copyright officer and on the overall university's copyright committee and we do face these issues all the time. People are always coming up to me and saying, "Can I do this?" and the answer is almost always, "No" or, "That's really complicated, I can't tell you," and send you off to the person who's in charge of dealing specifically with the statutory licence.

So let me give a few examples. So we do have one Monash scientist who's been invited to give a presentation at the State Library on a weekend in a couple of weeks. Talk to families and young kids about data science. He wants to use a couple of images to illustrate this, given the audience, in ways that I consider would certainly be fair, taking into account the fairness factors, but they don't fit within any of our pigeon holes, so that's simply not permitted.

Another example. Thinking about the narrowness of the pigeon holes, it comes up again and again. I recently saw one of the people I follow on Twitter post their kids homework assignment and that said the children were going to talk about music and the role of music in their families and they were asked to bring in some music on a USB key to play and the child was going to talk about it. Now, I had a debate about this, on Twitter, with some copyright lawyers and it was decided, the classroom use is perfectly permitted under the various licences and exceptions. It's okay for the 6-year-olds to put the music on the USB key but it's not okay for his mum to do it for him. So we just had this

ridiculous result where rather than focusing on the fairness of the use by focusing on the pigeon hole, things that really don't matter and are not going to cause anybody any harm are just simply not permitted.

Back to the university examples, our students very often gather - we ask them to do assignments and sometimes they incorporate copyrighted material in that work that they do, and that's a fair dealing for research or study. But they can't then incorporate those into portfolios to give to future employers or potential employers because that would be an infringement.

Conference presentations are a big problem for us in academia as well, and public lectures. Just as my earlier example, if we want to use an image it has to be fair. Perfectly appropriate and normal and correct that it has to be fair, but in addition it has to be for parity or satire or a criticism or review or one of those other things. That's okay for the people who are very funny but what if you just want to use it to illustrate a point in another way? We have to recommend against them doing that - - -

MR COPPEL: Are there any examples where people have done that and been pursued in courts? Those sorts of examples?

DR GIBLIN: Yes. So this is really the problem. What a lot of people say to me when I bring up issues like this is, "Well, it's never litigated so don't worry about it." And it's true, I can't think of any examples where they have been litigated. But these are things that end up just not happening. People end up just not doing these things that are socially valuable and it should be okay to do because universities are risk averse and we tell them not to.

So if we come back to that question that I raised earlier about who is losing how much, in exchange for who gaining what, well society in Australia is losing a great deal in exchange for really not much at all. So I think a lot of the uses that I think would be fair, under the new system, that currently would be infringements, under our existing approach, are not things that would result I any lost remuneration at all. What they would save is an enormous amount of administrative overhead. So, for example, it might be, in the US, for example, if you want to reproduce a very simple image in a conference paper, and it is justified, given all of the circumstances, remember, of course, the fairness isn't automatic, just using an image isn't necessarily fair, but taking into account all of those factors.

US academics just do that and we have to go off, we have to get legal advice about whether or not it might fit within one of the exceptions. We

often find that it's unclear or it's no, so the university solicitor says, "Don't do it." Then we'll get the academic in question to write off and ask for a licence. The usually one of two things happens. The most common thing is they just don't hear anything back at all, because the publishers just don't care and they're used to fair use so they're, "Why are these people even bothering me with this?" so often you just get no response. The other possibility is the publisher goes, "Hooray, here's an opportunity," and says, "Sure, but that will be $2800," which is prohibitive and it just can't happen. So either way the uses are just not happening and wouldn't happen on those terms and, as a society we lose.

MS CHESTER: So for them stepping back and looking at what might be the net economic benefits of moving from fair dealing to fair use, the material benefit, from your perspective then, is we avoid this what I call fair use chill, where people aren't doing things for the fear of whether or not it's an infringement or not?

DR GIBLIN: Absolutely. We would feel so much more confident on advising whether we think something is fair than whether it fits within one of the existing pigeon holes now. So just about three days ago a colleague asked me, "Can I upload this video from last year's international moot, to promote the moot to future students?" It has a song playing in the background and I can't say yes, under the current Australian law, but I could have said yes if we had fair use.

MS CHESTER: So that sort of dovetails into the issue of a lot of the focus around moving from fair dealing to fair use is what does that mean for educational licences? From what you're saying, there's going to be a net increase in use but seems that in principle wouldn't have been occurring, under fair dealing, because of the uncertainty or the chill factor. Do you think there is a legitimate concern of the licencing parties that moving from fair dealing to fair use will have a material impact on their licencing fees, or is it just that moving from fair dealing to fair use might change the negotiating parameters a little bit more?

DR GIBLIN: For the education sector particularly I have had a look at the data from the Copyright Advisory Group and their modelling suggests that they would probably pay about $8-12 million a year less if fair use was introduced, instead of fair dealing. It's really worth breaking down what that money was paid for and how it would have been distributed, so that we understand the economic impact of this. So this is based on their modelling, it's proportional estimate and it's the amount that they've calculated, proportionally, that they're paying for things like orphan works, for which the owners just simply cannot be found, and also for

works that were never intended to be monetised. So, for example, the About Us page on the Commonwealth Bank website.

Now, of that money that they're estimating that they'll save, and I'll call it $10 million, just as a round number in the middle, well, what would have happened to that? I would say virtually all of that would not have been paid out to authors, either because they couldn't be found or because they wouldn't have hit the minimum threshold amount for payment, through the collective licence thing, from CAG. So it would have just gone into the broader pool for distribution. So it wouldn't have gone, at all, to the authors or the owners responsible for bringing it about in the first place but into the broader pool. Then, on CAG's estimates from the publicly available data, it seems that it's just something around 2.4 per cent of that whole pool actually eventually finds its way to author's pockets at all.

So I think that there would certainly be some impact on some publishers, through the change for education, but I don't think that that is going to be very much tied to the provision of their own works at all. I think it's more likely to be a loss of revenue that wasn't about anything that they created in the first place.

MR COPPEL: You mentioned in your introductory remarks that under the international agreements it's not possible to have formalities or at least before 50 years. The US has voluntary formalities after that 50 year period. One of the advantages of formalities is that it identifies the owner of the copyright, particularly when it's a lengthy period that that can be an issue. I'm interested in your views on whether you see value in formalities in the area of copyright, or at least in this period after the first 50 years after death?

DR GIBLIN: Yes, absolutely. Of course the Bern prohibition is only on formalities as a condition of enjoyment of the copyright and you can still have them. There's a few interesting things that arise from this. For example, when I talked about the possibility of perhaps reverting rights to authors and all of the interesting possibilities that would arise from that, one of them is that we could have, as a condition of reversion, that the author has to claim their interest, in a register. So that could be one way. That's not going to fall fowl of the Bern prohibition and it would be a way of starting to allow us to gather information about who owns what, which then also facilitates licensing. I think it also gives us a little bit of - it improves our evidence base for dealing with orphan works as well. So, for example, say a work is not being commercially exploited and the time period occurs when it can be reverted back to the author, under the kind of model that I was talking about just for illustration.

If it's not being exploited and the author doesn't claim it back, so you can check the register and you can see that there has been no interest, that could be relevant either to whether the use is a fair use or perhaps to whether there is some kind of complete limitation on remedy or something like that. So it could really help us build an evidence base about not only when a work is orphaned, but help facilitate that licencing when people do want to continue using them.

MS CHESTER: One area of our report, so as you appreciate we had a very broad terms of reference and we're looking at all forms of intellectual property arrangements. One area that's been subject to some new evidence, by way of submissions and public hearings, has been in the area of design rules and I'm not expecting you to be an expert in the area of design rules but the reason I wanted to raise it with you is that you are an expert in the area of copyright and we've learned that the UK more recently, but some other European countries, have actually flipped design rules into the copyright system. Has that been on your radar screen or anything that you've given thought to?

DR GIBLIN: No.

MS CHESTER: Okay. Rebecca, that's all the questions we wanted to cover with you this afternoon. Thank you very much and thanks for the submissions and your involvement in the round table to date. Is there anything else that you wanted to cover that you haven't? Because I'm conscious we're actually miraculously running on time, it's unprecedented.

DR GIBLIN: I think, just in wrapping up, I just want to address this claim that I'm hearing a lot, which is that things haven't really changed since Bern, but fundamentally while we live in a digital world it's all just business as usual. In rebutting that I just want to tell you this story, which is from back in 1906 when Mark Twain was testifying to Congress about why copyright should be extended from what was then a term of 42 years to a term of the author's life plus 50. His claim was based not on the value of those books but on their complete and utter lack of value. He argued that the commercial value of almost every book written in America is extracted after its first few years. He said publically, "I doubt that there's 20 Americans per century whose works are worth reading after that. When copyrights expire," he said, "those few valuable books continue to be published and the valueless ones continue not to be and the only difference is that the profits are diverted to the publishers instead of the authors or their heirs." So, in those circumstances, what Twain was arguing is there's no downside to giving infinite copyright to every single

work because that would, at least, enable the authors to continue to reap the benefits of those few valuable ones and the rest are going to be lost to obscurity regardless.

I think this really shows how things have changed and how we are actually operating in a really different environment now. The marginal costs of a copy is now rapidly approaching zero for many, many, many kinds of works and we've got enormous potential here to use copyright to further development, to further education, to make the pie bigger for everybody. I really think that that's something that we should take into account when we're hearing these claims of business as usual. Thank you.

MS CHESTER: Thank you, Rebecca. That brings us to the junction of a break and we'll be looking at resuming our hearings at 1.55 pm. Thank you.

ADJOURNED **[12.58 pm]**

RESUMED **[1.55 pm]**

MR COPPEL: Welcome back, everybody. We'll reconvene the hearings today, in Melbourne, with Matt Wenham. So if you could make your way to the table, when you're comfortable if you could, for the purposes of the transcript, give your name and who you represent and then if you care to give a brief opening statement. Thank you.

DR WENHAM: Thank you very much for the invitation to talk to you today. My name is Dr Matt Wenham, I'm the Executive Manager of Policy and Projects with the Australian Academy of Technology and Engineering, or ATSE for short. ATSE is the national academy for Australian engineering, applied science and technology so we're an independent organisation, established in legislation, to provide advice to government, primarily, but the nation, more broadly, on issues around technology, engineering and applied science.

The structure of the academy is that we have about 800 elected fellows of the academy who come from industry, academia, research institutes and government and they're elected to the academy for their career achievements and excellence in areas of technology and engineering. So the follows are the resource base that we draw on. We have a small national secretariat based here in Melbourne. I guess ATSE's key interest in the inquiry that the Commission is conducting is

primarily around IP protection for technology and innovative products, so generally patents and plant breeders rights, to a certain extent. We haven't made a submission to the inquiry but we did participate in some of the hearings that you held last year or earlier in the year, I can't remember when it was now.

MS CHESTER: I think it was one of our round tables.

DR WENHAM: It was, that's right. So obviously we see the importance of strong IP protection, in terms of fostering innovation and particularly encouraging entrepreneurship in science and technology. I suppose the key points that we wanted to emphasise for the inquiry, which has been picked up in the draft report, was the importance of the international context and I think there's been a lot commented on in the draft report around treaty obligations and the interaction between Australian IP arrangements and arrangements overseas and particularly being concerned with the triadic group, in terms of patents to the US and EU and Japan.

Australia is a fairly small producer of IP in the technology area and a large importer of IP so the need to have consistency between Australian arrangements and those overseas is critically important. ATSE would be a strong supporter of the recommendations or suggestions in the report for Australia to remain engaged with the cooperation for the WTO and the World Intellectual Property Organisation to harmonise those arrangements.

In terms of the principles that the IP system is based on, we would suggest that a possible extra principle, in addition to the four that are already there, might be one of fairness. In that sense, what we're thinking of is reward for effort. I know it's a challenge in setting up the regulations to do the right thing and not reward the wrong sort of behaviour, but we're obviously interested in IP protection being offered to innovators and inventors and those who have actually done development work and so that they're fairly recognised for their work. I think there's some ability to perhaps, or a need to make sure that the arrangements recognise parallel development, where you've got two groups, working in isolation, on the same piece of intellectual property, making sure that that effort is recognised and rewarded even though one group may be slightly sooner to file for protection. We're also obviously keen to make sure that the benefit errs on the side of genuine developers, people that are inventing and innovating and want to make use of that IP, rather than those who are wishing to lock it up to protect market share or, in the worst case, patent trolls.

I think the comments around efficiency, obviously the time taken to

achieve IP protection is important and I know there are concerns the length of time that IP Australia might take to assess patents in Australia, particularly based on those comments around the international context and also the cost is also important in filing. That's particularly true for researchers who are publicly funded in universities or research institutes where the costs for IP protection are essentially coming out of research funds, so trying to minimise those costs as much as possible is important.

One possible idea for looking at efficiency might be benchmarking the Australian timelines and costs for IP registration on a market share basis. So people seeking IP protection in the mining sector is a very significant and potentially large pay off area for Australian IP versus some other areas where the market share is much smaller so you might expect that there'd be a difference in those two areas, in terms of costs and timing.

We're particularly interested in IP sharing arrangements to facilitate better collaboration between publicly funded researchers and industry, or research end users. Recently ATSE has been a participant in the review of research training that was conducted by the Australian Council of Learned Academies, looking at PhD and Masters by research training in Australia. IP sharing was identified as one of the key barriers to students working more with an industry because of issues around the sharing of IP and working out who owns IP.

In a couple of the specific requests, ATSE is generally supportive of the open access principle for publicly funded research but I guess offers a caution that there would need to be some exemption maintained for commercially sensitive material, where there are commercialisation opportunities or also in areas where the government or public funds aren't the sole funder of that researcher. Obviously other funding partners are going to want to have some involvement.

Finally, in terms of the exemptions for experimental use, I don't have any specific examples where a lack of that exemption has hindered researchers in universities or institutes, although we have had some anecdotal feedback from fellows and others that that is sometimes a frustration that restricts what researchers feel they're able to do.

So, from a research perspective, trying to make it as possible for researchers to do that work is important but obviously that's a fairly fundamental principle of the IP system, as it stands, to give those that develop the IP the first rights to make use of it, so that would have to be very carefully thought through. I'll leave it at that.

MR COPPEL: Thank you, Matt. I wanted to pick up on two of the points that you made, one, the framework that's used to assess the intellectual property arrangements and then the other is the issue of collaboration between research institutes and industry and entrepreneurs. You made the point that fairness should be a factor that is taken into consideration in any analytical framework. This is a point that had come up in earlier consultations and our report has four principles that guided process for assessment of the intellectual property arrangements; effectiveness, efficiency, adaptability and accountability. Within the accountability that includes the arrangements should reflect community value, which is a way that we're trying to inject that notion of fairness.

In bringing up that principle of fairness, you raised the point that it could act to limit intellectual property, or ideas or innovations being locked up by intellectual property. I'm wondering if you have any evidence or experience that could shed light on whether that is a phenomena that is significant, in the Australian context?

DR WENHAM: Off the top of my head I can't offer any strong evidence, it's mostly by way of anecdote and some of the other work that we've done in other contexts. I think, thinking about the university sector or a public funded research sector, there is a concern that there's a tendency to lock up IP. Now, that varies widely across the university sector. There are some universities and their technology transfer officers or commercialisation officers that are more open.

I think one of the better known ones is the University of New South Wales, with their open access IP model where they're basically trying to - they do have protection of the IP but it's made fairly freely available for others to use. We've had some interaction with the University of Warwick, in the UK, and the Warwick Manufacturing Group, which has a very open attitude to their IP, in terms of working with industry in that the IP that's developed out of their research is essentially freely available for industry partners to make use of, with a few common sense requirements or guidelines. Their theory around that is, I guess similar to UNSW, (a) that they want the IP to be used, otherwise is of not much value, but they see that as a very important way of fostering collaboration and relationships with companies and industry and they've been very successful in bringing in external funding from industry for their research because they companies have a positive experience that starts from the use of Warwick IP and that then leads to larger and larger projects and more contributions.

So I think there are examples and anecdotes around the place but trying to make sure that the IP is as accessible - I suppose the far end of

that spectrum is the use it or lose it principle. That, in general, I think would be supported to a certain extent but given there are caveats on that as well so I don't think it will be quite as black and white.

MR COPPEL: I don't think you were here before lunch but we were discussing collaboration between universities and industry and the idea of a use it or lose it mechanism, which was suggested in the inquiry by Ian Watt. They didn't have enough time to fully assess that idea and they've passed it on to the Productivity Commission's ongoing inquiry into intellectual property arrangements and we didn't have enough time to consider it for the draft report, but we will be looking at this more, in finalising the report.

One of the things we're trying to get a grip on, I guess, is the fundamental question, is there a problem and how big is that problem? You've noted that universities all have officers that aim to commercialise the intellectual property. There are measures that suggest there is a low level in collaboration but there may be more imperfect measures than a reflection of the reality. I'd be interested in having your perspective of how you see this issue. Is it general or are there really only specific cases where maybe a possible deal fell through because the commercial arrangements didn't favour one party over the other sufficiently to strike that deal.

DR WENHAM: ATSE's done quite a bit of work on that question of collaboration between research and industry. We're currently doing some work for the Department of Industry, Innovation and Science around reports that have been done on collaboration and looking at this question of why Australia performs so poorly. We've also done work, over the last couple of years, looking at the metrics that drive behaviour of university researchers, and that's a long and complex topic but we've basically developed a series of metrics to try and measure research engagement behaviour of academics working with end users; industry, government and others, and that has now worked its way into the national innovation and science agenda and Department of Education and the Australian Research Council are doing work and we're helping with that, around the metrics and the incentives for researchers.

There's been a lot written about the collaboration issue. That's certainly a very diverse one and there's a lot of different reasons for that. I think partly it's the metrics and the incentives, partly it's a cultural issue, partly it's the shape of Australian business and industry and the absorptive capacity of industry to take up research.

In this context I think IP is one of the barriers or one of the issues.

The feedback that we get from our fellows who are based in industry or connected to industry is that often universities can be difficult to deal with on IP issues. Now, again, that varies widely within the sector. There are some universities and tech transfer officers that are better than others, but often the complaint is that the starting point is lawyers at 20 paces and everything will be negotiated to the nth degree before we start any work. For a business, that's often a barrier that they're not willing, unless it's a large business that has other reasons to do it, they're not willing to go over. And certainly for small and medium enterprises that's a deal stopper. I think the IP issues are certainly one of the barriers that need to be looked at. It's more around how IP sharing and IP ownership is negotiated between parties.

You'd asked before about the research student training, and I think that's one of the areas where there is some fairly clear potential to make progress in those sort of arrangements. The context we were looking at there, as part of the review of research training, was students who are, PhD students generally, who are either placed in industry for a portion of their PhD or conduct part of their project with industry or, at the other extreme, are doing an internship or a placement, at some point, to help them interact with industry more. The review recommended that the default position be that any IP developed out of that lay with the business, the industry partner, and that be the default and if there needed to be exemptions or negotiations around that, that would be the starting point. That was based on feedback from businesses and industry groups that said, "That's the minimum requirement for us to be involved. If we're going to partner this group, we want to know that we've got access to the IP."

MR COPPEL: You mentioned the work on metrics, is that something that is publicly available? Would we be able to - - -

DR WENHAM: Yes, so the development work that went into it, to developing the metrics, is available and then last year we did a pilot study in Queensland and South Australia, working with the universities in those states, looking at their data. Those two reports are both available and we're currently doing development work as part of the NESA(?) engagement and impact process that will be released once the work has been done.

MS CHESTER: In terms of where you have been able to roll out the metrics in one or two universities, the overall findings, did they line up with the other metrics that we've seen on the extent to which Australian public sector funded organisations are commercialising their intellectual property?

DR WENHAM: So those metrics, which we've termed Research Engagement for Australia, REA, which is just to confuse everyone because the other exercise that goes on is ERA, which is Excellence in Research for Australia, which measures traditional academic outputs, publications, citations. So we did some work to look at the alignment of REA, the engagement side, with ERA, the excellence side, and, as you'd expect, there's a fairly good correlation and that suggests that researchers who are doing world-leading research are recognised by industry and that's where they'll go with their funding. But there are outliers where you have researchers who don't perform as strongly on the traditional quality metrics but do bring in a lot of engagement work. We're essentially, with those metrics, measuring external research income, as a proxy for engagement activity.

So we think that it does reflect the other statistics around the rates of commercialisation and I guess the purpose in doing that work was two-fold. One is to drive improvement in the sector, as a whole, to try and improve the national performance but also to recognise those groups who are already doing that work and are the outliers, if you like, who are very engaged with industry or end users who currently don't get recognised in the current suite of metrics that are used to incentivise behaviour for researchers.

MR COPPEL: There are a number of mechanisms that are being developed to facilitate licencing between universities and industry. Things like the IP Tool Kit, there's Source IP, IP Source, they're aimed at essentially streamlining the transactions costs that are involved in striking a deal. Do you have any views on the contribution that they make, in terms of their effectiveness?

DR WENHAM: I think they're important initiatives. Source IP, in particular, I think is a good way of opening up the IP that already exists so that businesses and entrepreneurs can come in and access that IP. The IP Tool Kit I think is a good initiative. I'm not sure how much of an impact that will have on practicing universities. There's a, I'd say, fair amount of inertia in technology transfer officers and they like doing things their own way. I'm sure you would have heard this morning, from Renee Hindmarsh, from the ATN, about their initiatives, as a grouping of universities, to standardise their IP procedures. So things like that I think are a welcome addition. The second part of your - - -

MR COPPEL: I think you've sort of answered it, in terms of their effectiveness, but a follow up would be, are there ways in which those sorts of mechanisms could be improved?

DR WENHAM: I don't know how much it pertains to the work that the Commission is doing, but we, again as part of an ACOLA study with the other academies last year, looked at research translation overseas and we studied 14 countries that were seen as high performers in the translation of research. So they're countries like the US and Israel and Germany and the UK, and took a country-comparison approach and tried to identify what some of the common factors were, both in the programs that they run and the way that their systems are set up. One of the interesting findings from that was the importance of intermediaries or brokerage organisations.

So simply having a database of the IP, well that's a good first step, often doesn't do a lot to allow businesses to - it's a small number of businesses that are going to use that resource, on their own initiative, to find new IP. What has been shown to work in other countries is having dedicated organisations, dedicated people whose role it is to provide the link between the two groups and speak to business and university and say to business, "What are the problems you are trying to address? These are the capabilities that we've got in universities or researchers that can help you address that." And that sort of goes to, "This is the IP that might help you."

So I guess the lesson from that is that it's not just an organic process where you can make the information available or the groups will find each other and they'll join up, there does need to be a bit of matchmaking done and, in some cases, quite intensive work to assess the needs of the business or industry and the capabilities of researchers. I think there's some positive steps in that direction, in Australia, in terms of things like the innovation connections program that the federal Department of Industry runs, which as advisors that try and make those connections. Then the Industry Growth Centres, I would also imagine, will have some role in that direction, of being the broker between the two. So I think the lesson is you can't just have the tool and the database, you've got to have someone that's actively using that to make sure that it's disseminated and getting into private industry.

MR COPPEL: In that world where essentially there's the establishment of a relationship, building trust, an instrument like use it or lose it seems like quite a heavy handed way of dealing with a potential problem of IP that exists but is somehow being locked up and not made accessible. You mentioned there were a number of issues with use it or lose it, I'd be interested in what your views are on that approach and some of those issues that you were referring to.

DR WENHAM: It is a fairly blunt instrument I think. It does create a fairly strong imperative for universities to try and get their IP disseminated and used. That sort of goes to one of the bigger issues around research engagement, and I mentioned it briefly before, around absorbing of capacity and how much ability academics actually have. I mean they obviously can't control whether someone takes up their IP or not, they're only one part of the equation.

Now, we do recognise that there are issues with the way that research funding system is structured so that the incentives aren't there for people to do that work. So having something like use it or lose it would potentially add an incentive for universities to go out and promote that work or have it taken up but they can't control what happens at the other end. They can push it as much as they like but unless someone's there to pick up the demand. Now, that may not be such a bad thing, that's one of the nuances, I suppose, that people need to be aware of, in promoting that sort of system.

MS CHESTER: Matt, it's also been suggested to us that the use it or lose it could also result in an unintended or a perverse incentive. So if you've got a public sector funded research organisation, allocating that public sector of funds is sort of decided, at the moment, on the merit or the potential of the research and that will partially be informed by what can be commercialised and what can't be. If you go for a use it or lose it, that could then start to influence how the public sector funds are allocated to the initial research, in terms of those where commercialisation might be an easier path but commercialisation is not always the best proxy measure of what will impact community wellbeing from that research. So that's been suggested to us, given your experience do you think there's legitimacy around that concern?

DR WENHAM: I think there's legitimacy in those concerns and it applies, more broadly, to the discussion around collaboration and even, more fundamentally, the balance of basicness as applied research. The evidence from all the work that we've done, around the engagement metrics, as I said before, there's quite a strong correlation between research excellence and research engagement and clearly unless you've got a strong basic research foundation you're cutting yourself off at the knees because down the track there won't be the research to commercialise. On top of the aspect of basic research, by its nature, is not directed towards an outcome so there's serendipitous results and things that get developed out of research that couldn't have been predicted.

So it's a legitimate concern but I think the focus has been correct in that by international measures Australia does very well on our research

excellence or our research output, the basic research side of things. The area we don't do as well in is the translation of that research. We've tried to consider that fairly broadly so it's not just about the commercialisation of research into a product or a service, which tends to apply more in the science and technology, the STEM, disciplines, but also thinking about other areas of publicly funded research, particularly in the humanities and social science, where the translation of that research might be into public policy or into business practices.

So we do need to be mindful of maintaining that strong basic research, that sort of curiosity driven research core, because without that the rest won't flow, but I think we do need to think carefully about how we encourage more of the translation piece of it and that's where maybe IP arrangements and commercialisation arrangements are important.

MS CHESTER: There was a second point that you made in your opening remarks around, and correct me if I've gotten this wrong, nearly like a triage or a priority system, in terms of how the IP rights are registered or certified so it would be weighted on the share of GDP that a sector has. I'm just trying to get a better understanding of what sort of problem is underpinning that solution that you're suggesting.

DR WENHAM: So it's a fairly undeveloped idea, it was one of the suggestions that had come up. I think what it was geared towards is the usual comparison that's done is looking at patent filing fees in Australia, versus other countries around the world and saying we're expensive or cheap, compared to others. I think, from my limited understanding, that Australia is relatively inexpensive, compared to some other countries.

Now, that's probably fair if you look at our overall generation of IP in Australia, in terms of being a net importer. I think what that suggestion was getting at was trying to view that with a bit more granularity, in the sense that the IP that's generated in our mining equipment and services sector, the MET sector, is actually quite a large portion of the world's IP in that particular sector, whereas in other sectors of the economy, perhaps in advanced manufacturing or pharmaceuticals, our IP is a much smaller portion.

So if you were to look at the comparative patent filing fees in the MET sector, Australia might be cheaper than it should be because that protection in Australia might actually be worth more, I suppose, than in a sector where it's a much smaller portion. I'm clearly not an economist and don't know the details of how that would work in practice, but I think it was a suggestion just to look at things with a bit more granularity rather than just on a broad based Australia versus other countries approach.

MS CHESTER: So it wasn't in terms of allocating priorities to getting in the IP Australia queue, it was more in terms of a weighting mechanism for assessing patent quality?

DR WENHAM: More in terms, I think, of assessing the efficiency of the IP system in Australia to sort of benchmark where we sit, compared to the rest of the world.

MS CHESTER: Your other opening remark that we've touched on a little bit already, around fairness, when you translated what you were thinking of there you used the words "reward for effort". I guess the way we've approached it, in our report, is reward for effort is a function of two things, it's a function of what exclusive rights you've been afforded by the intellectual property arrangements and then also a function of the commercial success of the innovation or the creative works.

What role, then, for the intellectual property arrangements in rewarding effort? I guess where we kind of landed to, in an indirect way, was saying, say for example with patents, the only way that we could have a proxy measure of the potential value or the potential community wellbeing from an invention is, is it truly inventive? Does it really meet an appropriate inventive step? So I guess if I'm getting your connecting the dots correctly, if fairness view is reward for effort in intellectual property arrangements, the only way we could kind of get our way to that is make sure we've got a quality inventive step in the patent system. So I'm just trying to see, does that address the issue that you're raising or is there something else that we're not covering or is there another mechanism by which - - -

DR WENHAM: No. I think that's a good way to approach it. It's quite easy to say that that should be a principle and ultimately we want to reward that effort but doing it in practice is a much more difficult - and making sure that the arrangements are structured in the right way to do that. So I think that inventiveness step is an important one and some of the examples around incremental – I shouldn't use the word "incremental" because that can be important, the sort of scintilla of innovation type notion. It might be worth looking at that requirement to make sure that that is strengthened and supports that sort of work.

MS CHESTER: Yes.

DR WENHAM: It's, sort of, the case of it's easy to recognise, in some cases, if you've got two extremes of, well this person is just trying to lock up that IP and prevent others from having the freedom to operate whereas

this is a truly inventive piece of work and you can recognise it in comparison. But trying to structure the system so that the system can recognise it in isolation is a difficult thing to do. But I think you're right that criteria is an important driver of that sort of behaviour.

MR COPPEL: Well, that's it. Thank you very much, Matt.

DR WENHAM: Thank you.

MR COPPEL: Our next participant is Maree Coote from Melbourne Style Books.

MS COOTE: Thank you.

MR COPPEL: Make yourself. When you're ready if you could, for the purpose of the transcript, give your name and who you represent. Then a brief opening statement. Thank you.

MS COOTE: Thank you very much for the opportunity to respond. I appreciate it. My name is Maree Coote, and I'm an independent small publisher, Melbourne Style Books. As a writer and designer and publisher, I am both a creator and consumer of intellectual property and although small, I think, my business is emblematic of a lot of small publishers and creator individuals who, together, form an important block in this review. I wonder, I fear maybe, the extent of the number of individuals like me may not have been – may have been underestimated.

Firstly, a comment about productivity. Basically, I am self-employed. I pay my own way. I've never had a grant of funding of any kind. So my books lead the way into topics deemed too small fry often for large publishers. They win awards. They represent Australia in International Book Fairs, as the Face of the Children's Fair for example. They're used as references in schools and businesses and are constantly bought as gifts by – for diplomats, government, corporate.

So I'm obviously creating material that's desirable to Victorian Government, Education, Tourism and Commerce. With no assistance, I repeat. I'm generating valuable material. I employ other people. I pay for my own equipment and research, and the costs of creating original work are substantial.

But these proposed IP changes actually threaten my business at its very core. Firstly, I don't believe that the current copyright system hinders innovation at all. It merely acknowledges and compensates originators. I use copyrighted material and when I do so, and historic

material, I pay royalties to our libraries and to our galleries and to other copyright holders. I don't understand why the professor that was mentioned just before lunch couldn't do so in his presentation. I don't understand what held him back from doing that, getting permission or paying.

If I can afford to do the right thing, tiny little me, by copyright holders, why can't Google, other aggregators, big universities, why can't they afford to do the right thing? I can only assume the answer is greed and this scenario feels to me like the greedy uncle at the table leaning over to stab your last potato saying, "You're not eating that are you?" I am eating it. It's kind of in my superannuation. It's my day job. It matters a lot to producers like me. I note a lot of the presentations have been from intermediaries. Well, I'm a core creator, base producer. I don't know how many in the percentage that you're hearing from are actually creators themselves, but I would like to know. If you could help me that percentage that you're hearing from?

I'd just like to make a comment about the term "fair use" because I think fair use exists already, as we know from review (indistinct) et cetera. I think that this unfair use change basically encourages what can only be called really parasitic businesses to use other people's work without payment or permission, one or the other, or both. It doesn't always have to be payment. Your report states that the beneficiaries would be internet intermediaries and content dependent industries. That's content aggregators, regurgitators, universities, Google, et al, we know that. I don't understand why my labours should be redeployed or even sold on by those entities for no – without permission or with no compensation to me.

Your report also says that it's not about protecting rights holders but a benefit to intermediary users and balancing the rights of copyright owners and the rights of others to use their works, which I find really curious. I mean, why should those users who have not contributed to the generation of this material, and it's very expensive to create, have rights over and above people who created that work. I don't understand why that is so. It's not so with other kinds of property.

The changes that are suggested in this intellectual property arrangement, certainly remove risk and uncertainty, but from re-users, not from creators. They shift all risk and uncertainty to the creator because we have no idea if anyone's going to infringe us and whether or not we'll have to chase them through the Courts to do it, or whether we'll even know really. I also note that you have been asking this question, what under fair dealing that is now remunerated would not be so under fair use? I just find the question really curious, possibly unanswerable, because

you're basically asking, what current un-stolen property would you be remunerated for under a new system where a law that allows theft without guidelines was introduced and the only recourse was in Court? I mean, it's very hard to quantify a scenario that we can't tell how it will be rolled out and how it will be abused. So I find the question really unfair. It's not quantifiable.

I think, multinational content aggregators, like Facebook, Google, Netflix, et cetera, obviously they want free use. It's Dracula blood bank stuff. Obviously they want free use. They can then operate unfettered in any market, unrestrained by paying copyright or tax, as we know. So I don't understand how that's productivity oriented for Australian citizens. I don't see how that creates productivity for we Australians to enable them to behave that way.

I just wanted to mention about the legal recourses. Without clear-cut guidelines, because your report states that, sort of, fair use is pretty much the statement, is it fair? Well, it's a very subjective kind of question and the only way that I, in my research, have discovered that, for example in the USA, it's really uneven and expensive to get to the bottom of what is fair, and the cases that I've looked at I don't – I wouldn't be able to tell anyone what I thought was a fair risk or not a fair risk because of what I've seen in the outcomes from the States.

But I just want to add a question too on moral rights, because - I won't go through the whole thing - but moral rights basically guarantee an obligation to attribute creators and their way with respect, et cetera, et cetera, and to prevent derogatory uses of the work. This entire, kind of, question has been framed in the context of remuneration and what you're going to lose and what you're going to gain and who's going to lose and who's going to gain. But moral rights are about permission and I think this proposal, kind of, shifts the onus onto the IP owner to discover firstly, misuse and then to legally challenge misuse. So I can't see how it's fair. I really can't.

The term of copyright again I actually, personally, think should be increased. I think it should be treated like any other property. Because unlike real estate or mining rights or certain pharmaceutical things which are acquired or discovered, this is actually created and, I think, it should have respect as a genuinely productive endeavour. I don't think that any assertion about the lifetime of IP being less than five years, is correct. I think you can look at Disney and Dylan and God knows what, and the fact that we're still Mark Twain, I referred to early.

Anyway, if it had no value, why would these re-users want to use it? You can't have it both ways. It either has value or it doesn't have value. Even if it has a different value to what the creator created in the beginning, it still has value and permission and payment should be offered to the creator who owns the material. That's my opinion. I think also the notes assert that lots of creative work, apparently, or invented work, is done without any expectation of remuneration. I find that really curious, because that's not the case with me. I suppose, you could say the same about cooking, but that doesn't entitle somebody to come in and eat my beautiful cake after I've made it, does it?

MR COPPEL: That's your statement.

MS COOTE: I think so.

MR COPPEL: Yes, thank you.

MS COOTE: Well, I would like to say we just need to ask for whom these things are productive and, as far as generators of original material in Australia, I really think – and parallel import as well, I have notes on parallel import which I won't hold you up with because I'm happy to chat with you about your questions. But I think that what the Commission should be asking about parallel import, for example, is for whom is it productive because the international publishers will undercut local creators on – by dent of nothing more than scale. Not relevance, not quality, not benefit to local culture, but just scale. That's how they'll damage the local industry.

We need to ask Australians what value to productivity has real origination made here, local Australian culture and how much do consumers really value that? Because Australian intellectual nutrition is key in this so-called innovation nation and it's rooted in locally grown creativity and you don't grow up to write things like Rake, if you've been raised on mass-produced, dumped intellectual junk food, you end up with intellectual diabetes, and I don't want that to happen to Australia.

MR COPPEL: Okay.

MS COOTE: So anyway that's basically where I'm coming from. How can I help?

MR COPPEL: Well, thank you, Maree, and you've posed a couple of questions to us.

MS COOTE: I did.

MR COPPEL: One of those was how many authors are actually participating in the inquiry?

MS COOTE: Yes. Well, not just authors actually, originators, so artists, designers, because I am an artist and a designer as well.

MR COPPEL: Yes. Well the answer is quite a few. This is the fourth day of hearings.

MS COOTE: Yes.

MR COPPEL: The first was in Brisbane.

MS COOTE: Yes.

MR COPPEL: I think it would be fair to say that about half, or more than half were writer in Brisbane.

MS COOTE: You think 50 per cent?

MR COPPEL: We had a similar proportion in Sydney. That includes writers and also designers – designers of furniture, designers of lamps. We have a writer participating later this afternoon and there will be others tomorrow.

MS COOTE: I'm hope you have inventors and photographs, and so on, because that's the very base level. There's a lot of discussion between, forgive me, intermediaries. I think it needs to include the original generators, the originators.

MR COPPEL: I think we have a broad range of participants in the hearings.

MS COOTE: Good.

MR COPPEL: I think in the time that I've been at the Productivity Commission, this is probably the inquiry with most extensive hearings. We've had a large number of submissions. We've had a couple of round tables. So we're quite pleased that we're about to get the perspective from different parties that are interested in the inquiry. As usual, probably one group that's less represented in the context of copyright, you might call them the readers. I guess, that's sort of understandable. So I just wanted to make that as the first point.

The second relates to the notion of, sort of, intellectual property and other forms of property. This inquiry is looking at all types of intellectual property. There are patents. There are plant breeder rights. There's copyright. There's designer rights. The common element in these forms of intellectual property is that there's a period of exclusivity that is granted that is there to recognise that there are upfront costs associated with the development of a – the expression of an idea or the development of a new technology. That period of exclusivity is there to provide a mechanism for rewarding that effort.

It's also recognised that the value to the broader community from that initial investment in research and development, for instance, can be enhanced by the diffusion of the mechanism that lies behind the innovation, with taking the case of a patent. It can also be very constructive in terms of facilitating further innovation. So innovation is an iterative process and one idea can lead to another idea.

MS COOTE: Certainly.

MR COPPEL: So it's always a balance.

MS COOTE: I'm aware of that. You are looking at the needs of, as I say, your discovers, miners, inventors, all sorts of people, but I think they should all – and patent holders. I think they should be thought of and considered as distinct from copyright holders and creators and further as distinct from re-users and consumers. Because I think it's very conflated this whole review, and there are many different dynamics that affect certain parts of it in completely different ways that affect other parts. So, I mean, I can't talk to patent law. It's about novelty, is it not, not originality? So, I mean, it's too complex for me.

MR COPPEL: Yes. Okay. I just wanted to continue the point in that that is a principle that lies behind all the forms of intellectual property. The actual terms of exclusivity will vary. Copyright is the longest in terms of that term. We haven't made any recommendation in the draft report that would affect term, and the international obligations that Australia has to adhere to is the reasons why we haven't even considered questions of term.

MS COOTE: I know. But, I mean, I know what you're saying about term, and I've heard this over and over, but I actually think that fair use actually impacts on term because if fair dealing – basically I'm, kind of, reasonably secure in the knowledge that people can't use my created property without permission. So I figure that I can use it in some sort of

predictability for 50 years or so. But with fair use, if someone deems it's fair they can go for it. So how does that - - -

MR COPPEL: That would've been my third point. You've mentioned often "fair use" and "free", "fair dealing". These are all relating to the area of copyright that provides an exception for the remuneration of copyrighted work. Those exceptions are, under fair dealing, a prescribed list. Under fair use, it's essentially converting that prescribed list into a set of principles that are able to adapt through time to technological innovations that couldn't have been anticipated when the Act was prescribed. That provides a greater deal of adaptability and flexibility. The notion of fair dealing and fair use both relate to providing an exception so that the use of copyright material can be undertaken in those circumstances that has a broader community value. It's important not to conflate "fair use" with "free use". Under a fair use arrangement, there would still be remunerated material – remuneration for copyright material.

MS COOTE: Well, the cases that I've seen in the States don't – are not as you describe where photographs are used – I can't recall the name of the case. I can look it up for you here in a minute. Her photographs were used and re-purposed, if you like, by having painting made on the surface of them. Now, the Court said it wasn't fair use until the artist appealed and then they said it was fair use. If I was to look at that myself and I was the – if I was the photographer, I would be devastated that a – two dozen photographs of mine had been used and re-purposed, if you like, without my permission. Another case comes to mind where I think what was done to the original was probably fair because there was quite a transformation and in that case they failed. The certainty and predictability is out the window from where I can see. I can't work out – this is very subjective about what is and what is not fair, and very expensive to chase.

MR COPPEL: This whole issue of whether fair use is more uncertain than fair dealing is one of the issues that's probably come over most over the last three days of hearings. It is contested. It will depend on the way in which fair use is framed in the legislation. It will depend on other – the nature of the guidance that comes with the introduction of fair use. There will be Court decisions that will also provide a level of predictability going forward. But it's also been said that under fair dealing, which is the more prescriptive approach, that users can be in a situation where themselves are uncertain as to whether it's legal or not legal and that can act as a dampener because of risk, to avoid making use of the - - -

MS COOTE: I find myself in that situation as a publisher, and you're talking about what this professor couldn't use his image in his presentation and there's a chill on the use. Well I get on the phone and I ring the

people and I ask them do they mind if I use it and if they say, "Yes, I do", and if they say, "No, I don't", and if they say, "For $100, $200, $500 you can" - and that doesn't matter if I'm talking to the Frida Kahlo Museum or a photographer in Carlton or anywhere. I can do it. So I don't find a chill factor on asking people do they mind if I use their work in mine. A lot of the time they say, "That's fine you can go for it". People ask me, they ring me and say, "Can I use your work in what I'm doing?" I regularly say, "Yes", to schools, primary schools, "Yes" to local councils, and so on, and sometimes I say, "Well", to somebody else, "No, you need to give me a fee for what you're doing". I mean, I don't see why the prescriptions are difficult. What I do see is removing them all means I don't know who has felt something's fair, and I don't know who has used it, and then I don't know how a Court will interpret that because it is so subjective and expensive.

MS CHESTER: So, Maree, have you had a chance to look at the fairness factors in the illustrative examples in our report which - - -

MS COOTE: I have had a look at some of those.

MS CHESTER: Which are really trying to take fair dealing, which are the prescriptive exclusions, and turn them into factors and examples which would allow people to, effectively, apply fair dealing in an adaptable and evolving way with technology. So we've heard some evidence today around chill. We've heard a lot of evidence and received a lot of other submissions of where technology or business models or platforms have changed such that a reading of fair dealing doesn't give you any guidance as to whether or not something is subject to remuneration under copyright.

MS COOTE: I know what you mean. Technology's changed so much.

MS CHESTER: Yes.

MS COOTE: The applications are all quite complex. Well, personally, I would rather employ the lawyers not helping me in Court chase it, but helping people unravel the application to new technology. We have taken intellectual property through from Gutenberg all the way up, and probably before, I don't know, to get to this far. I'm sure we can do it. Lawyers would love it. Why could they not spend their efforts there than elsewhere?

MS CHESTER: I guess, what we're trying to do here is to learn from the other areas of Australian policy. A good example would be Australian consumer law where a previous prescriptive approach was not doing the best for the welfare of Australian consumers with business models

changing and the like. That's moved to a principles based system, and much to the wellbeing of Australian consumers and their rights and their protections care of the ACCC. So what we're doing is the law's evolving to use principles in such a way that it then becomes adaptable.

The advantage with fair use is that because it's been operating in the US, we would benefit from the US jurisprudence, the guidelines that have been developed there. So these are things that will help with the transitional uncertainty and moving from fair dealing to fair use. Indeed, several countries, like Israel, have effectively transplanted the fair use system from the US across to their own jurisdiction in such a way to try to manage that sort of uncertainty during the transitional period.

MS COOTE: From my research it shows that unravelling all this stuff in the Court like, "The USA University of Chicago Law Review articulates concerns that Judges may be creating fair use privilege largely reserved for the rich and famous". I mean, it can be argued anecdotally either way. The States will make it easy. I look at examples from the States and it can be argued that it's absolutely clear as mud.

The outcomes and judgments from cases that I can find are baffling. I can't tell you why they were judged fair or unfair. It makes no sense to me, as an artist, and a designer, and as evaluating transformation from one entity into another where I deem it to be quite a transformation, I would say that it was transformed, they disallowed. Where I would say it was not a transformation, because as a creator I can tell they allowed it on appeal. A lot of money. So I have great concerns and I urge the Commission to look at all of the areas of this impact – that this impacts in separate categories from pharmaceutical to mining or whatever it is that your IP applies to.

I think you'll decimate the local publishing industry. I can't see why any artist, photographer, creator, would bother to write a book or do – or create a film if after – I don't know how long, that's baffling as well if - because someone feels that their use of it is fair, that they can go and exploit it. It's up to the originator – the onus has been shifted incorrectly to the creator to chase down their rights. I think the onus should be on someone who wants to exploit, not produce but exploit – we're talking about productivity. If they want to exploit fine, let them contact the originator and negotiate.

MS CHESTER: Maree, what is it about the move from fair dealing to fair use that makes you think the onus of proof has changed? It's a set of rules and legislation. It doesn't change any of the underlying principles

that if somebody feels that they've been infringed, they have enforcement remedies available to them.

MS COOTE: Well, I think if it - - -

MS CHESTER: Why does the onus shift?

MS COOTE: If it didn't change anything, it wouldn't be being done, that's number one. You're not changing the law and - - -

MS CHESTER: Sorry, I'm not saying why does it change the underlying onus of proof.

MS COOTE: Yes, I know. I hear you, but I'm just making the point that if there's no difference, then what are we all doing here? But I would say it does change the treatment because it's subjective. It boils down to a sentence and an evaluation of what is fair. The resolution of that question lays in an expensive Court. That's what's different. That once the prescriptions are removed and a broad sentence is there.

MR COPPEL: I think what goes to Court is typically going to be the tip of an iceberg. It'll be those cases where it's a very fine line between what is fair and what is not fair. The process of going to Court and the decision that's actually reached helped build a better understanding of where those lines are between fair and unfair.

MS COOTE: I wasn't trying - - -

MR COPPEL: In many instances - - -

MS COOTE: You mentioned about Court cases today. I'm not sure if it was you at that table or someone else. Talking about, I'm not sure again whether it was Thailand or The Philippines or somewhere where not a lot of cases had been brought.

MR COPPEL: Yes.

MS COOTE: That doesn't mean it doesn't work, that just means people can't afford Court, doesn't it? I mean, it's not - - -

MR COPPEL: Well it can mean many things.

MS COOTE: One's not a function of the other necessarily. So you can't measure this new introduction or the adoption – I think the adoption was mentioned that it was dropped into those countries holus-bolus and there

hadn't been too many case problems. Well, that doesn't necessarily follow that there aren't problems.

MR COPPEL: Yes, I think the point that was being made was that it was following a comment that the adoption of fair use in the United States – or the use of fair use in the United States leads to a large amount of litigation because there's that uncertainty element. The point about the other jurisdictions is that even though there is fair use you don't see that level of litigation. So there could well be other factors.

MS COOTE: Well, it could be financial or it could be cultural, but it's not necessarily proof that dropping it in there is a great success.

MR COPPEL: No, that wasn't being suggested.

MS COOTE: Okay.

MR COPPEL: Great. Thank you.

MS CHESTER: Thank you very much again.

MR COPPEL: Thank you.

MS COOTE: Okay.

MR COPPEL: Our next participant is Nick Gruen from Lateral Economics. We don't have Nick? Do we have David O'Brien?

MR O'BRIEN: Yes, you've got me.

MR COPPEL: Good. If you could come forward? So, for the purpose of the transcript, when you're comfortable, if you can give your name and who you represent and then a brief opening?

MR O'BRIEN: Yes. My name's David O'Brien and I'm a Director of Cengage Learning Australia Pty Ltd, which is an education publishing company. It's partly an education publishing company for primary school, secondary school, tertiary. So we're not trade. We don't do journals. We are purely education for the kiddies from 4 to 24 years old. My particular expertise is in schools. I've been a publisher for 28 years and I've ran publishing companies in schools for the last 18. So I think, hopefully, I've got a little bit to explain on that area. Now it's only a slither of the total area, but it's one of the areas that I wish to say a few things about. Because, I guess, there's – I'm probably going to go off script here a little bit because I just, sort of, figure I've had the advantage

of listening to a lot of the questioning and, I think – I don't want to get caught up in Canada and the UK and whatever else. I just want to go where I think it makes a different to schools' education.

The worry is, literally, the sort of – we feel like collateral damage on this whole argument of, sort of, fair use and fair dealing. That's the area that probably I can talk to anything on the Cengage submission, which also includes parallel importation but I'm guessing you're going to get a bit of a hit of that tomorrow or something with trade publishers. But I'm happy to perhaps respond to any questions that you might frame, rather than me go through that per se. So I want to talk more about the fair use, fair dealing, and the impact on schools' education.

Over the course of today, and I think some of the feedback from the Commissioners, it's been very much fair use, fair dealing, statutory licence over the top, what's your problem, in general terms. There's a couple of problems and I'll try and respond in the way that you have raised it with other people. There's a couple of things.

First of all, this is fact one for the schools' publishing, nothing developed by Cengage or the publishing industry in the schools' market is incidental in its use. It's for schools. It's for education purposes. It's not used for anything else. Nobody buys the Year 9 Science Book for Western Australia as an impulse buy or puts it in the stocking for the kid at Christmas time, okay. What we do is 100 per cent fit for purpose. It's not incidental (indistinct).

As a corollary to that, there is no other market in Australia for our work. Again, do you really want to understand photosynthesis and heat and matter for a 12 year old from New South Wales, or how they've got to work it out? It's only for them. So we get some export in primary, yes. We don't get much export in secondary, nor does the industry, and that's because it's curriculum based. We publish to a curriculum, the Australian curriculum. Nobody else's curriculum. Texas curriculum, not worth a rats. Singapore, GCST and UK, fantastic, doesn't get used in Australia. We publish for the Australian curriculum.

The Australian curriculum has three overarching themes, Aborigines and Torres Strait Islanders Cultures and Histories, Sustainability, and Australia's Engagement with Asia. So the first and the third of that, nobody else's material anywhere else in the world is going to include that. That permeates through every single year level of every single subject area across every State and Territory of Australia. That's what we publish for.

The other thing that's particularly important for us is that at any point in time teaching and learning is generally sequential. So you only need for this week, for this period, this month, this term, this amount. You don't need it all. Next term, next period, you need a little bit more. This idea of being able to, sort of – and the fact sheets, sort of, you know, the 30 – there aren't many grades that have more than 30 kids. So basically, what you're doing you're saying, "Well, you know what, we'll have an exemption 100 per cent of our market. That's the way we feel about it and that's why we worry about it."

Yes, there is a statutory licence and fair use, fair dealing. But if that's one of the exemptions, everything that allows them to be exempted, irrespective of there being a statutory licence over the top, is a book or a content sale in digital or book or both forms, lost. That's the way it is. We can't survive just on the statutory licence. That is not the industry. I would also say that the schools' industry is pretty fragile. It's remarkably small for what it does. I mean, I'm not here to put pats on the back of education publishers, but there's 4 million kids at school in Australia every year. There's 300,000 teachers. Right. There's less than 1000 people working in education publishing. There's probably only 150 of them who are actually publishing materials. The rest are sales and – admin and customer service, et cetera, et cetera. So it's pretty fragile.

When you go across all the different curriculum areas for all the different States, you lost a bit of revenue. That's it. You no longer publish for it. The answer is we stop; it's not going to come in from overseas. It just isn't. It's not going to be there because it is only for Australian curriculum.

So they're the, sort of, facts which I wanted to give you as a bit of a background and I'll be happy to take, sort of, questions. But so this idea of fair use, fair dealing, I suppose it is the exemptions for me. I mean, I should also say whilst I've been a director of the APA for many years I'm not at the moment so I don't talk for them but I certainly have empathy for their position. But we have to look at it that if we have bigger exemptions like what's in the – suggested at this point in time is it would be an example for education publishing in schools, that basically means there's the legal right to not have to buy any books because we can legally photocopy these and it's an exemption. Now, with the statutory licence that is there and for schools it's about $65 million which is $15, $16 a kid or something like that. That's not the total sum of all their materials that they need. Goodness me. So the net result for us is that if you have this exemption as the fair uses as it's possibly suggested in the draft, then we're going to have less book sales.

The other thing that happens is that – and this is a worry, and I'll just say it's just a worry, is that, frankly, the ALRC for the last five years, DEWA(?), the government, they have wanted to kill off or reduce down the statutory licence. That's a matter of record. I've got to plenty of round tables with them as well. If you have a greater level of exemption then even though you've got a statutory licence, well there's going to be a less need. What's being photocopied that's not exempted now is a lot less. They're not going to want to spend $65 million to schools on that. It's going to be a lot lower.

So there has to be money come out of it and I think that's probably what, I think, Mark O'Neill from Cambridge was trying to, sort of, say as well. I'm not going to go Canada, I'm not going to go England or anything like that, but just there will be less money. If there's less money – I'm a commercial for profit organisation. But there's 4 million kids out there who will get less Australian relevant material as a consequence. So we have to get that bit right. I'm open for questions.

MR COPPEL: Great. Thank you, David. Can you tell us roughly what proportion of your revenue is coming from textbooks sales and the proportion coming from the rest that - - -

MR O'BRIEN: Sure. It's different for primary and secondary. In primary, and we have very good statistical, or information because we – through the APA we pool all of our sales and things like that so we get – and we get fed back the aggregated obviously. In primary, there's only about five per cent of those who are members of the APA as digital. The rest is print. Predominantly in literacy, although there's good digital in maths from non-APA members like 3P (inaudible) maths (inaudible) secondary schools – sorry if this is too much – the secondary school (inaudible) most - about 78 per cent of – I'll call them textbooks.

There is virtually very few dollars that are spent on textbooks that are textbooks only. They're all text, plus an eBook combined as a package. So you get this textbook, yes, and it's got an E – it's got a pin in it. You key that pin in (inaudible) so the – then you've got the whole eBook or the whole series (inaudible). So you get both (inaudible) it's probably only about 15 per cent of the secondary school market (inaudible) and it's a philosophical thing (inaudible) - want any print whatsoever I want to do everything online and digital and the reason that is not – nowhere near as strong as what people have - always think or wish it to be. It is because the infrastructure at schools is very fragmented between remote, regional and metropolitan. The costs are there as well. The need for devices is there as well.

Quite frankly, and I'll – as I point in education publishing is that years 11 and 12 at senior and particularly year 12 for most States, there's an end of year exam that really makes the difference between you getting into uni or getting a score and going on. Frankly, that's still pen and paper. It's a very tricky effort to sort of say we're going to do the whole year on digital but by the way – then you go racing off and do a three hour exam in pen and paper that's going to count for probably 50 per cent of your mark. So there's a whole variety of reasons. That was probably more than your question, so.

MR COPPEL: Well, one of the reasons I was asking it is that often when we ask the question of what leakage – I think that's the term that's been used by some in the industry – from shifting from fair dealing to fair use, and specifically they've been focussing on basically, sort of, the statutory licensing income. I sense, from your remarks that you are saying that shifting from fair dealing to fair use would have leakage both on those, sort of, online sales but also on the textbook sales and that's not in - - -

MR O'BRIEN: Yes. Very much so on the textbooks sales as well. We've got to realise that – or appreciate and if we don't that – quite frankly the statutory licence is a terrific piece of administration, I have to tell you at this point in time. It works extremely effectively. It's not full compensation for the book sales that we lose, but it is relevant income. So we're philosophical about that at this point in time. If my CAL money goes up I don't sit there and go, "Yay, because I'm sitting there looking at book sales go down.

But teachers at the moment, under the sampling by CAL, and I think we can be fairly certain that when they extrapolate it out it's not under-doing it. I think you can be fairly comfortable that when they tell the certain amount of teachers at a certain amount of schools, "By the way, every time you go to the photocopier you've got to fill in a form", they're probably going to do less rather than more than what they would normally do. So we'll just leave it that, it probably extrapolates to actually more happening.

That's one a half billion at the moment, pages photocopied at schools. Well, that's about 2000 teacher's worth, I reckon. But anyway, so that's like 3 to 400 pages for every child at school from kindergarten through to year 12. It is with their ears pinned back at this point in time and we do not want that to be even more on the basis, now it's exempted so therefore we can go for it even further. Yes, we get a part remuneration and yes it's very valuable. It's hugely valuable. I think at a previous round table I made the – I basically, sort of, said as a matter of point, I said, "Well, I'd

be happy if there was no CAL, provided there was no photocopying," which, of course, is, it's that strong.

MR COPPEL: You didn't want to mention Canada but, can I mention Canada?

MR O'BRIEN: By all means you can mention it.

MR COPPEL: Because I think the number came up this morning that, sort of, statutory licensing revenue in Canada, or at least prior to the increase in changes was in the order of about $30 million. Here we've heard the number is about $100 million. More people, more kids in Canada than here. One of the points that has been made, I guess as the opposite of the one that've just made, that there's probably a lot more material being copied than actually was nominally paid for.

MR O'BRIEN: Hugely.

MR COPPEL: But the other side of that is there is a lot of material that is being paid for that doesn't necessarily have a – doesn't have a value. I'm wondering if you've got any, sort of, sense as to whether those differences between Canada and Australia are a reflection of that because you suggest quite a significant difference?

MR O'BRIEN: There would appear to be a significant difference. I'm not too sure that I've got any either anecdotal or gut feeling as to why that is necessarily the same or – sorry, the difference is quite so stark. All I can say is that in Australia - and we can banter around numbers and they start to not reconcile or something, I think CAL receives over $100 million for statutory licences, that's university and schools. Schools is roughly about 65 million. By the time that splits between – and I'm a publisher. By the time that splits between publishing companies and authors, it's well less than that. Obviously, it's roughly half, and then part of that goes to newspapers and quite a few other different smaller organisations that also came up in sampling. So there are those numbers.

I wasn't sure that I've answered your question, but were you alluding to the fact that like, what types of other – where things are being remunerated that probably shouldn't? I would say that there are some areas in that area. I think that's easy, relatively easy, to work on. If things are put online by organisations and they've been created and they say "Free, please use these", that's basically a marketing tool. Please use this. We're a really good", I don't know, "law firm, so this is something really good that might interest you for your year 11 or year 12 legal studies". What they're after is to get reputation and, you know, normal marketing. I

say this for myself, I'm quite comfortable that that should be excluded. It's not at the moment, but why shouldn't it be. They've put it up there for no – they've created it fully in the knowledge that it's a piece of marketed information, not to get some CAL because it came up in sampling.

The alternative of that is – and as I mentioned at the top of the speech, if you like, was that nothing that we do is not for use in the classroom to follow a curriculum from go to woe. We cover every outcome that the teacher is required to do under a curriculum. So when we put stuff up, we may well put one or two pages up and that's fine. We may well put a whole chapter up, occasionally, for remote schools because we're late in publishing. So, therefore, we realise and recognise that they're starting the year and we were late in publishing and they haven't got any materials. So we say, "Look, here it is electronically", or something like that, "download it", we give them a code and away they go. That's a different story. But, yes, if stuff is up there for marketing, I think that should be excluded. That's my view.

MS CHESTER: David, are there any statistics that can tell us internationally the incidents of textbook consumption by students of primary and secondary school?

MR O'BRIEN: Okay. Can I reverse it with secondary first, because it's a lot easier? In secondary, there are 1.9 million children in Australia enrolled in secondary across, obviously, six year levels, seven to 12. On average they do five to seven subjects depending on year 7 up to year 12 subjects. Of that they probably buy anywhere up to – if it's booklists, and sorry I'm not going to go into too many complications here, but if it's - the onus is on the students/the parents to buy the materials, then they probably average about three books a year and the other two or three would be second-hand, which is just part of the makeup of the way the model works and we don't get the dosh for it, but that's the way it works. Schools make more money than we do on second-hand.

In primary it's a bit different because except for some what's known as "consumable textbooks", like a maths writing book or a spelling book or something like that which may or may not appear on a stationery list for the parent to buy, essentially the schools buy all the books and most of those are literacy readers. They may have subscriptions to some online materials like Mathletics but - yes, so.

MS CHESTER: Yes.

MR O'BRIEN: Sorry, I'm not too sure that - - -

MS CHESTER: No. So the reason I asked the question is you're suggesting that there'll be a material change in demand for your textbooks if their use is introduced, albeit working alongside statutory licensing arrangements.

MR O'BRIEN: Yes.

MS CHESTER: I'm just trying to work out, do kids in the US not have textbooks in high school?

MR O'BRIEN: They do and it's nearly all – well, it's predominantly what's known as "class set" or purchased by the school or by the parents and communities or the – or even – there's adoption States and there's open market States. But it's not as often where the parent actually gets a booklist and has to buy the materials for their students.

MS CHESTER: But at the end of the day there's still - the textbooks get to kids.

MR O'BRIEN: Yes, yes.

MS CHESTER: So if under a fair use system in the US high school kids are still getting textbooks and someone's buying them from the publisher, why do you think that that would change then if fair use were rolled out in Australia, particularly given we're leaving in place the statutory licensing arrangements?

MR O'BRIEN: It's more the exemptions. I'm not going to get too het up on all fair use, fair dealing and stuff like that. It's more what those exemptions are. At the moment under the potential fact sheets, it's like, this thing about 30 copies or something. What I'm suggesting is that 30 copies is all the teacher needs for their school, 30 copies for that teacher. For every school in Australia it's all the whole – we sell into a honeycomb. We don't sell 15,000 copies or 10,000 copies to the New South Wales government. We sell 50 copies of that text into Paramatta High School and we sell 47 copies to Nedlands North High School or something like that for one particular subject.

As I read it, under the potential exemptions, if they were to work that way, is that – and they only need it for the first copy of weeks or something, "No, we'll just need chapter 1. That's all we're going to deal with for the next four weeks. I'll just photocopy 30 copies of chapter 1. Done. Here it is. Next month I'll copy chapter 2 when I need it and so forth". So the net result is that they get into a state where legally it's

exempted. So what worries me is that in that case they go "Well I don't need to buy them. I only need to buy one copy of the book. In fact, I only need to copy the" – "get the digital one and I'll just zap it off my high speed printer and binder", and it's all apparently legal now. So everything has to be – if it's more copying, there will be less books sold.

MS CHESTER: So you're saying there's more copying in the US, but still some textbooks being sold?

MR O'BRIEN: Massive, yes. It's just that it's a 10, 15 times bigger market for – get the volumes.

MS CHESTER: An important point that you've drawn out in your opening statement, and in your submission, is about effectively the tale of local content in the books that you publish for kids in Australian schools which, kind of, then segues into – you didn't touch on it in your opening remarks, but certainly in your submission – concerns around changes to the parallel import restrictions.

MR O'BRIEN: Sure, yes.

MS CHESTER: I guess I'm, kind of, trying to work out what the concern is around parallel import restrictions for your business model, given it's so heavily tailored to the Australian market and the decision on what the content should be is in the hands of the education departments and not the consumer.

MR O'BRIEN: Yes. No, it's a – that's why I said it was a lot easier for you to question me than me to make a dissertation, or read a slab of text. For primary, parallel importation, I don't think it'll have much – has much impact. In secondary, modest impact, not much impact, for the reasons that you just said because it's tailored so much to the Australian curriculum.

MS CHESTER: Yes.

MR O'BRIEN: That doesn't mean that that's 100 per cent. There are some subjects that we just can't – I've only got 500 kids in the cohort. They're doing some specialist American history or something like that and so, therefore, we'll bring in somebody else's books. So there is a little bit of that. In tertiary it's different. So there is a lot of Australian content but it's – my understanding, and I'm not the expert on tertiary but I'm certainly aware of my company, it's roughly 50/50 or something like, 50 per cent is Australian content or Australian adaptations of American content and 50 -per cent is American content. So American content, what

happens is that if you want to go to Thailand it'll be a hell of a lot cheaper because that's just the way it is with different countries, with different price points. If you want to sell anything you have to sell it there.

The issue with the parallel importation, in the tertiary markets, faces all of a sudden those things coming back into Australia at – and suddenly not being just one or two but suddenly becoming a significant leeching a product back in which reduces our sales. The way that that'll get – well, the way that it is likely to get sorted out, if that becomes a bigger issue, is that it becomes like one world pricing and that's it. So our company will go, "Right, if you're in Thailand it still costs you $US70 for the book even though before it was only $25. We're not going to sell it to you for $25 and then you buy thousands of them and send them into Australia and sell them for $50 which is still $20 cheaper".

MS CHESTER: Okay. So I can understand from the perspective of your company you'd rather have those sales. I guess, from the perspective of being a parent of a university student, would that not then result in lower costs of textbooks for university students if we allowed the removal of parallel import restrictions?

MR O'BRIEN: There may well be. They'll only be cheaper provided all the major publishers don't go to one world pricing. The other thing that will – is likely is to happen is, and this is probably over time, is that it will start to facilitate the speed to which print is reduced and digital is increased because it's a lot easier to then rent, if you like, the materials for a 12 month period and put them through the cloud, they can't print them off and things like that.

So therefore, yes, you can bring in the book but if you can't use the digital – at the moment there are – there's a whole series of laws and requirements around – certainly around assessment currently that makes that difficult to charge separately for. But that's what would look – what I think it would like look. But I'm really not the expert on tertiary. But in secondary I don't think it's a huge issue. I don't want to say no issue, but it's not a huge issue.

MS CHESTER: Would we - - -

MR O'BRIEN: Parallel importation.

MS CHESTER: Are there, sort of, a rule of thumb around the disparity of pricing that, I guess, the Thailand price versus the Australian price for these sort of textbooks?

MR O'BRIEN: Massive, yes. Yes, and there's been Court cases and I know our company, about three or – yes, I think it was the Kirtsaeng one with – it was Thailand sending them back into America. So that was it, they said, "That's it. All one world pricing". So our prices just went up as a consequence. So we pushed harder onto creating local adaptations so that we could control it because it was better content and more local, so. Probably bigger issues in cultures and things like that and Australian identity in trade, I know, is a big issue. I would say that that's still an issue for us in primary, whilst we don't get the – it is a massive issue for us. Sorry, I hope there's nobody American here, but we really don't want the American standards in our education.

MR COPPEL: Great. Thank you very much.

MR O'BRIEN: Thank you.

MS CHESTER: Thanks, David.

MR COPPEL: Now, we've heard from Nick Gruen that he's actually not available today, so we will move on to our next participant who is David Webber.

MR WEBBER: Thank you.

MR COPPEL: So make yourself comfortable.

MR WEBBER: I will.

MR COPPEL: Then for the purpose of the transcript, if you could give - - -

MR WEBBER: Is there preferred chairs?

MS CHESTER: Whichever you like.

MR COPPEL: So when you're ready, if you could for the transcript give your name, who you represent, and then a brief opening statement. Thank you.

MR WEBBER: Good afternoon. Thank you for having me. My name is David Webber. I am here in a private capacity. I'll give you some of my background. I'm actually an electronics engineer, also computer scientist. Then, as my uncle who teaches computer science would say, I then went to the dark side and undertook a law degree and became a lawyer and then subsequently a – and also a patent attorney.

So whilst I'm here in a private capacity, and normally I would leave some of the issues in this draft report to my clients to deal with and they do deal with them, it – there was certainly one section of the report – and whilst my submission focusses on a number of different sections, there was one chapter in the report, chapter 8, I felt that certainly on the urgings of a number of my colleagues and the clients I represent, that I did need to come here and hopefully give you a bit of a hand and help you avoid making a mistake that, I guess, Europe and some others have done. That mistake being, of course, the draft recommendation 8.1 which is to amend our Patents Act to exclude business methods and software from patent eligibility.

So whilst I'm here in a private capacity, I'm really here to represent those creators who I've seen over a long, long period of time, probably some 30 years of practise who those – particularly those Australians who come into my office with stars in their eyes and wishing to create a new business and have a new product and wish to attract investors and start a new business and hire staff and, of course, obtain some protection for it.

The actual chapter 8, unfortunately, and the recommendation to exclude business methods and software has a couple of issues with it which are outlined in my submission. But largely, unfortunately, the evidence that's in there in the analysis -and you'll probably hear this from others – it doesn't distinguish between business methods and software. It, sort of, wraps them up together. They really are two completely different things.

Particularly to an electronics engineer, software and hardware are effectively interchangeable. Certainly in the days of the 70s there was more hardware control and software really didn't do too much, it was really looking after the operands. Over time the hardware has become more quantised and, of course, we're relying more and more on software control. Things like controlling vehicles, running medical devices. I bought a new oven the other day and it's much like operating an iPad controlling that. So software is certainly much more powerful and diverse than it has been in the past.

Business methods, to some extent, is an area that, regrettably I guess, in 1999 there was a bit of an expansion in the US that saw some sorts of patents protected for business innovations. But over time, effectively, our Courts and Courts in every jurisdiction, have said – and particularly the Australian Courts have now said, "No, you can't protect business innovations but you can protect technical innovations". So anything technical is fine, anything that's a business innovation is not. Essentially

the way our law works - and, I guess you'd probably understand this a little bit now, but the way our law works is it doesn't have – like the US, it doesn't have a hard definition of what is patentable and what is not. It essentially says – it refers back to a statute of monopolies 1623 and most, I guess, reports or analyses when they look at this go, "Why are we referring back to the 1623 statute?"

The reason for that is largely because it bears some case law, particularly a High Court decision of the 50s in Australia which – and this has been followed in the US and elsewhere – which essentially said, "Look you should not have a fixed definition of what you want to patent and what you shouldn't patent because we cannot predict the future". In other words, "we don't know what technology is coming around in the future. You should leave this more or less principles based. Let us, the Courts, decide as we go along where we're going to draw the line".

Of course, there are other criteria associated with patents, and a number of hurdles and barriers that clients and those creators have to jump through. Those are the cost of getting patents, you've got to apply for them. There's inventive step requirements, which are focussed on in the report, which is really the area to probably focus on. Their inventions can't be obvious to the skilled addressee. They can't be obvious to their peers.

So any creator who comes in the first question I ask them, I say, "Well, look, would this be obvious to the guys you work with and you develop software with?" They go, "Hang on. Well, I'll have to go and ask them", or they might say, "No, no, this has never been done before. No one's thought about this. This is truly terrific". Then you say, "Are you sure?" You might do some searching. That's a fairly significant hurdle. So there's a lot of cost barriers in the way to actually get a patent in any event. Even when they've got one, they still have to pay renewal fees on an ongoing basis and you've mentioned that in draft report, and that's a good area to focus on.

But also even if someone does take their development, they have to enforce it. It's not a right to call the federal police and get the federal police to chase down the infringer. They still have to enforce it. Even despite that, they still have to deal with taxation issues, labour market issues, capital raising issues. So, I think, any encouragement we can give them, the better it is.

You mentioned in the report other areas of protection for software. Unfortunately, software is one of those things that, unless you actually, sort of, write code and compile and use it in machines, it's becoming a

little bit hard to understand. Lawyers, for example, never studied engineering or computer science. I remember one lawyer saying to me, "It looks just like a sonnet to me. You just write it down", you know, "It's like a written bit of expression". But, of course, that's not its purpose. Its purpose is to reside in the machine and undertake a specific task and a specific technical function.

To some extent, that's where copyright protection came about. They decided that, "We should give copyright protection to the software. That will be good and that would be fine". Now, the sole reason clients, like mine, try to get patent protection is because all copyright protection protects is that expression. It doesn't protect what the code does. It doesn't protect how the machine operates. The other thing is to prove copying you have to actually show that someone had access to the code and copied it or made an adaptation. A lot of cases when a competing product comes out they might've actually watched the code run or heard about how it operates, heard about the features. Then they'll go off and build their own version. That is where clients have to step in and try and stop them.

The other thing is if you take away the patent protection for software developers, they will turn to the other thing, which I've seen people turn to, and that is secrecy. They'll keep everything a secret. That's what they'll do. They'll try and keep it a secret as best they can. What that does is it just stops any collaboration between the industry and stops things being released and getting out, whereas if they can rely on their patent protection, their patents get published 18 months in.

Now, whether they get their patent or not, they're published. So the minute they file they think, "Well, I'm protected. I've got rights. Everything's good". All the details get published because that's the quid pro quo, the government says "I'll give you a monopoly if you publish all the details and secrets of your product. So all that information is out there. It's published. People can release papers. The creator might get their patent, they might not. But at least the information is out there. It's much better than keeping it secret. Where there is any doubt, I've had clients say to me, "Look, I'm not going to go to Europe and try and franchise and licence my product", or "I'm not going to try and licence someone else to use my product. I'll just keep it secret and keep it here", if they can't get their – they don't think they can get patent protection.

So patent protection does encourage collaboration. It's part of an ecosystem with the entrepreneurs and innovators understand. Software particularly, it doesn't make sense to me to say that you can patent hardware but you can't patent software. Software, in particular, it's the

one area of an industry where Australia is not hampered by the tyranny of distance, all right. It's the one area where we can actually release products here. Clients get their patent applications filed. They release their products. They test them here. They can then move them off overseas very, very quickly. They can enter the overseas markets. They're not constrained by the fact that we're at the bottom end of the Southern Hemisphere.

The other thing is, a recommendation, like the one that's in there, does – I mean, unfortunately, it does damage – I mean, even the draft report itself has – in having that recommendation it's done some damage. I'll give you an illustration. I was in the US recently for a series of meetings and I had an Asian company approach me and say, "Look we're very concerned about the fact that we can't get protection for our software in Australia".

I said to them, "Hang on, that's not true. You can get patent protection for software in Australia". They said, "No, no, we understand a report has been released by the Australian Government saying we can't. We're really concerned about this. We're not going to invest, setting up" - basically what they wanted to do was set up with some more R & D in Australia and actually sell their products here. It was a telecommunications product. They said, "We're not going to do that if there's no protection, patent protection that we can obtain in Australia whereas we can get patent protection in Singapore". Anyway, it took me some effort to explain to them that this was just the draft report and you don't need to worry so much, that it's not a final recommendation. I even had Australian clients ringing up very, very concerned that the government was going to take away their existing Australian patents and I did have to tell them, "No, no, this is just a draft recommendation. The government has to make its decision".

So there's no other country, no other jurisdiction that has tried to implement an exclusion in the way of the wording – the recommendation – the one that was put. No country has done that. If you give a contrast – I mean, certainly Singapore, the US and China would not try and introduce a negative exclusion like this. Those jurisdictions, at the moment, are trying to encourage more patents, not less patents. That's what they're trying to do, encourage innovators. The only thing that comes close is Europe. Europe introduced an exclusion to computer programs in 1977 at a time when they said, "Defence departments and large academic institutions when they pay $1.5 million for their computer, they shouldn't be constrained by any programs they want to put into their $1.5 million machine". So it was a completely different ballgame when they put that exclusion in.

They caused enormous pain with the industry for probably the last – over 30 years before it was finally settled in about 2010. It got to a point where in 2000 actually held a (indistinct) conference of all the European patent commission members - there were a number of countries there - where they all tried to actually remove the exclusion. Sorry, not all of them, a number of countries tried to remove the exclusion. It can be exceedingly difficult to get one government to agree, or members of a government to agree. This was a number of countries that had agreed and were trying to remove it. In the end, it didn't succeed for various reasons. So, I guess, that is, in a nutshell, I'm trying to implore you, I guess, to rethink that recommendation, 8.1. I do have some other comments on the other recommendations but they're fairly brief. I'm happy to answer any questions.

MR COPPEL: Thank you, David. In relation to this part of the report, we've had, sort of, opposing views and one view that was put was that it's very difficult to separate business methods from software. The business methods themselves are, sort of, embodied in the software. You're suggesting that it is possible. How would you counter that argument?

MR WEBBER: Yes. Look, I understand that's an argument that runs along the lines of well if you've got a business method and you stick it in the computer – I'll give you an example, in 1999 when the US Court in Signature and State Street started this, a Judge says "There's no exclusion in US patent law for business methods". Now that was a time, if you turn your mind back, when the internet was just blossoming. So everyone got extremely excited and started filing patents for things like reverse option systems, a lot of things that had done in – already been done in business around a table or in offline matter. Started applying patents for things, just sticking them on the internet, right, and arguing that, "Well, no one's done this on the internet. This is very inventive".

It was a time when the US patent office was besieged, didn't really apply probably as much rigour as it should've. There is some evidence that it actually fuelled a patenting frenzy that actually led, partly, to the dot com boom. That led that boom right through to 2000. For various reasons, those valuations were overinflated. There was a crash. In fact, I remember the day of the crash well because I was up at Port Douglas on holidays and I spent the whole day taking phone calls from clients saying, "That's my patent", "That's my patent", or "That's my application. I'm not going to proceed because all the funding had dried out".

To answer your question, you can separate. I'll give you a classic case, a business method that doesn't involve a computer. There's been a

couple of cases, like Grant, in Australia where there was a lawyer had a method for protecting assets to avoid bankruptcy. The Court said, "Well, hang on, this is just a bare methods scheme" and struck it out immediately. In the US there was a case for hedging, commodities hedging which involved – it involved some computer system. The Supreme Court in Bilski, that was in Bilski, said, "That's just ridiculous. It's just a business method, nothing more. You've only contributed a business method".

The way Courts deal with this now, the Courts have actually come in even harder, particularly the Alice Corporation decision in the US. It has come in quite hard. Our own Federal Courts have come in quite hard on RPL Central where they had said, "Look, if all you brought to the table is a business scheme, in other words, you don't bring any technical cleverness, any advance in science, any improvement in the machine, any great new technology that makes everything run better, and all you've done is come up with some method of auctioning houses or a new technique for selling gold, then we're not going to give you a patent for that because you haven't given us any technical contribution". That's where they throw it out.

They can then go to the next step of looking at it and say, "Well, what's the invention that's contributed here". They'll say, "Well, this just looks" – to some extent what Europe does. Europe actually looks at an inventive step and says, "What have you invented here?" If in Europe they think all you've invented is a business method, or some scheme, they say, "That's not good enough. Your invention has to be technical".

So these days, in Australia at least, it hinges on technical contribution. That's what it hinges on. In the US, they're still sorting it out to some extent. They haven't realised yet that the Alice Corporation decision, effectively, introduces the same sort of technical requirements. The Courts over there make it pretty clear if all you've got is an idea or a scheme that is businessy, you're toast, effectively.

It does annoy patent attorneys a bit because our skill is in drafting patent claims. What the Courts are doing, or what the examiners are doing is saying, "Well, okay, this is what your claim says, but we're going to look to see what you've actually brought to the table. What you've contributed here". That's how business methods are distinguished from true technical inventions, which is why, effectively, the Courts have done the job for you, to some extent on business methods.

MS CHESTER: David, you mentioned earlier that nowhere in the world, or any other jurisdictions, our recommendation is replicated so we're

going beyond the envelope created by anybody else. I guess a question that I put to you is, is our system as it currently stands with regard to business methods and software, if you look at holistically in terms of the legislative provisions and the rights that are afforded through both patents and copyright, the patent threshold and the – well, the application of that threshold by examiners and the breadth of the examination, i.e., is there narrowing through the examination process and how the Courts are interpreting it here, is our current system replicated anywhere else in the world?

MR WEBBER: It has, yes.

MS CHESTER: Which jurisdictions are they?

MR WEBBER: Beg your pardon?

MS CHESTER: Which jurisdictions are they?

MR WEBBER: I'm sorry, I can't hear you, Karen?

MS CHESTER: Which jurisdictions do – is that that our current arrangements, looked at holistically, replicated?

MR WEBBER: It's quite interesting, with a – I mean, this is the beauty of a flexible raised test that we have for a line of patentable subject matter, in that essentially what the – what our Courts are allowed to do is to look at other jurisdictions when they make decisions. The patent office as well can rely on Court decisions of other jurisdictions. So the latest decision in the RPL decision in the Full Federal Court, what they did there was they looked at everything that occurred in the US. Our Courts tend to do this because they – for patent law they try and have harmonisation, so they look at decisions in the US but they also look to the decisions in the UK and how Europe approached it. At RPL they, sort of, adopted a mixed amount of that, effectively.

MS CHESTER: Okay. I think you may have misunderstood my question, and maybe that was down to my poor wording. You're suggesting that our recommendation takes us where nobody else has gone.

MR WEBBER: Correct, yes.

MS CHESTER: What I'm trying to ask is are there other jurisdictions internationally that replicate our current arrangements for BMS?

MR WEBBER: Yes, the US. So the US, Canada. The world largely falls into two camps. It largely falls into the US-based jurisprudence where there's a broad definition of "invention", or there's an exclusion like in Europe, right. So some countries have adopted the exclusion. But by and large it's – it's US-based broad patentability test. So, yes, look, our law largely follows – essentially at the moment on patentable subject matter, and this is not - - -

MS CHESTER: Sorry, I'm just focussing purely on business methods and software that being - - -

MR WEBBER: Yes.

MS CHESTER: So you're saying what we've got here in Australia at the moment, looking at it holistically including in terms of the behaviour of the examiners and the Court interpretation, i.e., the Alice case, the equivalence of what we have here is replicated in the US and Canada?

MR WEBBER: What we've got at the moment is fairly similar to the US and Europe, right, very, very similar. Probably more similar to the US, but it's not too far away – not too far removed from Europe. Now, the minute you start playing with the wording, like you're advocating, that puts you in a different position, which is your own position, right. That's where the danger lies, that's where real danger lies.

That's the problem New Zealand found, right. I mean, if Europe had their time again, they wouldn't have the exclusions in there, I'm pretty sure. But that's where New Zealand found itself because New Zealand was on a path – and you mention New Zealand in the report. New Zealand was on a path of having no patentable subject matter test at all. They just had an invention and then they were going to rely on novelty and inventive step. For years that's their draft patent bill, that's how it was.

The stories I heard was that just before it went to parliament, the select committee – the chairwoman or someone had lunch with a member of the open source community and they changed their mind. Then they decided to just, effectively, they were going to do what you've advocated, to some extent. It was largely just software, I think. Of course, all hell broke loose when it got into parliament. Then the government actually wanted to pull back on the position, but it had already entered into parliament and it had been announced. It wasn't until the rest of the industry and the community got wind of it that the government then had to pull its position back to something more like Europe. So what they've got in the New Zealand Act is a bit of a bastardisation or the position in

Europe and they don't really know what it means at the moment. They're still trying to test that out.

So I don't think you should try and go down that path. No one else has gone down that path. Every other country, you know, US, Singapore, China, they're all trying to encourage innovators, and China particularly. They're giving subsidies to their innovators to actually file more and more patents to get more of a leg up, effectively. UK has a patent box. A lot of European countries have a patent box to encourage those things to be filed. So now is not the time, I don't think, to say no to software developers.

MR COPPEL: Great.

MR WEBBER: Thanks.

MR COPPEL: Thank you very much, David. We're now going to take a short break, stretch our legs, have a cup of coffee. It's almost 10 to 4, I think we'll reconvene at 4 o'clock. Thank you.

ADJOURNED **[3.49 pm]**

RESUMED **[4.02 pm]**

MR COPPEL: We will reconvene. Thank you, very much. Our next participant is the Australian Design Alliance. You're already at the table so I invite you for the purpose of the transcript to each give your name and who you represent and I invite you to give a brief opening statement. Thank you.

MS KELLOCK: My name is Jo-Ann Kellock and I am Executive Director of the Australian Design Alliance. That's an alliance of 14 peak bodies with a stake in design.

MR McKECHNIE: I am Malcolm McKechnie, I'm COO of Knog, we're a bicycle accessories brand based in Melbourne, we produce a range of bicycle accessories, particular lights and locks is our speciality. I don't know how much of an introduction to - I'm happy to keep going. We are an award winning company, we have probably at the moment about 350 products in SQs in our range, we sell into about 50 countries across the globe. We've been around for about 13 years. We have multiple registered designs and patents and trademarks in the business. And we

have, I guess, over the 13 years we've become a bit of leader in our industry. So we're constantly being looked at and followed and copied. And I guess that's a good reason to be here today, is to put forward some of the issues that we're faced with as a leading edge design driven accessories brand.

MR HOOGENDOORN: I'm John Hoogendoorn, I'm the Creative Design Manager for Phoenix Tapware. We're a tapware, showers and accessories company located here in Melbourne. Like Mal, we are an award winning design and manufacturing company. We work hard to make sure that we're always at the leading edge. We now lead the field and like Mal we're very excited to be here so that we can maybe tell you about some of the issues that we're having at the coalface.

MS KELLOCK: I would also like to say that I've also got a submission from Steve Martinuzzo, who was due to come but was called away at the last moment, from Managing Director from Cobalt Design, an award winning Australian based creative product development group operating locally and in Asia, Europe and North America.

MR COPPEL: So are you interested in giving an opening statement?

MS KELLOCK: Yes. Thank you. Having waded our way through the document, and in particular chapter 10, the Registered Design section, for our members the key point that stood out for us and indeed has driven our activity over the last six weeks, has been the summary around the lack of evidence to support any changes to the existing regime. That concerned us greatly. And to that end we have organised, along with a number of other groups, in particular state based activities to rally the industry and get the message out there that, hey, particularly in the industrial design furniture low ticket item goods, you need to be putting your hand up and talking about and passing on examples of where you've had difficulties with the current regime.

We believe that the current regime actually contributes to a poor cultural issue within Australia where design and designers are not valued as they are in other parts of the world. And we think the intellectual property regime has a role in that. And so what we would like to see, the main message that we would like to give today, is that we ask you in your recommendations also add in that last point where it states, "There is a lack of evidence to support the case for extending the scope of design protection to virtual and partial designs". That you also add another point after that, that you recommend that further research be undertaken. So I think that's all I'd like to say at the moment and I'd just like to draw your attention to a table where we've put together the prime areas where the

intellectual property regime impacts our members, so whether it's copyright, designs, patents, Acts, or trademarks, and I've submitted that.

MR COPPEL: Thanks, very much.

MR HOOGENDOORN: I guess I would like to give you some concrete examples of where IP laws and their restrictions cause us some issues. So as I said before, Phoenix Tapware has been around since 1989. Nothing really happened with our company until about 11 years ago when a new management was put in place. Since then we've grown from a $4 million company to a $50 million company this year. We see this growth continuing for the foreseeable future and intend the company to be a $70 million in three years. We're growing incredibly fast. We manufacture in four countries.

Strangely enough, we only sell our products in Australia at the moment. All of our growth, and especially margin growth which is the stuff that you put in the bank, comes from new products and our profits are very strong because we provide a desirable designer product for every price point. Like Mal, we have won major international product design awards. And we don't do that because it makes us feel good, we then use these to effectively market our products. And it's not cheap what we do. We employ 60 people in Bayswater here in Melbourne, and of those seven work in my design department. We spend around $650,000 a year just on R&D, just on new design, just on patentable stuff that we can sell around the world. And last financial year we spent in excess of $150,000 to protect our intellectual property.

Just to give you some details of concrete case studies of where we come unstuck, our products are regularly copied by others here in this country and overseas, our strategy has been - well our products are a little bit unusual in that we don't sell a single product, we sell a range of products. So you can imagine if we sell a new range it includes a basin mixer for your bathroom, it will include a shower mixer and a kitchen sink mixer, vessel mixers, and so on. So it's a whole range and then accessories with that as well.

For us to be able to protect each one of those designs would be prohibitively expensive. It was prohibitively expensive when we started out, it still is, we're now a much larger company, 10 years later, but it is still one of these issues that when you consider that in the next six months we're going to be releasing 14 new ranges of products, it adds up very, very quickly. So our strategy was at the start we would take the basin mixer and the shower mixer, which represented about 70 per cent of all sales for a certain range, and we would protect those. The idea being that

if you protect these items there's no commercially viable reason to copy the rest of the range because you would miss out on the rest of those sales. And we did this to minimise the cost of IP protection.

Unfortunately, what we found was that companies would copy our entire range verbatim and wait for us to send out a cease and desist letter. Last year especially this happened a lot. They would then marginally change the designs of the two protected items and leave the rest of the range alone. This then means to this day there's other companies that sell identical product to ours with complete abandon. So the issue that we have is that providing a mechanism for us to protect the entire ranges economically is unquestionably necessary and this will substantially reduce our IP costs. Not only at the application stage but also at the enforcement stage, you can imagine that if everything was protected as a range then enforcement becomes an awful lot easier for us as well.

We're not backwards in coming forward when we see someone protecting our - copying our products, the extension of this for us is ultimately to provide not only us but the Australian companies in general adequate legislative protection. We need these products to be stopped when they arrive in the country. There is still a large cost and man hours involving chasing down copied products when we find them, mainly my time and my designers' time and then our lawyers. Once we do it would be desirable for us to provide Australian customers with the name of the company, and we have both the distributors and the company in China copying the product, and then for Australian Customs to stop those shipments, or future shipments. As they do currently with copyright and trademark products. And that's basically my - - -

MS KELLOCK: Do you want to just - how long it takes you to develop a product?

MR HOOGENDOORN: Sure. So as I said, we're in the next six months I've got a timeline for all of our products, product ranges, so we're looking at probably releasing 200 products in the six months. Those products will have been in gestation in the R&D department for between six and 18 months. So you can imagine that I have seven of the most fabulously talented people, as does Mal with his company, and multiply that out by the amount of money that that costs, there's a significant investment that immediately gets diluted when someone is able to copy our products.

MR COPPEL: So John, how long does a product stay on the market before you bring out a new model?

MR HOOGENDOORN: So in general it takes about 18 months for a product to start taking off. So you can usually see an increase from zero to a stable position in 18 months. You then after that get about four or five years where it just steadily increases, depending on market acceptance, after which you then see it fall off slightly. So we usually work on a timeline of about seven years after which any profits is just bonus. But we expect a range to last seven years. We will already have not in five years' time but in two years' time will already be looking at a replacement for that. So it's to get this sort of 30 per cent year on year growth we have to stay on top of it. But we're comfortable with products not lasting more than seven years.

MR COPPEL: Right, okay. So it sounds like the issue is more infringement of the product once it's on the market. And you mentioned that your approach is to register sort of the key items and don't register the remaining items that sort of sit around it, and you said that what is happening is that a company that is making a replica will make changes to the registered items and that it would be vastly preferable if it were possible to register across the range, but wouldn't that just simply lead to one or two changes to each of the items across the range and still lead to an issue with - I mean, is it an enforcement issue or is it really something that can be fixed through sort of the registration process, I guess is the question?

MR HOOGENDOORN: I think it can. If a company - you can imagine there's a lot of ranges of tapware in the world and we do things, we think, a lot more refined and in a better way than most companies. If you make a product slightly different and make it slightly different for the whole range you're going to end up with a product that is going to be very, very similar to ours but we can say to our customers, look, this is a product that is obviously copied from ours and there's quality issues with using someone that you don't know. But I do believe it would be infinitely more desirable to let them go through that whole stage of having to redesign every part of the range than just the two.

MS KELLOCK: Because there's that time lag then.

MR McKECHNIE: Yes, and if I can just add to what where John is coming from there, but I could almost mirror everything that - the heartache that you go through at times, I'm sure. But in the case Knog we have a much shorter lifecycle so right now we're developing a complete new range of bicycle lights to replace a range that is now in its fifth year. Now in that range of lights we have I guess a similar situation, we have a range of variations of a product theme. Now in the case of the blinder light, which is our most popular light at the moment, because of the

nuances of registering designs in Australia, and other similarly set up jurisdictions, we decided we'd register everything in Canada to begin with because we can, we can register a range or variations on a theme.

Now if we have someone that comes along then and they copy like in the case with John, they've got a range of say ten products but they've only registered two, in order to change every iteration of a product range there's tooling, there's testing, there's a design process that you've got to go through to modify every component in the range. Now you've already done that, as the originator of the design you've already done it, you've invested and you've got all the tooling, but as a copier instead of modifying two now you've got to modify tooling and designs relating to a whole range of products. So I'm talking, I guess, about a deterrence, a level of deterrence, in a situation where you can register a range as opposed to only to be able to afford to register one or two key products.

MR COPPEL: So in Canada it's possible with a single application to cover a range of products, but this is an issue that came up in yesterday's hearing in respect of furniture and lighting, that there are different prototypes that if you wanted to have protection on each you'd have to file an application for each.

MR McKECHNIE: Exactly. And describe every element of design with each design and if there's a variation it will be regarded as another design. And so you can imagine with every design it's five, six, seven thousand dollars or something to register, multiply that by your designs, and then in the case of Knog we've got - we're in 50 countries now, we don't register designs and patents in every country but we target, I think, sort of five or six key markets. But we're a small company and we've got to scale that up 5000 here, 5000 there, and then multiple designs, and then renewal fees every year, so it's massive. We are a small company. We're sitting on around about sort of 10 or 11 million in turnover. In the last five years we've spent over a million dollars in IP registration. So it's a pretty big chunk and then of course with R&D I think it's, - we spend in terms of R&D costs - a large majority of our team are design based individuals so it's in the order of up to $2 million in salaries, which are generally R&D costs for us.

MR COPPEL: Do you use trademarks - - -

MR McKECHNIE: We do.

MR COPPEL: And does that provide, I mean, with a name like blinder it sounds like - - -

MR McKECHNIE: That's an interesting question because in the case of, not so much the blinder, but maybe some people if they're cyclists in the group here they might be familiar with our Frog light, which is a little silicone bicycle light, as most copied product and also our most popular product. We set a trend with that which then everybody has followed. That's been a situation where we learnt a lot about, that we didn't tie up our protection suitably. But we had a trademark on the word Knog, obviously, but we also decided at one point to let's register Frog. And so where we saw most of our copies was on Ali Baba and Taobao and Aliexpress and those sort of online eCommerce sites.

I was able to use the facilities within the Ali Baba online structure to - with the IP protection, their protocols and policies, to stop a lot of sellers because they were using our name. So forget about the design, I was able to shut these sellers down just using a trademark as the driver to stop them. So it was an interesting situation where in fact we have spent so much on design registration but in this case we were able to use the trademark. So it's important to have a few tools across the board. But I guess in general design registration has been our most powerful tool to stop people.

MS CHESTER: On the flip side though, for the consumer in sort of with the Phoenix name in tapware and Knog in bicycle lighting, does that brand awareness resonate with the consumer?

MR HOOGENDOORN: Yes.

MS CHESTER: So it's not just a protection in terms of being able to get them off the Ali Baba sites of the world but also in terms of the informed consumer knowing that, no, I only want the Phoenix brand because of the quality, or I only want the Knog original.

MR HOOGENDOORN: And that's absolutely right. We spend millions on advertising our products and that marketing does help and people do - the pull through marketing from a retail end is definitely there. What you're going to get is you're going to get to large sections of the market, the builder market, for instance, where they want our look but neither the customer nor the builder cares about where it comes from. And if they can save themselves two or three hundred dollars on each product then they'll do that.

MS CHESTER: Okay.

MR HOOGENDOORN: Since we went through the whole only IP protecting two products what we've now taken a stand and we've now

said, okay, we're going to protect many more products. But not only in Australia, we're now protecting in China as well. With our patents we're now protecting with PCTs around the world as well. The interesting thing, we're starting to become one of the big players in the Australian market so now we want to, like Mal's company, we want to export our products to major international markets. The US is going to be probably our first market.

So we attended the largest show for our products, a kitchen and bathroom show in Las Vegas earlier this year. We were in the - I guess because we're the first time kind of exhibitor we were in with all of the other smaller exhibitors and we spent the whole time just getting fawned over and people loved our products and they could see a real application for our products in their market. We were feeling incredibly high and very proud of ourselves by the last day. On the very last day, which is sort of the breakdown day, we came back to the stand to clean it all up and all our product was gone. All of our products had been stolen, so they didn't care what they smashed up but - yes, so we are going to the next capers which is coming up early in the new year and we'll be trying to find who has copied our product.

MR COPPEL: But, yes, clearly someone has come along and thought this is fantastic, it's all the latest and greatest, let's pinch it and take it back to China and reproduce it.

MS KELLOCK: Both of these companies have a strong brand recognition. But Steve, who couldn't be here, in CobaltNiche, is a designer who has a client - and he develops product, his business develops product for a client, and his main theme was that he thinks that he is treated unfairly around the copyright legislation compared to the artists that we've approached. And he cited an example, which I'd like to - just a couple of point forms here, he said, "We developed a significant project over an 18 month period. This represented a significant body of work from concept, strategy, design, engineering, prototyping, tooling, management. Our work totalled 160,000 k plus, or 1500 hours. It also includes some overrun, loss of fees, et cetera, in getting the job done to the client's satisfaction. At the end of the project the product was completed, the client was happy. The client asked us to arrange and art direct a professional commercial photographer to take a product picture. It was two hours' work. The client releases a media release which appears in a trade magazine. The article makes no mention of us, the designer. It mentioned the client, there was a picture of the product, even the photographer's name is acknowledged next to the photograph."

As a result, Steve believes, that because that photographer had

copyright, but he didn't because he had commercialised the product, and the client had, it had no protection. He believes that this contributes to a poor cultural awareness of design's role. And he said, "The client and magazine publisher were very aware of the appropriateness of the photographer of being acknowledged but the client was totally unaware and slightly reticent in acknowledging Cobalt as the product designers." For us, that's a huge issue, it's a big issue, and we believe that there is a gap there between what's protected under copyright then what's required as a design registration to get - and then what actually gets commercialised. And it seems to be as a result of that we're getting this replica issue, we're getting dodgy product coming into the country, we're not monitoring it, it's left to the companies themselves to really police to the detriment, I would argue, of their effort. And their resources are focused on things that perhaps their competitors in other countries don't have to worry about.

That is what concerns me, when you look at the spend around R&D in Australia, and we're known for having a good legal structure, but so you've got R&D and IP to result in this commercialisation but it's the designers in that commercialisation space that are making the decisions around what materials to use, what the process is going to look like, how all of that comes together. If we really are going to be a nation of ideas, people with ideas, then we need to finish that last bit and we need to put in a regime that will actually support that last bit not make it more difficult for companies. Today we've got examples of the best people within their sectors. So if they're having problems imagine what's happening out there in the rest of the community that don't have the knowledge or the wherewithal, or the resources that aren't growing as quickly.

MS CHESTER: Can I just ask a question of John and Mal, in terms of the infringement of your design rights that you're seeing, whether it's an unauthorised copy or a replica in the periphery of your range, of the design right, but the rest of the periphery is an unauthorised copy, given the commercial life that you're talking about, sort of five to seven years for your product ranges, is the unauthorised copying, or the replicas, is that the window within which that's happening as well?

MR McKECHNIE: It's actually a shorter window, so in many cases I've literally received documents from IP Australia, so a design registration certificate, acknowledging design that I registered 18 months ago, and on the one hand on my screen I'm battling trying to shut down a copy product and I've only just received acknowledgement of the registration. So it's not balanced, it's taking too long to get registration through and be acknowledged to the extent that we can then publish them and talk about them confidently. So that's an issue.

MS CHESTER: So from the issues listening to the discussion this afternoon, one is the time delay with registration, things can't go to market, and secondly, the way that they deal with a related suite of products in terms of the design that's embedded in each of them, are there any other elements of intellectual property arrangements as they currently apply to design rights that - because it sounds like the infringement is occurring with the design right protected period, whereas we've heard evidence from others like furniture designers with replicas and unauthorised copies, a lot of that can also be after the design right - - -

MS KELLOCK: Yes.

MR HOOGENDOORN: Yes.

MR McKECHNIE: Absolutely.

MS CHESTER: We're just trying to get a handle on what are the issues, that we've got a full handle on the issues - - -

MR HOOGENDOORN: You won't find, for us, we actually find that people copy the product for the first year and a half to two years. As I said earlier, that's the period when the sales start taking off. As soon as someone sees in Reece or Bauhn, or one of the major retailers, that something really takes off then they start copying the product. We have had exactly the same thing with a few ranges but other ranges which are slower burns - and we actually design ranges sometimes not to be peaking early but to just be around for a very long time and they will leave those alone. And just because there's not that instant gratification out of any products like that.

MR COPPEL: Do you certify the design range, you first register, do you do that after a certain period of time or can you register and certify at the one point?

MR HOOGENDOORN: We do it after a certain amount of time, yes.

MR COPPEL: Can I ask you then, maybe Jo-Ann, what you see as the role of the government policy in terms of a response to these sorts of issues?

MS KELLOCK: Generally speaking, the feeling within the group is that we need to move towards harmonisation with the rest of the globe. Our biggest concern is that given the Free Trade Agreements that have been negotiated and continue to be where does that leave Australian businesses

in that space, and so if we could move to that place that would be a plus. The likelihood of that happening, I know, is probably not on the short term horizon, but that's our major concern.

MR COPPEL: Are you aware of the Hague Agreement?

MS KELLOCK: Yes.

MR COPPEL: Yes, and do you have any - - -

MS KELLOCK: And aware of some of the things that are happening in the UK, and generally speaking, just even the recent announcement around the replica furniture, sort of there's - our general, I think, Australia is a long way removed in the Southern Hemisphere, it's a big open space and whilst we seem to be over regulated in some parts we've got gaps in others. I think we need to learn to move more quickly in how we develop things because things are moving quickly. My worry is that we don't have a big Customs department to monitor a lot of this stuff that's coming into the country. So where is the rejected product from America, from the UK, from Europe, going to end up? That's my concern, that we're an easy target, and we're far removed from the rest of the globe.

People know, we actually have television programs here that encourage replicas, to purchase replicas, so it's a mindset, and that's when I step back to say about the cultural problem that we've got here, there's no recognition about design's role. We think it requires a suite of measures, it's not just solely this, there's other things that we need to educate as a sector the general public. We've got a role to play in that too. But what we're asking here is that if evidence is what's going to drive the change then we are ready to put the evidence together but we want to work with government to do that.

MS CHESTER: There was a report by ACIP about 18 months ago in that design area and I only just picked up on it this morning reading the Lexology download that the government has just announced its response. I don't know if you've had time to digest that yet?

MS KELLOCK: No, I haven't as yet.

MS CHESTER: It's a bit of a bifurcated response, adopting some of the recommendations and then saying these other ones are going to be looked at by the Productivity Commission as part of our intellectual property arrangement, so I have not expected you digest it or absorb that yet. But it would be helpful given the group that you're representing, Jo-Ann, if you could give us some form of feedback in the next little while as to what

extent the recommendations that have been adopted address the issues as you've identified in your broader table and then what of the outstanding recommendations, your views around those?

MS KELLOCK: I'm happy to do that.

MS CHESTER: That would be really helpful.

MR COPPEL: Thank you, very much.

MS KELLOCK: Thanks for the opportunity, yes.

MR COPPEL: Our next participant is Jo Spurling. So, welcome.

MS SPURLING: Hi, how're you going?

MR COPPEL: Good, thank you.

MS SPURLING: Sorry, I'm a bit nervous. I'm not very good at public speaking, unfortunately. So I'm an author - - -

MR COPPEL: First, if I could ask you for the transcript if you could just give your name and who you represent and then opening statement?

MS SPURLING: Yes, sure.

MR COPPEL: Thank you.

MS SPURLING: No worries. So my name is Jo Jette, I'm representing myself as an author. I also work in the digital creative industries, and have done for the past 15 years. And I'm also formerly the editor of a few different magazines, being Desktop Magazine, Wooden Toy Publishing and VNA Magazine, T-World, I've also worked for. My main concern is in regards to the proposed changes to copyright law and the proposal that a creator would only own the copyright for 15 years. Obviously as someone who is a writer that's deeply concerning for me. Mainly because it's not a hobby for me, I take my craft very seriously. I want to make writing my career. I want to do it professionally.

I've just published my first novel which took me six years to write based on characters that I first published short stories of in 2006. So if you follow the line of thinking with the proposed changes, if I started in 2006 and we're in 2016 those characters have been published for 10 years already so essentially I've got five years to do something with those characters and then it's open slather on anyone who wants to come and do

anything with those characters. Essentially the worst case scenario, say, a pornographic director likes my characters, he can put them in a movie based on my storyline and there's nothing I can do about it. And obviously that's concerning to me because it's my intellectual property, it's my creation, it's my legacy as well, and I've written a children's story, I don't want my children's story characters appearing in a porn.

To be honest, I'm really confounded that the Australian Government would want to strip creative people of their right to own their work, at least until they pass on, because you spend so much time putting something together and it has so much value to you and an idea is so fluid it's really difficult to put like a benchmark time on an idea and say well you've come up with this idea so you've got 15 years to do something with it, if you don't do something with it in 15 years then too bad. A good example would be George R R Martin, I'm sure you're all familiar with Game of Thrones. Game of Thrones was first published in 1996 but was not picked up or converted to a TV series until 1991(as said), which is outside the 15 year period, or it would be outside the 15 year period.

So that means that HBO would have been able to create the TV series without having to pay him any royalties for that or without his input, which he is quite involved in the show, and the publishing company would have been able to stop paying him royalties because it's now free to anyone. And the show actually created a resurgence in sales for the books. So sales of the books went through the roof. So I guess that's my biggest concern. One other concern that I have with the report is just lack of evidence and referencing in the report.

I read the report and I was looking for references. I know you have a heap of references at the end of the report but there was no actual referencing to the time periods around where you've gotten this information from. I looked for it and I was looking for a reference to say, hey, you can find this reference here, but there was none of that. And that really concerned me because to be honest if you're in university and you handed that in it would be a fail because the professor would say well you haven't provided any evidence or references to back up what you're saying. So I found that deeply concerning.

I also think that history has proven time and again that many works have a life span that extend well beyond a 15 year period. Even a five year period, I know that it was mentioned that most works see their growth in five years or the most return in five years and then after that it tends to drop off. But I would argue that with literature especially that a lot of times a book may not be popular for 20 years after it's written but then in the 21st year all of a sudden everyone wants to read it. It might be

picked up and used as a text in a high school or a university, and I don't understand how that was quantified. It doesn't really make any sense to me.

I'm also really concerned, some of the statements I could point to, the first one it was in section 4.2, page 114 of the proposal, "Ensuring works are generated by the most efficient creators and at least cost to society, traded efficiently, and do not impede competition", now the thing that worried me about that is efficiency does not necessarily equate to quality. So just because you have something that's been produced cheaply and efficiently doesn't mean that it's going to be of a quality. And I would be - I mean, I know that you, if I presented a report to you, then maybe I'd produced it cheaply and maybe I produced it efficiently, but it wasn't of quality, I couldn't back up my research, then that wouldn't be acceptable. So I find that also concerning.

The other one, also in section 4.2, was your statement of, "Encouraging the creation and dissemination of creative works that would not have occurred in the absence of copyright", which is contradictory to the proposal that removing copyright would encourage the dissemination of works. Because what this is actually saying is that these works would not have occurred in the absence of copyright. So I don't understand why that statement is in there, because it is contradicting the proposal. It's also having copyright makes you feel safe to create works and put them out there and hope to make a career out of them because you know that your idea is safe and someone can't take it from you. That's so very important if you're a creative.

I think that creatives would feel threatened and also not valued if their works aren't protected. It also is basically negating the value of content. Content is very valuable, it takes a long time to create, and if you want quality content it may take longer than, say, someone who just wrote - I could write a statement tomorrow but it's not necessarily going to be factual, it's not necessarily going to be correct. It's not necessarily even quality. But if you take a week to do it then, you would assume that the longer something takes you would get more quality out of it. So I don't again I don't think something being efficient is necessarily going to be something that is of good quality. Sorry, I am very, very nervous so I do tend to rabbit on a little bit when I'm nervous.

One final thing is that I don't understand how removing the right of intellectual - copyright after a 15 year period is going to encourage innovation and creation because if you spend that much time creating something only to have it taken away from you after an arbitrary period why would you do that? So you wouldn't spend 10 years building your

dream house if you knew that you were only going to have it for 15 years and then after that 15 year period anyone could come in and do whatever they wanted to it and you wouldn't be able to control it any more or have access to do what you wanted to do with it. That's my main concerns as an author and as a creative person.

MR COPPEL: Thank you, very much. Well I think we can allay your main concern because we do not recommend in the draft report a reduction in copyright term - - -

MS SPURLING: It says 15 years, though.

MR COPPEL: We have a finding. We don't have a recommendation. And that finding is based on sort of the average commercial life of a published work, which is in the order of 15 to 25 years. Now, because of Australia's international obligations and we're bound by our Act and not to be in breach of those obligations our report and the recommendations that are made in the report are consistent - to the best of our knowledge, consistent with those international treaties. But I can say for certain that there is no draft recommendation relating to term. I think that's the first point. The second one, I guess - - -

MS SPURLING: Sorry, can I just query that, though, because a lot of my fellow authors and creatives have been saying that there is the 15 year term though. So does that mean that the report is perhaps confusing in the way it's been written in regards to that?

MS CHESTER: I think some of the media reporting might have been confusing and unhelpful.

MS SPURLING: Well, I also read 15 year, a 15 year period and a five year period in that document in relation to copyright.

MS CHESTER: So that was where we were looking at there's some statistics from the Australian Bureau of Statistics that look across all the forms of copyright materials and look at what the commercial life would be, and our findings, so this is just like an observation, is if you were going to construct the optimal term of copyright purely from the perspective of the commercial life it would be somewhere between 15 and 25 years. So people have misread that and some media reports have misreported it to say that we were recommending reducing copyright from life plus 70 years to 15 to 25 years. And we're not. So that's wrong.

MS SPURLING: Okay, so maybe then in that regard then you need to look at the way the report has been written and actually be a lot clearer in

the language because that's definitely what I picked up. Especially in the infographics as well, it comes through and a lot of people will refer to those because it's a bite size amount of information. So are there any changes proposed at this stage to - - -

MR COPPEL: We will look at the language and to the extent of any ambiguity there then that's something that we will seek to modify. But the second point about referencing, I think is linked to the fact that our style standard for overviews excludes all references. But you will find throughout the remaining 550 pages quite extensive references to - - -

MS SPURLING: I didn't just read the first 100 pages, I read quite a lot of it, and there were things I felt should be referenced but then I couldn't find the referencing for that.

MR COPPEL: Okay, well that - - -

MS CHESTER: Well, Jo, if you want to let us know what that is because we would like to get that right for the final report?

MS SPURLING: Yes, sure.

MS CHESTER: But, yes, it's clear from your commentary today that you're read more than the opening there.

MS SPURLING: Of course. Yes, it was quite a huge document to read but, yes, and obviously as well I think that the bigger a document is, then the more people do tend to switch off, especially if you're talking about moving into a digital age then you need to look at maybe being more concise.

MR COPPEL: The work that you have published, is that recently published, or?

MS SPURLING: Yes, so I've been publishing since about, yes, 2006. So I've published a series of short stories, I've also published in magazines, I ran my own magazine for three years, and I've recently published a full length novel and I'm working on my second one at the moment.

MR COPPEL: How does your experience then relate to the Australian Bureau of Statistics which is sort of picking up an average that suggests that most of the royalty payments will be coming in the first few years after initial publication?

MS SPURLING: I would argue that that is actually not the case because it takes - I mean, if you're lucky and your book gets picked up and becomes popular, say like The Martian, he self-published and got picked up by Amazon and he's the dream story, just had a movie with Matt Damon in it, the writer, Andy Weir. But I think that by the time you actually publish you then have to go through the whole promotional cycle, it's not - it's not like something that's going to occur, like I mean I've been - I published my book last year and I'm still going through the initial promotional cycle now.

I know that especially because I self-published it's going to take me a long time to build up that audience because I work full time and I do it in my after hours. But, yes, I would argue that if you're self-publishing, which a lot of people are doing now because it can be prohibitive to go to the publishers because you've got to get an agent and agents are hard to get and then, publishers of (indistinct) books every day, so people tend to self-publish. When you self-publish it does take longer to pick up that audience because you don't have the money and perhaps the connections of a larger company. But I still don't think that that makes the content of any less value, it's just a different cycle.

What you will find moving forward, especially with digital, is a lot more people will be self-publishing because they've spent all this time creating this product and just because a publisher says no doesn't necessarily mean that the book - I mean, Harry Potter was rejected twice before it got picked up and that's now a multibillion dollar franchise, so I think that what we will see over the next few years is a move a lot more to self-publishing and books will take longer to pick up sales. It doesn't just happen straight off the bat. Maybe if it's a big publishing company and they create a book and they have the money to pay for reviews and everything else and get advertising, because a lot of these bigger companies, especially with music as well, they pay to be on the radio and they pay to get reviews. So it's not organic.

If a band - because I've got a lot of friends who are musicians, if you're a band, say, and you've just released your album but you can't afford to pay to get on Triple M or Triple J then your song won't get played so you then have to build your audience another way, and it can take 10 years for an album to get a decent amount of sales. So it's quite a different world, I guess, when you move away from the big corporations. But I think we will see a shift more towards that, especially with digital.

MR COPPEL: When you self-publish, do you work with book shops for distribution or are you also self-distributing?

MS SPURLING: Yes, so I work with Amazon. So I distribute through Amazon and I also distribute through local bookshops, independent bookshops, and it's a lot harder to get into the bigger bookshops. I sell from my website and also through Apple, I see my - like I've done a digital version of my book. So I have a digital and a print version and I sell that through Apple and also through Amazon.

MS CHESTER: That was going to be my question, the split between digital and hard copy in self-publishing, so you've obviously gone for both platforms, and what are you finding the experience like in terms of the sales that you're making in your book, Jo, how much of it is digital, how much is hard copy?

MS SPURLING: Yes, I would say surprisingly print is more.

MS CHESTER: Okay.

MS SPURLING: Which I actually thought was surprising, I thought that digital would be more, but print, I think people do still like print and having a book, I don't think that will ever die. I have a lot of friends who say print is premium. I sell my book for $15 including postage in Australia, or $10 overseas plus postage. I think that's a reasonable amount. It cost me, I think, $3.60 to print each book, which I do myself, I pay for that myself. Then the digital version I sell for just the standard Apple and Amazon price, which is 2.99, which I think is fine, and I can sell that all over the world.

MS CHESTER: For doing it at $3.60 per unit, what sort of print run do you need to do to get that price?

MS SPURLING: I can print five, I can print 15, I can print 160, it doesn't matter, they're all the same. That's printing through Amazon. So Amazon offer that. Unfortunately, the Australian companies are just not competitive on price. Yes, I would say that would be - if I could afford to print in Australia I would love to print in Australia, I would definitely be happy to do it.

MS CHESTER: What's the cost comparative for doing it in Australia versus what you can get through Amazon?

MS SPURLING: If I print it in Australia I'm looking at probably anywhere between 10 to 15 dollars per book to print.

MS CHESTER: Do you need to have a commercial arrangement with Amazon beyond the printing?

MS SPURLING: No, I don't even have a commercial relationship with them for - I own everything. They don't. They will take a commission but I own everything, which is awesome. In fact it's a really good - I mean, I would like - I actually would love to set up my own company that did eBooks and promoted them, similar to band camp, but it's just having the time and the money obviously. The same with everything.

MR COPPEL: Okay, great.

MS SPURLING: Awesome, thank you, so much. Thank you, for having me. Sorry, for being a bit nervous.

MS CHESTER: No, that's been helpful, Jo.

MR COPPEL: You didn't sound nervous.

MS SPURLING: No worries at all. If you ever have any questions about digital and printing and self-publishing I would be more than happy to answer them because I've had quite a lot of experience in doing it. I also did a digital magazine for three years which went really, really well, I only gave it up because I got sick of chasing artistic people for interviews. Thank you.

MR COPPEL: Thanks, very much.

MS CHESTER: Thanks, Jo.

MR COPPEL: Our final participant registered for today's hearing is Robert Bouvet. Welcome, make yourself comfortable, I think you may have heard, when you are if you could give your name and who you represent, for the purpose of the transcript?

MR BOUVET: My name is Robert Bouvet, I represent myself. If you have a look at my submission you will see that I created the original work for a very famous Australian film, quite a while ago now. My concern is that the court system is not adequate to deal with IP matters. That's why I would advocate for a dedicated IP court. I think it's a big plus because I think lawyers tend to confuse patents and trademarks with copyright so if copyright could be just set aside and dealt with by just one dedicated court it would be terrific.

MR COPPEL: So I sense that you are saying that based on personal experience where you had - - -

MR BOUVET: Yes, I have been fighting for many, many years, for 30 years, but lawyers seem to apply the law like a rubber stamp, you know? And the original Copyright Act says that you must present your work as a manuscript in hard copy written form, and this is what the lawyers have been pushing. But recently there's been a few amendments brought to the Copyright Act where an author can present his work as - in electronic form or as a tape recording - so in my case it was a tape recording, and as you know it can be converted into writing, it could be reduced to writing by just dictation, so I can't see where the problem is but they keep pushing for the hard copy in written form. Hard copy written form.

MR COPPEL: So you think a dedicated IP court would be one way of addressing these disputes?

MR BOUVET: For sure, yes.

MR COPPEL: We heard this morning, you weren't here this morning, that litigation can be very expensive.

MR BOUVET: Yes.

MR COPPEL: Regardless, even when there are very simplified processes. It was suggested that there could be other measures to address disputes that lead to an outcome that's amenable to both parties.

MR BOUVET: Well, mediation. Then mediation would be a terrific idea. I also feel that in addition to lawyers we should have people who know what they're talking about when they're talking about copyright, publishing and so on, and scripts for films. I think it's a very narrow kind of field when you write for films you write vision so which is different from writing a novel. So the court must consist of judges, I guess lawyers, we can't get away with that, but also with people who know a lot about film scripts and of course publishing as well. Because sometimes it starts as a book and then it's converted into a screen play and then from the screen play it goes to a film.

MR COPPEL: So the argument is a dedicated court would be experts in intellectual property, or in copyright, which would be an expertise that's built up through hearing day in, day out, cases relating to intellectual property, which is one argument that's been put to counter that view, is that intellectual property can cut across other forms of law and it's helpful to have an expertise not just in the narrow intellectual property law domain but across other forms of law, contract law for example. The other is typically a dedicated court wouldn't be the ultimate court so if

there were an appeal you would still have the situation where that case would then be heard by a court which may have limited expertise.

MR BOUVET: Yes.

MR COPPEL: I don't know if you have any - if you think that would be a problem, or is it - - -

MR BOUVET: Well, for me, I'm not a lawyer, for me it seems to be straightforward, you've got all your material there to prove that you are the author so there shouldn't be any arguments? That is why I've also mentioned section 219 of the original Australian Copyright Act. I don't know why in 2000 the government decided to remove that section. It was very fair because it said, okay, the author gets a percentage of whatever the film earns at the box office. That's after costs of production. So 219, if you could bring 219 back into the Copyright Act that would be great.

Also there seemed to be some confusion about the meaning of the word, "créateur", which is a French word? Some people can't see what it actually means, it means somebody who conceives something, somebody who creates something from nothing. So when they say that the makers of the film are the authors that's wrong because a film is not an original work, a film is a copy of a screenplay and a screenplay in turn is a copy of an original story, which very often is in the form of a novel, like Gone with the Wind for example. Yes, and 4.2 and finding 4.2, and recommendation for one, I think it's way too short. Liked speaking for myself, it's been - it's taken some 30 years and I still can't get through and if you bring it down to 15 to 25 that's it, I'm - - -

MR COPPEL: Yes, so, again, as we mentioned to the previous participant, there's no recommendation in the report to reduce the length of copyright term.

MR BOUVET: Yes, much too short.

MR COPPEL: Yes, okay.

MR BOUVET: Yes, that's it.

MR COPPEL: Thank you, very much.

MR BOUVET: Thank you, very much. Thank you.

MR COPPEL: 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? If not, I adjourn the proceedings. This concludes the public hearings for today in Melbourne and we will reconvene tomorrow morning at 8.45 again in Melbourne. So thank you, very much.

MS CHESTER: Thank you.

MATTER ADJOURNED AT 5.05 PM
UNTIL FRIDAY, 24 JUNE 2016 AT 8.45 AM

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 PRODUCTIVITY COMMISSION, MELBOURNE
ON FRIDAY, 24 JUNE 2016 AT 8.41 AM

INDEX

RESUMED **[8.41 am]**

MR COPPEL: Good morning everybody. Welcome to the public hearings of the Productivity Commission Inquiry in Australia's Intellectual Property Arrangements. My name is Jonathan Coppel and I am one of the Commissioners on the inquiry and my colleague Karen Chester is the other Commissioner.

By way of background, the inquiry started with a terms of reference from the Australian Government in August 2015 to examine Australia's IP arrangements including their effect on investment, competition, trade, innovation and consumer welfare. We then released an Issues Paper in early October 2015 and we've talked to a range of organisations and individuals with an interest in the issues. We have also held a number of roundtables, both pre-report, draft report and post-draft report and met with many groups of interested parties to inform the inquiry.

We released the draft report in late April, which included over 20 draft recommendations, draft findings and a number of information requests. We have received a large number of submissions in response and now they total well over 500. So we are grateful to all the organisations and individuals who have taken the time to prepare submissions, many of those who are appearing at the hearings both today and in previous days.

The purpose of the hearing is to provide an opportunity for interested parties to provide comments and feedback on the draft report; things like where people agree with the draft recommendations and where they may disagree or where there may be differences of opinion on ease of implementation or even factual comments.

Prior to this hearing today, hearings have been held in Brisbane, Canberra and Sydney and also yesterday in Melbourne. A further hearing will be held in Sydney next Monday. We will then be working towards completing the final report, having considered all the evidence presented at the hearings and submissions, as well as other informal discussions. The final report will be handed to the Australian Government later this year. All those participants and those who have registered their interest in this inquiry will be advised of the final reports released by government which may be up to 25 parliamentary sitting days after completion.

Regarding today's proceedings, we 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 transcript will be made available to participants and will be available on the Commission's web site following the hearings. Submissions are also available on the web site. If there are any media representatives attending today there are some general ground rules and we ask you see one of our staff concerning those and that member of the staff is there by the door.

To comply with the requirements of the Commonwealth Occupational Health and Safety Legislation you are advised than in the unlikely event of an emergency requiring the evacuation of this building that you should follow the green exit signs to the nearest stairwell. Lifts are not to be used and follow the instructions of the floor wardens at all times. If you believe you would be unable to walk down the stairs, it is important that you advise the wardens who will make alternative arrangements for you. If you require assistance, please speak to one of our inquiry team members here today. Unless otherwise advised, the assembly point for the Commission in Melbourne is at Enterprise Park, situated at the end of William Street on the bank of the Yarra River.

Participants are invited to make some opening remarks of no more than five minutes, keeping the opening remarks brief will allow us the opportunity to discuss matters in participant's submissions in greater detail. Participants are welcome to comment on the issues raised in other's submissions. Those formalities complete, I would now like to welcome the first participant who is Mark Summerfield. So welcome. If, for the purposes of the transcript, you could give your name and who you represent and then I invite you to make a brief opening statement. Thank you, Mark.

MR SUMMERFIELD: I am Mark Summerfield and I am with Watermark Patent and Trademark Attorneys, but I am actually mainly here in a personal capacity, so whatever I say here doesn't necessarily represent the views of my employer, but my feeling is that they're probably fairly well aligned. Just by way of opening I would like to just summarise some of the points in my submission and that submission relates to the recommendation that business methods and software be excluded from the - from patentability under the Patents Act 1990, and there are a number of reasons why I regard that as a poor recommendation and one that should not be carried over into the final report.

Primarily, the issue is that this whole category of business methods and software as it appears to have been brought together within the report is extremely broad and at one extreme you have the kinds of business processes that have already, on a number of occasions by the Full Federal Court in Australia been found to be unpatentable in any event. At the other extreme, under heading of software or computer-implemented inventions or inventions that have been implemented partially or wholly by means of programming, rather than preconfigured hardware, you have things such as the CSIRO Wi-Fi technology which is itself largely nowadays implemented in hardware that may or may not be programmed.

My background originally is as an electrical engineer. I practised as an electrical engineer for over a decade before entering the patent attorney profession. During that time I worked at Telstra's research laboratories, Telecom at the time. I worked - I did a PhD in optical fibre technology at Melbourne University. I did post-doctoral research at Melbourne University. I worked in a start-up company that was developing hardware and software for telecommunications access networks. I worked in a second start-up company which was developing computer-aided design software for use in the design and development of optical fibre technology systems; everything from devices through to large-scale national telecommunications.

Following that, I became a patent attorney and I have worked for a number of clients in related areas in relation to hardware and software, and within the general areas of technology that I've worked in and where I have assisted clients, I would have to say that the decision as to whether something might be implemented in hardware or might be implemented in software or might be implemented using some form of programmable hardware, which again, the tools are used in those cases are very similar to software development tools, they consist of effectively programming languages, that it is entirely an engineering implementation decision. There is no distinction in terms of the end functionality; the distinction is in relation to matters such as cost, performance, miniaturisation - those sorts of things that affect the engineering decisions and the final product design.

The general preference nowadays is for implementation to be as far as possible and, at least at the early stages of development, in programmable devices whether that's microprocessors with associated software, whether it is devices that are - there are types of hardware that can themselves be programmed; they are bit like digital stem cell arrays, if you want to think of it that way. They start out having no particular function and you feed

them a file and that configures them to perform a particular way. The reason, of course, that that is preferred is because you can then build the hardware once and you can reprogram it in development to adapt it, develop it, correct bugs. You can reprogram it even after it is deployed in the field, to add new functionality. There really is no clear dividing line between what you would do in hardware and what you would do in software in a range of these fields.

The other area that concerns me is in relation to the kinds of software that I worked on in the second start-up company that I mentioned. Highly technical software that is outside the everyday experience, I guess, of most consumers who deal with large-scale consumer operating systems office productivity applications. But when you get into areas that are more highly specialised and more highly technical, you are dealing with software that require significant investment of time, money, human resources in order to develop features that people rely upon for such purposes as designing national telecommunications networks, for example.

That software can't be thrown together in a few days and put out into the world for people to play with. That software needs to work. It needs to produce the right answers every time. It needs to tell the users when it can't, for some reason, produce the right answers. It needs to be robust, reliable and people count on it, it's mission-critical. The development cycles, to get an idea effectively from - for a new way of doing that more efficiently or more accurately or more effectively through to something which you can actually put out into the world, knowing that it is reliable, robust and people can rely on it for what they do - that's not a short cycle. It might require many, many months of development and the involvement of very highly qualified people in order to bring that to a final form that's suitable for the market.

And so much software that is all around us every day that we don't see and that we take for granted is of the kind of nature that I've been talking about. I don't think that that kind of software is really what you, the Commission, have had in mind, in preparing that chapter. I am not sure, reading it, that there was an appreciation there of the range of technology and the range of industries that would be affected by such a recommendation and that's the primary reason I have made my submission and it is the primary reason I am here today.

MR COPPEL: Thank you, Mark. Maybe I could begin by mentioning that we have had a number of other participants in previous days commenting on the business methods and software chapter of the draft report. One of the, is that they have made is that it's better to think about

business methods and software as two distinct forms of intellectual property. Listening to your opening remarks you seem to suggest the opposite, that a business method is sort of embodied in software and that the areas of intellectual property need to be looked at together. I was wondering if you could comment on the - - -

MR SUMMERFIELD: I am sorry if I have given that impression. My opening comment was that your draft report had, in fact, brought them together into a single category. My belief and my written submission is that no such single category actually in fact exists. So the first thing you have to do is separate your thinking from this idea that there can be a BM and S, a business methods and software category.

I would agree with probably - I mean, I haven't heard exactly what people have said, but my general view would be that you need to separate the thinking about business methods from the thinking about software. I am not sure it is as simple as saying that business methods is one kind of IP and software is another kind of IP, because it certainly is true that software supports business processes and that software can support business processes in a variety of different ways.

I am not sure that trying to separate them in terms of, "Well, here is one sort of IP and here is another sort of IP" is possible, but you do need to separate it as the Full Federal Court has effectively done in its three most recent cases in this area; the Grant decision, the Research Affiliates decision and the RPL Central decision. They have said quite clearly a technological innovation is patentable; a business innovation is not.

So what they are looking at there is, where is the innovation? I mean, one of the issues that I have with a particular client at the moment is if the client that is a large multinational company. It provides the sorts of high reliability, high transaction rate processing systems that run the global travel networks. These days when you fly, you get a e-ticket, you go into airports and everything is all computerised, everything is done. Millions of passengers fly every day and this particular company has a data centre with 11,000 servers sitting in Germany and they handle 42 per cent of that traffic around the world every day.

There is enormous - and they have, I have to say, an R and D presence in Australia in Sydney. They obviously have customers in this country. They do invest here. I recently visited them in Europe and they - part of the reason for investing in Australia is they saw it as a good, stable legal environment for the kinds of things that they do, as well as a good commercial environment and having the kinds of educational, intellectual capacities to do the R and D that they are doing. So they now have

concerns about the position in Australia, at least from the legal perspective. They have been very surprised by what has happened here in recent times in that area.

Now, the reason that's relevant is because much of what they do supports things such as the searching for travel itineraries and things that work for what travellers want to do; the sale and processing of tickets, rebooking, managing seating on flights. All of the things that the airlines do, all of the things that passengers do. The technology they use to do that involves enormous amounts of R and D work. It's not enough just to say, "Well, he's now willing to do it." It has got to be implemented within that server system in a way that it never fails. If that system fails - one of the things that it does is allocate spots for planes to take off and land. So if that system fails it's a bad thing.

So there are huge amounts of technological innovation and technological R and D, methodologies that they are developing that have wider application in large-scale transaction processing systems and database systems. Massive investments in that, and yet, a lot of it is regarded from the perspective of patentability in what we are seeing from the examination processes not just in Australia but in the US as well. A lot of it is regarded as business methods.

Now, the issue here is that, yes, it is a business method; people don't invest huge amounts of money in these kinds of developments unless it's going to support their business and their customer's businesses, but in actual fact the investment and the research and development, and the deployment is in the technological platform that underpins that and so it is important to focus on where is the innovation? Have they just come up with a new way of helping passengers to book tickets?

The implementation is neither here nor there or have they in fact created a technological innovation that has enabled that new service which otherwise wouldn't have been possible. So the distinction between what is a business innovation and what is a technological innovation is important. The distinction between what is a business method and what is software as distinct forms of IP, I think it not important in that context.

MR COPPEL: You have given a number of examples. Do you have any sense as to the life of these - the commercial life of these examples? Software is typically associated with something that is pretty fast-moving. There are always new developments. If you could give us a sense as to the life of these innovations.

MR SUMMERFIELD: Okay. The software that I worked on in the (inaudible) design area, which - I was there from 2000 to 2002. The Australian start-up company unfortunately is no longer in existence after a number of investments and acquisitions over the years, and there were all sorts of problems are doing there in Australia sadly, but the product itself still exists. I noticed, when I looked recently that they are still promoting one of the features that I was instrumental in developing while I was there, as one of the key features of their products that distinguishes it from their competitors' products and the underlying platform - and, in fact, the basic simulation play form that that uses is originally an open source platform Creators Think Autonomy(?) created by the University of California at Berkeley.

The work that we did was to say, "Well, there was no point in reinventing the wheel in that sense." We were strong supporters of open source in a variety of ways. The new intellectual property that we created was in the specific models for the various devices and systems that that system was - that our particular product was designed to simulate and the new user interface features that we provided to make it much easier for our target users to access that. So that kind of product has a long lifetime.

In relation to the high-volume transaction processing, our client there is about to move for commercial reasons from an IBM platform that many, many companies use that have to deal with really, really high volume high reliability transaction processing to developing their own. Of course, IBM charges ongoing licensing usage fees and it only runs on their hardware, so it's a nice business model for them. I was interested to see, when I looked at the information for that IBM platform that it's been around for - since the 1960s, I think or certainly the early 70s. The last time it had a significant update was 2005.

This kind of software that does really important stuff and has to be really, really stable, people try to get it right and then leave it alone. There is a lot of software out there with long lifetimes. Again, we are far too accustomed these days to our smartphone apps updating every second day and annoying us with those notifications. We are far too accustomed to Microsoft and it's new release product-release cycles. That represents only a very small part of the sorts of industries that we are talking about that use software and programmable hardware as fundamental building blocks in everything they do.

MR COPPEL: There are multiple ways in which to protect the investment in research and development and in a number of industries, they don't use intellectual property laws at all. They rely on secrecy, which has a downside that it may never enter into the public domain. I am

just wondering whether software is one of those areas where the ability to keep the innovation away from potential competitors is an option? How easy would it be to copy software, if it's kept secret, for instance.

MR SUMMERFIELD: Well, setting aside stray copying which, of course, is covered by copyright, one of the issues with software is that there are a variety of ways in which you inevitably expose your innovation to the market and to your competitors when you release software products. One of them is that people can see the functionality on the face of the software. That may of course, in some cases, not tell them anything about what's going on inside or in other cases it might reveal quite clearly the kinds of innovations that have been made in order to achieve that new functionality. So that's one way. I mean, software inevitably goes out into the world.

Reverse engineering is another and despite various technological measures to prevent that, pretty much anything that is done in software or in any form of programmable hardware is subject to reverse engineering, and the copyright protections that are supposed to prevent people from doing that for a variety of reasons really are not going to be effective in an industrial context. So that's the second - - -

MR COPPEL: Why is that?

MR SUMMERFIELD: Well, simply because there is no way to know. You can have that says it is illegal to - as we do in Australia - that it's illegal to break the technological protection measures that have been put in place to try and prevent it, but you cannot know what somebody does in the privacy of their own research facilities. You cannot know that they are doing that in Australia as opposed to in India when no such law exists.

So in practice, you really cannot prevent the reverse engineering of software. In relation to - again going back to the systems that I worked on in the simulation area, our customers were and still are presumably the kinds of people who design; highly qualified engineers who design telecommunications devices, networks or optical fibre systems. They didn't just want to know that our software worked because we said it did, they wanted to know how it worked.

So we actually published descriptions of our algorithms and the underlying theory in the documentation for that software. We have no choice, because if those researchers and designers didn't know that they could trust those models and how they worked, and what the difference was between one model and another, then they were going to be confident using that software. So that's another example of where there's a problem.

Finally, I've said in my submissions and I said elsewhere, I believe that open-source models and proprietary models are not polar opposites. They are complimentary models and most companies nowadays that work in this area are using some combination of open source and proprietary, aside from people who are purely running an open source-type business like Red Hat, but if you look at the open-source projects that companies like Microsoft, Google - as I've said, I've worked with companies that are using a mixed proprietary open-source model, that the travel global distribution system company I was talking about, they also have an open source policy and they use some open source software. They contribute open source - they contribute - go back to the open source community as well.

What other forms of IP protection allow in that environment is that they allow companies that are engaging in with the open-source community in that way to have control over the intellectual property. You can do really interesting things, for example, like put out open source code for people to use and build on, but because of the copyright protections and even the patent protections that might be in there - because once people learn how it works, they can be implemented perhaps without infringing copyright, but because of the IP protections that you can cover that with, you can impose licence terms on that that goes out into the world.

So you can say, for example, and in some ways Oracle's and some Java model was like this, and Google's Android model was a bit like this, you can put that code out into the world for people to use and you can say, "For non-commercial purposes, research purposes, whatever you want, you can do what you like with this code. If you want to give us back improvements you make or other code that you develop using it you are welcome to contribute to the community." But at the same time, you can say that "For commercial use, we are going to enforce our IP rights there." We are going to say, "You need a licence," or, "You need to participate in this program or you need to buy in into this part of our business. "

It also creates very interesting opportunities for hybrid models that can give you the best of both worlds, the best of what the open source advocates will tell you is great about open source and the best of what we've had for many, many years from the proprietary software developers who have - Microsoft, for whatever criticisms they sometimes cop, have delivered productivity software to ordinary people in businesses for a number of decades now that have made us all more productive. And they have done that via a proprietary model for the most part, and if you look at the open source alternatives to Microsoft Windows or Apple - well,

Apple's IOS is built itself on an open source platform, but to the office productivity software, Microsoft Word and the others in the suite, they don't provide businesses in the majority of consumers with a plug and play solution that they can just get down to work with. They are much better nowadays than they used to be, but they still require a level of self-support that most users are not willing to engage in and most businesses don't have the time and resources for.

So the proprietary models do deliver, and they deliver - in Microsoft's case, they deliver the sorts of platforms you don't see as well; the cloud computing platforms, the database systems - all of the back-end things that are really highly technically sophisticated and Microsoft spends billions in R and D every year on. They deliver all those things as well. And open source doesn't really deliver for those highly specialised technical markets. The people involved in that, generally speaking, are not connected to those markets and enterprises, and they're focused elsewhere, and they are doing great things and large parts of the web are built on it, but it doesn't deliver everything to everybody.

MR COPPEL: Okay.

MS CHESTER: Mark, I just want to explore a little bit more the views that you espoused before around the ineffectiveness of copyright when it comes to coding, just to make sure that I kind of understand it. So you are saying that copyright is clearly a form of protection for coding, but it is more difficult to enforce those rights, because it is more difficult to detect when it is being breached. Is that what you're suggesting?

MR SUMMERFIELD: Yes.

MS CHESTER: Okay.

MR SUMMERFIELD: I'll give you an example. I mean, suppose we take something like the CSIRO's Wi-Fi invention which, when it was first invented, really needed to be from your hardware and now you can do it in software with just an ordinary PC and microprocessor. You can do everything that is required to implement what was invented at CSIRO.

If I do that and then I release that code and somebody reverse engineers that or perhaps I provide the source code and open source it, if someone just- and I say, "Look, there's a licence term here. You can do what you want with it for non-commercial purposes, but if you want commercial use then we require you to take a licence." Now, if I have only got copyright, what happens is that the code itself reveals the algorithm. It reveals the actual steps - general steps that you have to take.

If someone takes that code and they are just copy it and they just reuse it well then they have infringed copyright.

If somebody takes the code and they read it and by reading it they deduce the algorithm and they write down the steps of the algorithm in plain English or as a specification and then they hand that to another programmer who hasn't seen the code and says, "Look, we've got an interesting algorithm here. Could you write that code to implement this?" Now, that person hasn't seen the code, they haven't copied it. They haven't been given anything other than the underlying algorithm and been told, "Go away and independently implement this."

That independent implementation almost certainly does not infringe copyright. The connection to the original code, via something which is not itself code is not - is certainly not a derived work, and the connection may - it probably isn't strong enough, because what you are seeking to protect with a patent in that case is the actual technology which you have developed which is then represented by a series of steps and an algorithm which can then be implemented in hardware or software in order to bring that into a product.

There are two separate things there. There is the expression of the work as there always is in copyright, that's the actual code, but there's the underlying idea of the work in this case, is perhaps the algorithm. Without the ability to protect what you have actually invented there, which is a new algorithm independent of how it is implemented, you have no way via just copyright to effectively protect that.

MS CHESTER: So if we were to draw a parallel with, say, code versus say a book or a story, breaching copyright doesn't require a pure replication of the book itself. You can sort of still lift key ideas or, say, music as well and that can still be seen as a breach of copyright. What is it about the algorithm that sort of separates it from the coding? It is a function of the coding, so it is part of the embedded innovation. I am just trying to work out why the copyright then isn't effective.

MR SUMMERFIELD: Well, again, using the Wi-Fi example, the primary claim in the patent that protected that innovation contains about three steps. It says you have this lot of data you want to transmit, and then the first step says to perform one particular type of processing on that data, and then the second step says, well, take what you've just processed and perform this further step on it, and then the third step says then take that and perform this still further step on it, and then transmit it. So that is the level at which you can describe that algorithm.

The code to implement that, if you were to look at it all, taking into account the fact that in practice there's various bits and pieces of it you wouldn't have to write from scratch, because there would already be libraries and other things out there that you could use, but the code that implements all of that would be many, many thousands of lines long. If I copy those thousands of lines or any part of those thousands of lines that I am potentially infringing that copyright. If I did use the underlying algorithm and get it back to those three steps, that's the underlying idea. It's a technical idea. It isn't an aspect of what copyright protects in the code. The code is a particular expression of that idea.

You can think of the - I mean, I don't like to say algorithm is an idea, because ideas are not patentable and we are not talking about an idea in a sense of the plot for a novel. We know the plot for a novel is something that is not protectable, as the guys who wrote Holy Blood and Holy Grail discovered when they tried to sue Dan Brown in the UK for his book, but because it's a technical idea as opposed to a literary idea. I mean, I think the fact that code is protected by copyright is as much as anything else a historical accident. One thing I do agree with some of the more extreme free software advocates about is that there is a serious question as to whether copyright is really the appropriate type of IP right to protect software.

At some point, it was decided, "Well, there needs to be protection for software," and it was decided, "Well, let's pretend that" - it is a legal fiction, I think, it takes no account of the actual process of technology. It says, "Let's pretend that code is a literary work and throw it in with literary works in the copyright law," which is now, effectively, the global approach, so I don't think it can be changed now.

Code is not a literary work. It is not the same sort of an expression of an idea that a literary work is an expression of an idea. I think, with the benefit of hindsight, a little bit more effort in devising a generous form of protection for software code might in fact have been a much better idea.

MS CHESTER: Jonathan mentioned before some other ways of protecting intellectual property in the software space that don't require the formalities of a patent or relying on copyright. With the exception of some of the outliers that you've spoken about, if you are looking at the - we've seen a lot of evidence around software having very sort of short commercial lives, what role does - people talk about the first move advantage. What role do you see that playing in a complementary sense?

MR SUMMERFIELD: Can I first challenge what you just said about me talking about outliers. I don't believe I am talking about outliers. I

believe I am talking about things which are not readily visible to the majority of society and to consumers, but I am very pleased to see that Qualcomm are appearing this afternoon to talk to you as well. They know a lot about this area too. These are not outliers. The sort of programmable hardware and software code that I'm talking about is all around us. It's just not the stuff that you see all the time.

MS CHESTER: So is there a - sort of like a statistical evidence-base that we can look at to get a better handle on whether or not there is a misconception of most software being a very short commercial life, which is I guess what we have been drawing on in our report?

MR SUMMERFIELD: I think the notion that software has a commercial life - it's complex even in the case of the kinds of software that we look at all the time, in the sense that some features of software have a short life. Some features last for many, many years. Not very long ago, I wanted to retrieve the electronic of my PhD thesis which I wrote on Microsoft Word 2.0 in 1995. I was able to load that into the current version of Microsoft Word. The formatting was a bit off, but a couple of hours work and I was unable to do that and I was then able to save it back out in PDF which hopefully is a much more stable format.

There are features of software that although the application itself may be updated regularly, there may be underlying features are quite important that were quite innovative when they were developed that require real technical effort to bring into effect and word processing is probably not the greatest example of that, but software products may evolve, but the core features on which they were originally - the platform on which they were originally developed may remain quite stable underneath the surface.

So the fact that we as consumers see software being updated regularly doesn't necessarily mean that all of the technology and research and development, and innovation that's gone into developing that software is becoming obsolete at the same rate. So that's one factor. You could ask Microsoft how much of the early 1990s Windows NT code base is still is in Windows 10. I daresay it's not zero. So they might actually be able to tell you something like that, if they were minded to.

The other thing I would say about patent protection for software that does have a short lifespan and see many examples of smartphone apps for example, that are fads and come and go, and things where there may be an opportunity that arises and then fades away. The patent system isn't well-suited for that anyway. I don't generally encourage people who ring up and say, "Look, I've got this great idea for an app and I want to know

how I get a patent for it" - I don't necessarily encourage those people to pursue patent protection.

There's an article on my blog which has been the most popular article I ever wrote, which is called, "Can I and should I patent my smartphone app", that goes through these issues. If it's got a short life span, if it's only going to be commercially valuable - if you've got a first mover advantage; if it's only going to go for a year to two and then you are going to be moving on to something else, don't spend thousands of dollars entering into an IP protection regime that's going to potentially take you four or five years even to get a right granted.

I think there is a serious problem with a misalignment between the way some people use the system and what is an appropriate use of that system. It doesn't mean saying, "We shouldn't let software be patented", what it means is making sure that people are better educated about the IP rights that are available to them and what's most effective in their business. I don't know what other patent attorneys do. What I do is I sit down with people and I say, "What is your business plan here? What are you commercial objectives and how do you see this panning out?" And if patents are not right for them, then I will tell them "Patents are not right for you." That's how it should be.

MR COPPEL: This is an inquiry where often the experience of other jurisdictions is called upon, particularly in relation to proposed changes. So we have heard with respect to fair use as an exception, the experience in the Unites States statutory licensing for education in the area of copyright, the experience of Canada in parallel import and restriction removal in New Zealand. This is also an area where New Zealand has a different approach. I am wondering if you are in a position to give us a sense of how software is protected or not able to be protected directly in the case of New Zealand. Do you have any clients for instance?

MR SUMMERFIELD: I can talk about New Zealand. Before I do that, I just want to say more generally, there is an assertion in the report that there is somehow a general trend around the world for protection of software via the patent system to be wound back. I don't believe that that is the case. Europe, for example, has been very stable for a long time and I think the European system as it stands now is actually very good. It's good in a number of ways. It's good because it's achieved a level of stability, certainty and predictability where people such as myself can give advice to people; whether what they are developing is patentable there or is not and what the outcomes would be in those terms.

The United States and Australia, the courts have recently arguably moved in a direction that restricts, certainly, the patenting of computer-implemented business processes where there is no technological innovation in that and, as a result of that, I think that there has never been a time where there has been greater harmony between Australia, the United States and Europe in terms of what's protectable.

So it is not that there is a winding back, it's that I think that's there's an increasing consensus about the technological requirement. Now, what happened in New Zealand was in many ways rather unfortunate, because they had what was a very much needed replacement for their ageing and clunky old Patents Act, which was hijacked at the last minute by interests who wanted to include just the kind of software exclusion that you perhaps had in mind with the draft recommendation.

The result of that was a recognition of that debate, a particularly important New Zealand-based company Fisher and Paykel, in fact, were the ones who jumped in and said, "Hang on a minute, this is going to stop us from getting patents on the sorts of technologies we put into our domestic appliances which are all microprocessor-controlled now." So that led to this debate about embedded software, which then followed, which was a complete disaster. It was a huge waste of time and resources, as everybody tried to deal with that.

Engineers can't agree on a dividing line between what is embedded software and what is not embedded or standalone software. So quite how policymakers and lawyers and the Intellectual Property office in New Zealand were going to do that is completely beyond me. It was a terrible mistake to go down that path.

What they ended up doing was to say, "Oh well, let's just copy Europe." Okay, so let's say a computer program is not a patentable invention and to the extent that it's a computer program as such. So what they were hoping there is that they would draw on what has taken, probably, 20 to 30 years to reach a very stable and well-understood position in Europe as to what is a computer program as such, and what is, in fact, a technological innovation that is implemented through the use of software in computer technology and let's just hope that all of that European case law, and in particular the British case law is going to just be followed in New Zealand.

It is early days yet, but from what I'm seeing, that's not happening. New Zealand, in practice in the patent office at the moment is looking very much the way that Europe did 20 years ago, we would have ridiculous situations where somebody had a technological invention and it

would be claimed in terms of the algorithm, so the process as I was discussing before and it would then alternatively be claimed in terms of a piece of hardware, programmable hardware that was configured in order to implement that process, and you would get - despite the fact there is only one invention there, and those are just two different ways of claiming it, you would find that one of those was rejected and the other one was considered to be completely fine. It's utterly inconsistent and it just creates confusion and uncertainty in the system, and we are seeing exactly those kinds of issues now arising in New Zealand.

I think it is in inevitable as IPONZ struggles to implement this regime that's been imposed upon them that at some point a matter will end up going through the court system there. It's got to really get up through whichever High Court it is; Wellington or Auckland; the Court of Appeal and the Supreme Court before you get any certainty. It's going to be many, many years and somebody is going to have to take it through that court system.

We are in the situation in Australia right now where we have had three Full Federal Court decisions that are very consistent that have - as I said, the most important message that comes out of those is business innovation is not patentable but technological innovation is patentable. Some guidelines for how you deal with that - IP Australia, admittedly, is still grappling with that, just as the US patent office is still grappling with the implications of the Supreme Court's Alice Corporation decision a couple of years ago, but the court decisions themselves, I think, are clear.

So we are in a position now where really, I think as I said, we are quite close to the US position. We are quite close to the European position. We have a stable and consistent legal statement from the Full Federal Court and I don't see why we would throw ourselves into the situation that New Zealand is now in where we don't really know what the law is there. We suppose that according to the stated intentions that it is something like the UK, but the wording is not exactly the same and the matter is going to have to go before the New Zealand courts and it could be years before that is resolved. So I really wouldn't want to see that happen in Australia.

MR COPPEL: Thank you very much for participating. Thank you. Our next participants are from the Australian Booksellers Association. So when you are comfortable if you could give your names and who you represent for the purpose of the transcript and then feel free to give a brief opening statement. Thank you.

MR BECKER: Joel Becker, Chief Executive Officer, Australian Booksellers Association.

MR RUBBO: Mark Rubbo, Managing Director of Readings Pty Ltd.

MR WHITE: Tim White, president of the Australian Booksellers Association and owner of Books for Cooks and Microspecialist Books.

MR BECKER: Tim and I will be speaking, then the three of us will be open to questions afterward, so I will be going first. Thank you for the opportunity to present before this inquiry. Over the last seven years we have experienced significant disruption. Booksellers have been impacted by fear mongering that the physical book and the bricks and mortar shop were going to die because of e-books and online bookselling.

With the growth of the Internet and global online suppliers, consumer expectations have changed significantly regarding price and speed of availability. Seven years ago, rightly or not, book prices were regarded as being too high, relative to overseas exchange rates. We have actually seen a significant reversal of trends since the closure of Red Group, which owned Borders and Angus and Robertson about five years ago, there has been stability and many new bookshops have opened as well as expansion by existing franchise operations.

Several existing retailers have opened new businesses. Last year the ABA experienced a five per cent growth in membership, and by membership I am talking about the number of bookshops who are members. E-book sales peaked in 2014 and in more mature markets there has been a net drop in sales. In the US, sales for trade totals dropped from 31 to 32 per cent down into the low to mid-20s, with no sign of any rise at this stage. E-commerce continues to be a challenge to bookshops, but in Australia without physical warehousing thus far from offshore providers, and the growth of an Indigenous online market, this challenge has been met to some extent.

Following the work of the Book Industry Strategy Group and the subsequent Book Industry Collaborative Council, I worked with the Australian Publishers Association and we devised a voluntary 14/14 speed-to-market agreement to supersede the 30/90 day rule, which has been endorsed by government bodies. The ABA and APA and our members have abided by these terms over the last four years. Booksellers have long had the flexibility to order the edition of the customer's choice if not available in Australia.

I asked two of Australia's leading independent booksellers how much stock they sourced from local publishers and distributors. Mark Rubbo who is here today from Readings indicated that that was at least 95 per cent. David Gaunt from Glee Books indicated it was the mid-90s. David also added that over the last 10 years the percentage of stock orders from offshore has diminished as a direct response to more efficient publishing and competitive pricing from local suppliers, so what benefit can booksellers see from having to increasingly source books off shore and more likely, more expensively for them and for the consumer.

As part of an attempt to provide an evidence-based rather than an emotive response to the recommendations, I did a snapshot - which formed part of my submission - comparing present Australian retail price, ex-GST with US and UK prices for trade titles. It was a selection taken using - because I wanted it to be fair to the extent it was a snapshot - every internationally-released title under Readings Carlton front table, along with some randomly chosen new releases, cookery title and new children's books.

I also added, so that there was representation for the more popular end of the market, any bestsellers not already on that list from the Nielsen BookData, which is Australia's leading provider and collates of book-related data. The outcome of the snapshot was to show that at least 85 per cent of equivalent Australian editions were the same or less expensive than the converted retail price overseas or less than 10 per cent more expensive. I grant that this was not comprehensive, but as a sampling it reflects poorly on the recommendations of the review which is based on flawed out-of-date data from 2009.

It is appalling to think that we could have the parallel importation rules dropped using faulty out-of-date information. Without evidence-based dated justifying a change in PIRs, I can't understand how dropping PIRs could be implemented responsibly. I have a comment here also which actually relates to something that somebody said yesterday, that a university lecturer would likely fail any first-year student who used out of date information to justify conclusion when there was evidence that the information was no longer relevant or accurate. Along with the APA, we do support codifying the 14/14 speed-to-market agreement. We are also working collaboratively with publishers to ensure that prices are always competitive.

At the recent 8th Australian Booksellers Association Annual Conference, we had a forum on copyright and parallel importation rules. There were more than 120 booksellers present representing independent and franchise shops. Not a single shop indicated support for the removal

of PIRs. Where is the evidence that confirms that removing PIRs would be beneficial to local businesses, and if local businesses cease to be present, where is the evidence that this will be beneficial to the reader?

New Zealand is often brought up by both sides of the debate. Now I don't know that the elimination of parallel importation rules in New Zealand caused virtually all the major global publishers to leave New Zealand. I don't know that the fact that there are less booksellers in New Zealand than 10 years ago is a result of PIRs being removed, but I invite you to find any evidence that proves that things have improved for the consumer in terms of either price or availability.

Some of the best publishing in the world happens here. Some of the best booksellers in the world are in Australia. We have a system that works. We have a vital healthy book industry that is seen out difficult times. We work through them. Trade publishers and booksellers, at the business-to-business level and at the institutional level are working together extraordinarily collaboratively.

We are an industry which relies on speed-to-market, simultaneous international publication, promotional spend by publishers and the risk sharing of returns. This symbiotic relationship is dependent on the current system. This is seriously at risk if parallel importation rules are eliminated.

The comparative relationship between Australian and international book prices are lower than they have ever been. If PIRs are removed and any or all of the following happens to a lesser or greater extent; that is, that bookshops and publishers close or reduce the size of their businesses, Australian writers stop being published or earning an income, less books are published, jobs are lost, book prices in a less competitive market go up; there is less local availability, a successful creative industry is depleted or literacy rate drops, what are the unsubstantiated benefits worth that risk? All Australians should be rightly proud of the fact that we have a vibrant successful, dynamic publishing industry that tells Australian stories at home and abroad. Why put that at risk?

Publishing Australia is prolific and continues to grow. Australian independent bookselling is a global success story. In a nation of 24 million people we continue to grow, export and win. Our stories are embedded in the culture of Australia, thank you.

MR WHITE: Thank you, Joel. In my former life a corporate lawyer I spent 15 or 17 years reading terms of reference before making submissions to bodies, whether they be the Full Court or a Commission,

so my starting point was to read in detail the 2009 report and to review the terms of referral and reference there, and the terms of referral and reference for this Commission.

When reading reports, whilst the ABA disagrees ultimately with the conclusions that were reached in 2009, it acknowledges that the Commission in 2009 identified and found qualified support for our position in relation to maintaining a form of limited territorial copyright. We believe that the methodology that was used on that occasion was far more detailed and far more rigorous than what is apparent on the face of the current draft report.

In the draft report, you purport to rely upon the 2009 report as a basis for making many of these conclusions about the state of the market in the future of the Australian market as it should proceed. We are disappointed that there has not been able to over in terms of the major macroeconomic factors that have affected the book market. These major economic changes have been blatantly ignored.

The reality is, as a retailer with daily experience, I know that my customers are fully informed. They are often better informed than many shopfloor assistants. They are certainly better informed that any shop floor assistant in a direct department store or a DDS that will simply palletised stock on a one-off basis.'

The reality is that the Internet has since 2009 changed again retail. There is no detailed information, because the government in its wisdom in 2003/4 declined to continue with funding to understand the economic status of the book industry by withdrawing funding to the ABS for an examination of the book industry on a regular basis.

That proposition that the book industry should be reviewed was one of the recommendations of 2009. To the best of my knowledge, that recommendation has not been acted upon and was a fundamental basis before moving forward on any implementation of change to PIRs. In the absence of that sort of investigation and that sort of data, I think it is important and crucial for this commission to step back and to determine whether there have been significant changes.

I have listed the Internet. The reality is that we are perhaps the most Internet-enabled country in the world. We are early adopters of technology. Smartphones - we have one of the highest levels of smartphone participation in the world. I've seen street-livers with smartphones here on the streets of Melbourne, just this morning walking down from the market; a person with an Android capable of accessing

market information from Amazon, Book Depository, publishers worldwide. They have the ability because the network has already been built to have stock sent to them. The volatility of our currency. In the time of my trading, since 2000, I've seen the dollar at .47 and 1.12. Since the 2009 report was issues, the dollar has inflated by 50 per cent and deflated by 50 per cent. The Reserve Bank constantly reminds us that the dollar is currently overvalued and is desperately trying to revalue the Australian currency.

Those sorts of factors have a direct impact on the day-to-day business of the book trade and any retail or importing business. Global publishing mergers, the largest publishers in the world have merged. We are seeing more and more globalisation which is leading to changes in distribution. We have also seen the fragmentation and the disappearance of educational publishing in a deliverable model of real books over the counter.

The educational publisher is broadly, particularly in the US and UK, moving to a direct consumer, one global price, the highest price possible in US dollars, delivered by downloadables and not real books. In other words, circumventing all forms of territorial governments, whether it be by paying tax for deliverables. So the ability for a retailer to actually provide books in a timely way is almost lost.

In my personal experience, I sell an occasional trade book to an apprentice who has been so thoughtless as to again lose their book - their training manual and their knife kit, and a few other things, and so mid-term or mid-year they need a textbook to replace. I can't supply it. There is no supply, because it was available once at the start of the year and it is only otherwise available on extraordinarily short terms.

Now, the ABA is not saying that territorial copyright is something that should be maintained without some form of nuance. We seek a balanced and vibrant debate about the ways in which territorial copyright can act, both as an incentive to publishers and an incentive to ensure that the Australian consumer has the broadest possible range of options of supply, whether it be over the counter, whether it be from an online retailer, whether it be direct, but at the end of the day, we maintain that some form of nuanced territorial copyright will provide economic benefit to Australia.

Now, I have made lots of notes and I realise that time is limited. So what I want to come to the point, ultimately, is that in my personal experience I know that I can't as a small micro bookseller, and I represent the bulk of our membership in terms of size - I can't negotiate with 700 to

1200 publishers worldwide for efficient or fair terms for delivery and supply of books.

I can't absorb $10 to $12 a kilo for delivery of books in store. I can't arrange my affairs in such a way that I have a media supply when I am faced with the reality that supply must come from overseas. Our fear is that by removing territorial copyright you will remove, under the current regime, an incentive to publishers to stop a broad range of material at an effective price.

We believe that the Internet and current global trends in retail consumerism mean that there is effectively a price - the international price. Our personal experience is that those prices that are sold in the store are determined by the Australian market and are lower generally. That means the PIRs effectively allow for and provide risk management for publishers to ensure that there is sufficient supply. The books that we sell in our store are in limited quantities. They are not available in every bookstall, because not every bookstore curate a different collation of materials and endeavours to curate and present that to its audience, to provide a specialised service.

The sort of books that I'm looking for are ones and twos. They don't come in in pallets. If they are not available in store, the consumer will simply say, "I will buy it online." It makes no sense to us that we can say, "We will order it. We will get it to you at the same price, same mechanism, different supply chain." The consumer wants it now. If I don't make that sale that now, I lose that consumer, I lose that customer. The country will ultimately lose in terms of the fact that currently we don't charge GST. Currently those sort of supply chains don't return revenue to the government and they certainly don't in which society.

When I sat down and compared the two options I would have, assuming that there is a reduction of titles available, because risk has increased for publishers, I will lose margin. Currently I get 40 to 55 per cent on a title as a discount. Not one of the publisher wholesalers in the US or UK will offer me better than 40. I get it, sale or return, which means I can take a risk or I can promote a title and risk is shared with the publisher. If I go to a wholesaler, there's no such thing. They tell me it's sale and return, but have you ever tried to send a parcel back the UK? $32 for the parcel to go back, for one kilo. Try to send back 100 books to the UK. It takes three months if you send it by sea. It's not feasible.

So there will be a natural attrition. There will be a natural reduction on the part of booksellers to stock larger quantities of books. This will

lead to a less diverse, less vibrant, less social, less aware community, because there is simply less material available.

In the report, there are a number of other reasons why local supply suitably balanced and nuance controlled, whether it be by 14/14 or whether it be by a price band, whether it be by a recognition that the global market determines maximum pricing, those factors will mean to us that we want to be able to source broadly in the way we currently are. We are continuously negotiating with publishers to incentivise them to ensure better supply on better terms. We are competing globally for our customers already.

MR COPPEL: If you can aim to wrap up - you have mentioned many points and it would be useful to - - -

MR WHITE: I have. Okay. Now, my final point would be this. The 2009 report makes three recommendations in relation to our market and the removal of PIRs. The first is that it should be delayed for a reasonable period of time to allow the market to adapt. The draft report responds and says that, "No, we don't need that time anymore, because the market is adapting." The market is not adapting to the loss of territorial copyright as a mechanism for business management and risk management. The market is adapting currently in response to consumer demand and its needs.

PIRs, as the 2009 report recognised, provided a number of different functions within bookselling and publishing. We will need time, if the conclusion of this commission's report is still the PIRs should be removed. We would say that we still need, as an industry, time to adopt to address the underlying and implicit embedded factors around territorial copyright. It is not about necessarily exclusively speed-to-market.

The second thing is that those recommendations required and recommended a range of inquiries into author support, cultural support and also measurement of the book industry. I have mentioned before, those things have not been done. We would say that even if you were to proceed with a recommendation that PIRs be removed, those measurements and recommendations ought be adopted and ought be included to allow for a proper and fair transition. The current way is simply a guillotine.

In conclusion, thank you. This is a very personal and emotional thing for me. As a bookseller, I love servicing my customers and I dread the day that I will not be able to, because I cannot source a book at a fair or reasonable price and my market is being dictated to by overseas interests that have no interest in a local community.

MR COPPEL: Thank you, Tim. Thank you, Joel. Let me begin by just picking up on the point you made vis-a-vis the 2009 report and the analysis that was done there. In our draft report we initially didn't - we borrowed on the analysis. We initially didn't think that an updating of that work was of necessity for this report, because the way in which the terms of reference asked us to look at the issue of parallel import restrictions is one that was essentially to focus on the sort of implementation of a decision that had been taken in response to the Harper Report to lift parallel import restrictions.

So the idea was then to focus on those transitional issues that would be associated with that decision. We have received from you and many other participants and interest in what that analysis would suggest, if it were updated, so we are going to do some updating of that 2009 work for the final report and we will see what it shows.

MR BECKER: Could I please ask you a question? Are you suggesting, in fact, that the outcome is already determined and what we are giving is victim impact statement?

MR COPPEL: No. What I'm suggesting is that the government has indicated when it released the response to the Harper Report that they had asked us to look at the transitional questions associated with the removal of parallel import restrictions and my answer to you is that we will be doing further work to look at some of the changes that may have happened over the period 2009 to 2016.

MR BECKER: Could that conceivably result in the recommendation to not go ahead with the removal of PIRs or is that not within your remit?

MR COPPEL: I think the - - -

MR BECKER: If the outcome that I got from snapshots and some of the other evidence you have turns out to be accurate on a broader scale.

MR COPPEL: Well, let me put the question to you, because you have presented some information that is based on your own comparison of prices and have said that essentially they are either cheaper here or similar, and that's something that our work may reveal; the work is based on thousands of books. It's not based on a very small number of books.

MR BECKER: I understand that. That was a snapshot. Okay.

MR COPPEL: So if that is the case, what is the - I mean, you are already facing a very competitive market. That is revealed by the numbers that you've suggested that there is isn't very much difference in the prices that consumers face. What would be the change that would be a consequence of lifting the parallel import restrictions? It suggests that, already, individuals have the capacity to directly import a book. It would suggest, from our perspective, that the capacity for a book retailer to do the same would give you a more level playing field in terms of your ability to meet your customer needs.

MR RUBBO: Can I answer that? My business is a relatively large independent bookshop. In my report I've said we turnover about $25 million a year, which probably makes us the largest independent bookseller in Australia.

MR COPPEL: Yes.

MR RUBBO: We have some buying power, but we cannot - I cannot buy a book more cheaply in most cases from an overseas supplier that I can from a local distributor. So I fail to see where an open market would give me any benefit. I think the other most important factor is that many of our major English-language publishing countries, the US, UK or Canada, have a completely open market.

I have been in this industry since 1976. I have seen it develop. When I started, probably 80 percent of the books we sold weren't originating in Australia. Now it's probably close to 40 per cent originate in Australia. To me personally, I take great pride in being part of that history.

Why take Australia out of that eco system where trading territorial rights, I believe, is essential to developing local publishing industries. Why take it out when you cannot demonstrate to me that I can buy more books more cheaply? The only company I can see that would benefit would be someone like Amazon. They are the ones who have buying power that they can go to Random House in the UK - US and say, "I want this price on this book to bring it into Australia.

Random House, US/UK will not deal with me. I have to buy my books from a wholesaler. Now the wholesalers in America are Ingram, Baker and Taylor and Bookazine. The maximum discount I know that they give is 44 per cent off the US retail price. You have then got freight costs. You can't return them. So as I say, I cannot buy that book more cheaply than I can from the local Random House company and I imagine that is true - there are not any retailers big enough to get that price.

Random House won't sell to a large chain like Dymocks, because they have contractual arrangements.

So Dymocks will have to go to the wholesaler as well. The wholesaler, so far as I know, and I may be wrong, would probably get between 50 per cent and 55 per cent discount off the retail price. Their margins are wafer thin. They are not going to give away a huge discount to Dymocks, unless they buy 10 - 20,000 copies of a book, but most books they're buying 100, 200, 20.

I just don't see where the economics of scale are going to come. The only thing - as I say, the only people who are going to be advantaged is the large offshore multinationals who are already really creating havoc in our industry.

MR WHITE: I touched on that briefly in my opening comments and I wanted to say this: I deal with all of the wholesalers. As a specialist bookstore, I deal with over 700 suppliers in countries all over Europe and the US. Given my size, I cannot negotiate on terms of trade in relation to freight, in relation to discount, in relation to boxes.

For example, I order a book from Hachette in France, I get a 30 per cent discount. I get the privilege of paying a fee for the box and a packing fee, and then I have to organise my own courier to do a pick-up from Paris to ship it to London to air freight it, because there is no consolidated air freight for books from France.

So as a specialist, I am already behind the eight ball. I am struggling to compete with anyone who decided to find some cheap way of air-freighting or posting books from overseas. The wholesalers themselves, they are large. The one that Mark was talking about they all proudly state they stock over a million titles.

The bad news is that there are over a million titles published in English every year. That includes of course, POD and a number of other factors, but the reality is that they're still only stocking physically the tip of the iceberg. If we want our customers to have a book today, we need it to be here available to us. The international wholesalers are predominantly domestic businesses with an international supply arrangement. They actually provide an important function in the US and UK markets by an alternate form of wholesale supply. There is no such arrangement here. Their stock decisions are based on their local markets. They don't curate their stock levels based on what they think they might export to Australia. We simply ask and we get when they get it. That's the best we can do. It's the best we've been able to do for 20 years.

MR COPPEL: So that the point you're making is that it's not so much competition that would be coming from individual readers who do make online purchases from Amazon, it's more competition between online retailers - wholesalers like Amazon, with the bookstores in Australia?

MR BECKER: Broadly. We - - -

MR RUBBO: Sorry, what was the question?

MR BECKER: Yes, I wasn't clear on that.

MR COPPEL: It sounds like you are not concerned about the ability for an individual who has the right to order a book online from an international bookseller, it's more the competition that you would see coming from an online bookseller like Amazon, establishing itself in Australia.

MR RUBBO: That is my concern. One of the reasons, I believe, that Australia has such a vibrant retail book market, apart from - certainly independent - is that Amazon never opened in Australia. If you look at every other market where Amazon operates in America and the UK, when they first opened they decimated the independent bookselling sector.

That's coming back, in America particularly. In England it is still very, very weak. Amazon held 40 per cent of the market there. So my fear is that if it was an open market and Amazon could stock - where it could open up here and supply, say, the New Zealand and Australian market with products sourced most cheaply. Amazon Subsidiary Book Depository have just opened. They have an arrangement to supply Australian books to their customers. They use a third-party distribution centre to ship the books, but what they display on their site - so for, if Richard Flanagan for example - what they display on their site is the English editions.

So they are only cherry picking the Australian versions and I'm sure publishers will tell you - certainly local publishers like Text will tell you how afraid they are of that phenomenon. So if you search Richard Flanagan, all your see is the UK editions; not the Australian editions which should be supplied here. But if you search - say, for example, Richard Flanagan had a new book out, and it was only available from Penguin Random Australia, then you would see that on the Amazon site, or once it came out in England, you would see the UK one, because they can buy it more cheaply from UK and Random House.

MR COPPEL: Joel, in your opening remarks, you mentioned some statistics on per cent of sales that are online sales and from book retailers.

MR BECKER: I referred to e-book sales.

MR COPPEL: E-book sales. I thought you also gave some information on online sales?

MR BECKER: With online sales, I indicated - my comments were that e-commerce continues to be a challenge, because you are competing with businesses that you can't compete with, because they are prepared to lose money to get market share. That is the thing we have to be really clear about. People aren't - they've confused the consumer in terms of what a book is worth, because they actually charge in some cases less than they pay for it.

In the case of Book Depository they then ship it at no cost from overseas. If they were - it's kind of a weird thing. If they were operating wholly within Australia, we'd be going to the ACCC regarding anticompetitive behaviour and certainly in terms of if the effects test winds up being applied, that would be the case. But, I mean, Mark has quite a significant online business.

MR RUBBO: Online, there is really only one significant player in Australia which is Booktopia and the chief executive of that company is quite proud of saying what he turns over, which I think he says - he was saying he was heading towards 100 million, which if you say the retail trade here is, say, two billion, that's a significant share.

We don't know - Amazon and Book Depository would have a significant share. They would probably be the largest bookseller in Australia and, of course, that's a great loss to the Australian community in terms of GST that is foregone. But there are no figures on that.

MR COPPEL: Do you have an idea? If you have an online platform - - -

MR RUBBO: We do. About 12 per cent of our sales. So it's about 2.2 million, but it's a very competitive market. We don't compete with Amazon.

MR WHITE: We have found some anecdotal evidence as well. Oddly enough I also deal in second-hand and (indistinct) books. I am regularly buying large collections of books from people - recently published books and they almost invariably still have the receipt of delivery docket in them. Somewhere between 10 and 12 per cent of the books that I buy

second-hand are shipped in from overseas, in my limited small category which is 2 per cent of nonfiction. It's significant.

MR COPPEL: Tim, you made the point that if parallel import restrictions were removed, the industry would need time to adjust. What would you do? What would the nature of that adjustment be?

MR WHITE: Scary days. The first thing I would observe is that the ABA represents approximately 600 to 800 bookstores and we range from micro stores in country towns to businesses like Mark's, and Booktopia who are also members, but if you were to look for the median-sized bookstore, a single store, probably suburban or country with a few employees and not a huge turnover. We are small, small businesses. We will need to somehow find a way to market for those businesses that is viable and sustainable, whether it be by a buying group or enhanced negotiations with wholesalers and fruitful they could possibly be is - who knows?

Perhaps it's - from the bookselling side of things, we will need time to try and find a way to market for the books that we need to sell, because the risk that we perceive is that the three types of books that we think are affected by territorial copyright removal would be, first, Australian-published books. Now, you would say, "What could happen to them? They're still here?"

The publisher has to somehow work out, do they sell the right to an Australian book? Do they increase the price of the Australian book to cater for the potential that they are going to be subverted in their own market by parallel or grade imports? Do they push the price down? Do they not sell rights? Do rights come with conditions and licences? How do we know what volume or supply is going to go forward? There has been no modelling around that, and so we would say that if there is a move towards PIR removal, then there should be modelling around that sort of thing just for the local industry.

There are then two types of books that are distributed or brought in from overseas copyright owners. So first, a business might bring in a book that they will localise. Now, I'm not going to talk about text books, that's a completely different market and that is heading in a completely different direction.

As a cookbook seller, I need books that are in metric, that use Australian language. The number of times I get asked what is a stick of butter or how many mils in a quart. Cookbooks are just one example. Gardening books are seasonal; they use different names. They use

different terms. In nonfiction, it's rife, but in popular fiction books are customised to the Australian market based on Australian cultural needs.

One simple observation is that if you look at fiction, the covers are entirely different. We have a different aesthetic appreciation culturally of what a book should look like to what the American market book do it as. Many people would say American books here are very ugly. There would be a barrier to trade. So we will need to find some way to incentivise local publishers to customise or to Australian-ise content; that is, to buy a right to bring a book - to create the book here in Australia, having bought that right and to sell it at a price that is effective.

One example of a book that is currently available to me, both - it was published in the US at 29.95 USD and it's a book on vegetarian cooking. It's a bestseller. A local publisher here decided to buy the right and sell it in Australia. They reproduced the book with Australian-ised content and sold it at 24.95. Without the territorial copyright protection, they were exposed to the potential that people could buy remainders or dumped book from overseas for a book that they were actually making an effort to sell into the market at a better price in an Australianised context. The third issue is simply the distribution of licensing agency agreements.

Publishers look at their warehouses and say "Every inch costs me a dollar. I need to get a return on the investment of bringing a book into the country." Now, we would say that in the event you remove the territorial copyright protection, they will not be able to make future good plans for bulk buying. The will be - the knee jerk reaction will be to say, "Everything is in there. You can have it, but we will fly it in after you ask for it, and it will be at the spot price when it arrives."

So pricing for retailers will be entirely variable. It will be volatile. Supply will be late and it may be even completely inconsistent, because they in turn will be seeking immediate supply just out of time from another warehouse somewhere in the States. There is then the issue of if we want to do events. Currently, if I want to do an event with an author that has an imported title, I can at least rely on the local publisher to provide me with stock at a fair price at a healthy discount and an ability to return the stock. So I add to the culture of this city by selling books, promoting authors and turning up to events, enriching culture. Mark does the same; many bookstores do this.

If we have to source 200 copies speculatively to go and sit at an event to sell an author, to support the cultural and social fabric of our city, we can't justify it, because what is the risk that we might only sell 20? What do we do with the rest of them? Do we dump them on the market? Do we

pulp them or do we say, "We don't the event" or we only bring in 20 books and look the author in the eye and say, "Australians don't really care, mate."

All of these issues need to be carefully thought through and modelled. I don't know exactly what publishers are going to do but I think you can draw some parallels from what educational publishers are doing with their books and the fact that they are moving to uniform international high prices based on US dollars; they are restricting supply to either direct or through very limited supply arrangements in relation to serious academic titles and they are moving to a downloadable and direct on-demand model tells you that there would be a significant withdrawal.

The 2009 report also acknowledges that there will be a significant transition period where there will be an impact directly on booksellers. Publishers may respond and may be able to reply, but the reported knowledge is that booksellers will suffer.

MR BECKER: I'd just like to add to that, because it's good that Tim has brought up what could happen if the legislation regulation goes through, but I mean, it's so - to even think about it going through is so counterproductive to the aims of Australian society, which is to have jobs, to be culturally rich, there are only - the way I see it there are only downsides and I'd want to see the evidence of any upsides with dropping of parallel importation rules for the industry or for the society as a whole. Economically, in terms of jobs, all those levels - I just see no upsides.

MR RUBBO: Can I just add, I started off selling records and as you know, music is an open market. That industry (indistinct) because there was no collaboration between retailers and the producers. They abused their market power. They wouldn't supply music in a timely fashion or in the quality that was available. If you attempted to import records to - or CDs, because your customers wanted them, they would raid you and serve writs on you. Their prices were too high. They deserved to be made an open market. The same applies to film, which is a closed market but this industry - it understands the problems. It knows that it has to be globally competitive. It knows that it needs to work together with retailers and they need to work together. They know they have global challenges and intelligent - and they - but they are also proud of what they've created.

Admittedly, that hasn't always been the case. When the 1990 reforms came in, a lot of publishers opposed them bitterly and booksellers and publishers were at loggerheads there. So I think you can't sort of compare music or DVDs with this industry. This industry is capable of producing something very good for the Australian consumer at reasonable prices.

MS CHESTER: I just have one question, if I may. So I think we have all acknowledged today and certainly our draft report acknowledged that a lot has changed in the past six years since our - the Commission's 2009 report. So much so that prices have come down. Proactive initiatives by the industry with the 14 days in terms of faster supply to booksellers.

I guess, to some extent, that makes it a very different landscape, when you are looking at it from a transitional perspective. Given the risks of overseas suppliers coming to market. So I guess the question is, if the Australian publishing industry has really lifted its game and it's now a lean, mean machine for booksellers, with the exception of remainders and dumping and we will come back to that in a moment, why would it be that supply must come from overseas? Why wouldn't the booksellers, if they are getting a competitive pricing from local publishers - why would it be that they would look at sourcing from overseas?

MR RUBBO: Well, that is true and, once again, I think I come back to - my point is you have a very sophisticated publishing industry here and once again I say we all in this room should be incredibly proud of what's been achieved, but all our fellow publishing industries, UK, Canada, US - all have territorial copyright. And the reason they have territorial copyright is that so published authors and markets can be exploited for the best advantage for them.

I know that if a book is published here by an Australian publisher, it will sell many, many more copies whether it comes from Australia or overseas than it would if it was just imported and distributed. Michael Hayward will talk to you this afternoon and he buys rights to many overseas books. Many of those books, if they hadn't - if Michael hadn't published them, they would probably sell 20, 30 copies in this country, but he manages to sell two or three thousand. I would argue that that's a great social benefit to this country and to our readers that they're exposed to literature from around the world that they wouldn't otherwise hear of.

MS CHESTER: We might come back to the UK and US on territorial copyright in moment, but I guess my question might still be a little unanswered there in terms of - - -

MR RUBBO: Well, look no, I think that - - -

MS CHESTER: If the publishers remain competitive, as you say that they've become and it looks - looking at some high-level data in terms of

the changes in pricing over the past six years that they have, then why would it be that supply must come from overseas?

MR RUBBO: Well, look, I would turn the question around to you then. If the industry is operating as we would see is good for society, why make changes?

MS CHESTER: So there is an important aspect of the competitive pressure that comes from the removal of parallel import restrictions. It would ensure that the publishers continue to remain competitive over time.

MR RUBBO: I think you can do that in other ways. Canada has done it quite successfully and also you do have the competitive - you do have Amazon and Book Depository exerting quite a lot of pressure.

MS CHESTER: No, and we - I think part of the reason what the industry has done what it's done over the past, sort of, 10 years is because of the online pressure from Australian consumers being able to effectively import from overseas. Just on the issue of the UK and the US, and geography-based copyright - territorial copyright arrangements, I think we probably might need to clarify that a little bit because with the UK it is - but it's within the EU and with the US as we understand it now, it effectively no longer does have parallel import restrictions, given some recent court decisions, about four or five years ago.

MR WHITE: Well, we would disagree with you analysis of the US market. We think that the practical reality is that it is still a closed market and trade publishing in particular acts that way. If you are talking about the Kirtsaeng decision, there's an ongoing debate at a significant level across law schools, academics, judges as to what the outcome of that decision will be. I think it's very difficult to draw conclusions from that in this market for a number of reasons. The first is, it was dealing with second-hand goods. The second is that it was dealing with the doctrine of extinction at first use, which is unique to the US and to Europe.

MS CHESTER: Yes.

MR WHITE: It doesn't correlate with British Commonwealth-based copyright law and it hasn't led to a change in trade publishing practices. What it has done is it has changed the way in which trade publishers - sorry, educational publishers have responded to the market.

We think the relevant aspect of that decision is that the actual practical outcome that has occurred, the way in which Wiley responded to

the decision was to make universal US price for their book worldwide. There was no such thing as benign price discrimination and price discrimination in relation to territorial copyright can be benign or it can be aggressive, and we would say in the Australian market it goes beyond being benign now, because of the extenuating external pressure provided by the Internet and by consumer choice.

The reality is that we believe are territorial copyright ensures and provides a certain level of risk management for local publishers to ensure adequate supply at good prices for us to be able to meet our customer's demands in a timely and reasonable fashion. If you remove the territorial copyright, my personal view and I'm sure the view of our association is that it will actually force publishers to look at how much will the invest in stock in their warehouses? How much will they speculate on buying in a right for a book to make it available to the Australian market?

We believe that there will be a significant shrinkage of available titles immediately available for supply. We think that this top-end view of how the market will work if you remove the PIRs is, with respect, uninformed. We don't think that there has been any proper modelling of what will happen if you remove them. Our deep fear is that there will be a significantly less number of books available for us to sell, whether they be Australian or overseas-sourced.

They are currently competitively priced and are currently competitively priced because of general competitive pressures, because publishers understand that this is an issue and because of the access for consumers. We, as an association, want to go further and we are having viable and significant discussions about exploring further the Canadian model where price bans come into play, so that there is even further tighter control to ensure that there is no aggressive price discrimination. We are territorial copyright now is beneficial for the current global market we are in.

MR BECKER: The think I'd like to add to that too also is in terms of Australian publishing, if Kate Grenville is published by Text, I believe. If a book of hers - the rights are sold to the US or UK market, the publisher over there goes in at a reasonable - what they think is reasonable quantity. If the book doesn't sell as well as they expect in that market we - the word "dumping" got mentioned before - they can then decide to sell it back into the Australian market where it sell well, but it's a cheaper edition.

So it makes that a less valuable - I hate to use the word "commodity", to Text who has invested money in publishing and selling overseas rights, and if parallel importations are allowed, then those books can be made

available and knock the stuffing out of the original investor. And the author's royalties at the same time.

MR WHITE: To expand on that, the issue is that again there is no modelling about what will happen to the market for author rights. We are interfering with a successful industry where we export content. If we remove territorial copyright what is the natural consequence that will happen on the ability of publishers and authors to sell their rights at Frankfurt, London or the New York Book fair? Will they achieve the same market price? I wonder. Will they want to, because they are concerned that they may not be able to sustain the book in the very market they are in.

There is also, it seems to me, an oxymoron in the way that the recommendations are put forward. If the author or the originator of content - if you create a book in Australia under your recommendations, if they're adopted, will have this unique consequence that they will be able to sell, arguably, a more enforceable right to a third party over their own work than they will have themselves in their own market.

That is, if they sell and English language edition to the UK, the UK can assert territorial copyright against the world at large for that edition in that market. They can then dump it back into our market. Our Australian author has no such protection. They effectively are somehow managing to sell a bigger, larger property right than they themselves actually own at the time that the book is created, if these recommendations apply through.

MR COPPEL: I think we have run out of time. We could certainly continue, because it has raised many issues - - -

MR WHITE: Well, can I say, we would welcome any opportunity to sit at the table with your and discuss this, because we think this is a crucial issue for our industry. We recognise that these are complex issues and that you have a very large and very complex report to deal with where this is only a small part of it, but we would welcome any opportunity to sit down and if there are going to be further considerations, Joel and I pretty much - and I am sure Mark would be available too.

MR BECKER: We would be very happy to be part of an industry roundtable.

MR COPPEL: Okay. Thank you very much, Joel, Tim and Mark, and also thank you for your submission on the post-draft report.

MR WHITE: Thank you.

MR BECKER: Thank you.

MR COPPEL: We are going to take a short break for coffee and to stretch our legs - which is available just outside this room and we will come back at 10.35. Thank you. 10-minute break.

ADJOURNED **[10.23 am]**

RESUMED **[10.39 am]**

MR COPPEL: Welcome back. Our next participant is Jon Lawrence from Electronic Frontiers Association. When you're comfortable if, for the purposes of the transcript, you can give your name and who you represent and then a brief opening statement, thank you.

MR LAWRENCE: So I'm Jon Lawrence, from Electronic Frontiers Australia, I'm the executive officer of that organisation. EFA is an organisation that promotes and protects civil liberties in the digital space, often called digital rights, these days, as a generic term. We have been long-standing supporters of access to information and positive copyright reforms in this country.

In general terms, we're very pleased with the draft report from the review and I'll just go through a number of key points that we wanted to highlight our agreement with. We don't, given that our focus is digital, we don't have any opinion on issues relating to physical books, so I'm going to stay well out of that discussion.

Starting with draft recommendation 2.1, which is the general statement about formulating intellectual property policy, we strongly agree with that recommendation and support it. We think that's a good approach to look at it, so it's saying that such policy should be informed by a robust evidence based and have regard to the principles effectiveness, efficiency, adaptability and accountability. So we agree that that's a good starting point.

In terms of copyright terms, we have a long-standing belief that copyright terms have been extended well beyond any reasonable point that one could argue that effect the incentivisation of new creations. The suggestion that anyone undertaking a creative act is going to involve a calculation of potential earnings for decades after their death is fairly

absurd. So we would agree with particularly finding 4.2, we realise this is pretty unlikely to ever happy, but that reasonable initial copyright term would be in the range of 15 to 20 years, post creation.

Certainly, we think it should be less than the lifetime of the author. We are open to the idea that there could be a default initial copyright term, followed by some sort of registration process, which would allow certain rights holders that wished to maintain protection to do so. That would clearly have the advantage of dealing with orphan works and ensuring that they no longer - that having a long, default copyright term obviously would create a whole issue of orphan works where the copyright holder may not be known, findable or even alive. While we understand that that's, given current international arrangements, particularly unlikely to ever occur, we would certainly support a significant reduction in the current copyright term.

Moving on to unpublished works, and draft recommendation 4.1, we strongly support the recommendation and the draft legislation that the government put out to extend, so that there is a copyright term applied to unpublished works. Again, we would prefer that not to be as long as the current term but, clearly, there is an issue there with these works never come out of copyright at the moment, as I think the Library Industry Association demonstrated very well, with their Cooking for Copyright Campaign, I think that was a good way to look at it, where they took things like recipes from Captain Cook's Diaries and said, "We actually can't legally publish this because it's not out of copyright because it's unpublished." So we strongly agree with that and we see absolutely no downside to making that change.

I will touch on parallel importing very quickly. Again, we have no position on physical books and physical products but, in terms of digital products, we strongly oppose any geoblocking or geographic restrictions and we are certainly concerned, particularly with the Trans Pacific Partnership Agreement that there are potential not just restrictions on circumventing geoblocking but potential criminal sanctions involved with that, we think that's an extremely dubious and unhelpful restriction and we think there should be no restrictions on circumventing geoblocking technologies and particularly we would like to see Australian law clarified to that extent. We know and we've certainly had comments that it is not illegal under Australian copyright law, but I think it's important that that actually be clarified and made explicit.

Fair use, very quickly, we're very strong supporters of the introduction of fair use, broad, flexible fair use exception. We, pretty much as you've done in the draft report, support the recommendations of

the ALRC from 2013, so I won't go on about that. Innovation patents, we support the abolition of innovation patents.

Draft recommendation 15.1, about free and open access to publicly funded research, we think this is a very important point. Any publicly funded research should be made available on freely access basis, certainly to Australians, if it's funded by the Australian government. We accept that there may need to be some restrictions about that initially, but it's pretty clear to us that any publicly funded research should be made available to the public. We note that most federal government departments now use a creative commons attribution default copyright licence. We note that most US government organisations actually just publish everything, without copyright, in the public domain. So there's a couple of good examples there.

The last point I think's worth making, just in terms of compliance and enforcement, we certainly support the expansion of a safe harbour scheme with the removal of carriage service provider to extend that to all service providers. We think that's a necessary and overdue reform that will likely benefit copyright holders, in that it's likely to result in a more efficient process for action to be taken on legitimate copyright infringement take down requests. We do note, however, that international experience, particularly from the US, shows that such take down processes, particularly those that are implemented under the terms of the Digital Millennium Copyright Act in the US are unfortunately subject to routine and widespread abuse by rights holders and there, therefore, needs to be some degree of ongoing oversight to ensure that that is kept to a minimum.

The last point I'll make is to very strongly agree with draft finding 18.1, that the evidence suggests timely and cost effective access to copyright protected works is the most efficient and effective way to reduce online copyright infringement. That's certainly a position we've held for many years and we agree that the evidence is in and that that is the reality.

MR COPPEL: Thank you, Jon. In the Commission preparing the draft report you've identified the framework we've used, which is to make an assessment of intellectual property arrangements, based on the community-wide impact, which is the requirement of the PC Act. Another requirement is not to recommend areas that would be in breach of our international obligations so the recommendations are consistent with those obligations. One such obligation does relate to copyright formality, which are not permitted, at least for a period of a copyright life plus 50, the Bern Convention. The United States does have a form of voluntary

formality after that period and you noted that the lack of formality can be a particular problem, with respect to orphan works, given the length of term.

Can you give us a sense as to whether you think there's a role for formalities to play, in a way that is consistent with the international obligations, in a voluntary sense, to address some of the issues such as the difficulties associated with orphan works? Or is it simply just too far in advance, life plus 50 isn't really going to solve this problem?

MR LAWRENCE: I think any copyright term of life plus it becomes a pretty moot point at that point, I think. Any organised rights holder is going to be actively protecting their work and taking steps. Any small author that has written a few books and done their thing and then disappeared into the world is probably never going to be found. Maybe at some point their estate may follow that up. I think unless we can get copyright down to a reasonable initial term, any sort of secondary stage I think is fairly academic at this point.

MS CHESTER: Yesterday, Jon, during the public hearings, we had a novel suggestion put to us by a copyright legal academic and it could potentially address a few of these issues and I just wouldn't mind kite-flying it with yourself. So given our obligations at the moment remain at life plus 70, copyright, say, for example, that copyright doesn't always remain with the author through the life plus 70, it can quite often transfer to a corporate entity, an intermediary. So one suggestion posed yesterday was maintaining our obligations, under conventions and agreements, but at 25 years there's a point where the copyright needs to revert again to the underlying right holder, the originator so, say, for example, the author and that that point in time there'd be some registration process, i.e. the author would realise that right. Two advantages here, it would actually help with the balancing act between the rights of the author versus the rights of the publishers, over time, and there's some new academic work around that balance, but it would also allow us to potentially identify where an orphan work may then be established, which would help folk, in the absence of extensive formalities, of what endeavours are required to establish whether or not you've taken the right initiatives to try to identify the ultimate author or owner of the copyright. Anyway, that was something that was suggested to us yesterday, during the public hearings, and I'd be interested to get your thoughts on it.

MR LAWRENCE: Yes. I think that's kind of similar to our thinking and, to be fair, this is a proposal that I'm not sure if it originated with him, but Lawrence Lessig, in the US, has certainly proposed this initial term

followed by if you do wish to continue to protect your copyright you then have to go through some sort of nominal registration process.

From our perspective we think, I would say, for the vast majority of copyright works 15 to 25 years is actually more than enough for most people but there is the larger, let's use Disney as an example, because it's pretty clear that life plus 70 is all about Mickey Mouse, organisations like that, that do wish to protect things on a longer basis should, arguably, have to put some effort into that. Of course they do, in terms of policing it, but if you look over at the trade mark context, that is something that you have to proactively register and continue to maintain and protect in order to maintain those rights.

So I think if people are going to say, "We need 150 years to make a meaningful return on this piece of creative work" then there should be some effort they have to go to, after an initial term, to continue to protect that, because by pushing the default out for everyone, you create this massive problem of orphan works, which, in many cases, I think people would simply, even if they were contactable or alive would probably say, "God, I've completely forgotten about that, you're welcome to use it." So I think there needs to be a balance there, in terms of giving larger and more lucrative rights holders the ability to have longer term protection, and I say that because I think it's just the pushback on pushing copyright back to a shorter term would be enormous and we've seen that because that's how we got to life plus 70 in the first place. So I think it's realistic to accept that larger rights holders should be able to, if they put effort into it, protect their works for a longer period, but I do like this idea of it defaulting back to the creator after an initial term.

I think if an author licences the copyright or something to a corporation then that really should change the arrangement. There's then no consideration about death and time after death, because corporations don't technically die. Yes, I think, in that sort of situation some sort of registration process is very appropriate. I don't think that needs to be, necessarily, an onerous process, it can be done on a cost recovery basis. To be honest, if I'm a copyright holder and if I feel it's too onerous or too expensive for me to go through a registration process then perhaps that copyright isn't worth protecting after all.

MS CHESTER: Just so it's not misunderstood, and just to clarify, for the purpose of the transcript, so this suggestion was that the copyright would still remain in place for life plus 70 years but at 25 years it would revert to the original copyright originator and - - -

MR LAWRENCE: Assuming they were still alive, or to their successors.

MS CHESTER: Yes.

MR COPPEL: You made the point that you thought that copyright of 15 to 25 years was sufficient. On what basis - earlier you said it was the belief, do you have any evidence or material that leads you to that landing?

MR LAWRENCE: I think if you consider the creative process, anyone that's - we certainly accept and we support copyright very strongly, as an incentive to promote new creative works, but I think anyone that's sitting down and making some sort of calculation that this is only worth doing if I have 40 or 50 years in order to realise a return, I just don't think that's a reasonable thought process that anyone's going through.

I think for most people, to the extent that they are undertaking a creative work for financial return and, of course, many people do it for other reasons, I think looking at anything beyond 10, 15 20 years is just too far in the future to really make a determination. Now, of course, there is the argument that artists have a right and, in some ways they might see it as an obligation to leave something to their children and so forth, and that's not an unreasonable position. But I think if you don't realise an economic return on your copyright, within the first 15 to 25 years, then the likelihood that you're going to realise one any longer than that is, I think, quite minimal.

MR COPPEL: One of the examples that's been put to us is an author of a book that may, many years later, be written into a screen play, a period of 15 years, but quite often screenplays come many years after a book. That's one example that's been put. I guess what you're saying is that initial reward for the effort is one that wouldn't be seen as significant enough, I guess, to give it that initial impetus, which is a different way of thinking about - - -

MR LAWRENCE: Yes, I think that's a reasonable point. I think our position is not necessarily that copyright should be limited to 15 to 25 years, it's just that there should be a default initial term. Anyone that does wish to seek extended protection should have an ability to do that, but it shouldn't be the default. By doing that we then free up the bulk of material. We essentially, largely minimise, if not completely eradicate, the problem of orphan works and, in a sense, rights holders that wish to continue protection can and the people that don't -

MR COPPEL: In your initial submission you made the point that Australia's copyright regime is inflexible and confined to practices that lag behind current technological developments. Can you provide us with some specific examples that illustrate that point?

MR LAWRENCE: Sure. The widespread of social media is probably the most glaringly obvious one, the sharing of images and creation of memes and all these sorts of things which people do every day on social media would in breach of Australian copyright law. So, to a large extent, in that circumstance the introduction of fair use exception would bring the law up to date with current practice.

There are, I think, not just in the social media space as well, but pretty much everything on the internet is a form of copying. The internet essentially is copying. I think if you look at business models such as Google search engine, or search engines generally, social media sites generally as well, it's arguable that these businesses simply could not exist under the current Australian Copyright Act. That's a clear disadvantage to Australian businesses. I think Australian businesses in those sort of spaces are always going to struggle in what is a large, very globalised market. The last thing we need to do is to be putting the Copyright Act down in front of them as well.

I think in order for us to be the innovative and agile nation that we are, we need to move to a broad exception in copyright so that new business models and new service models can be developed and can have the ability to get to market without being shut down, on a copyright basis, even before they get their first customer in the door. I think fair use has clearly worked well in the US for the last 40 years, Singapore. Israel, interestingly, is a good case study. They shifted from a British fair dealing basis to fair use and I think that's one of the reasons why they have a very innovative and dynamic tech sector.

MR COPPEL: You've made the point that it would lead to a situation where you would avoid an innovative business being shut down because of copyright, are there any examples of that, to your knowledge?

MR LAWRENCE: Yes. There's certainly one case here and there have been similar - yes, one case here, which has parallels in the US, where these businesses have been allowed to succeed, which was the Optus TV Now product, where Optus was essentially providing a record and playback service to its users, or broadcast free to air television. Now, the ultimate decision of the Federal Court, I think, was on quite a technical basis but it was certainly - there was no ability for them to say, "This is a fair use, we're broadcasting your signal, as it was sent out, with all your

ads." Of course it was the football codes that took issue with this because they wanted to have their own, exclusive internet based licencing deals. That's certainly one example where I think a fair use exception may have changed the outcome slightly and may have allowed for more innovation in that space.

MS CHESTER: Jon, you touched on geoblocking in your opening remarks. We spent quite a bit of time, in our draft report, trying to better understand the problem of online piracy, which is a gross infringement of copyright holders' rights. So we looked to an evidence base, as we like to do, and in looking at that evidence base there's been some very interesting consumer surveys which try to understand why people do pirate online.

What was interesting from that was a lot of it was a sense of frustration of accessibility, timeliness, cost fairness, so there was always a small cohort, a minority cohort, that will pirate, regardless of what happens, but there was this the middle that matters will be happy to pay if it was cost effective and they had timely access. So that was really the thinking behind our draft recommendation around geoblocking, i.e., not that the Australian government should be encouraging people to do anything illegal within their contracts with the Netflixes of the world, but nor should Australian legislation make circumventing geoblocks illegal.

Now, this is an area where we've received some conflicting evidence and, at the end of the day, we might ultimately need to get some legal advice ourselves, but whether or not Australian legislation is clear that there is nothing in Australian law that makes it illegal for an individual to circumvent a geoblock. You did touch on this in your opening remarks, but it would be good to get your sense of whether or not that uncertainty does exist and, if it does, which part of the legislation?

MR LAWRENCE: So it's certainly my understanding that it's commonly accepted that it's not illegal to circumvent a geoblock and certainly common practice in the DVD space. I suspect most of us here hacked a DVD player to remove region coding and I think there's a pretty general community acceptance that geographic regions on DVDs is a pretty consumer hostile business practice. We would certainly like to see more clarity in the Copyright Act around the issue of geoblocking.

The problem, I think, particularly when you look at film and TV distribution arrangements that unfortunately we're still seeing these industries play out through what are pretty legacy business models, creating artificial scarcity around release dates and all sorts of things which really don't, I think, ultimately benefit anyone in the long term. We're not saying that everything should be released globally at the same

time, but I think there are good reasons why distributors and producers should look to be much more open and accessible in their content.

I think, as you found, in the Netflix example, I think there are up to five million users now already in 12 or 14 months. I mean that's a pretty clear example that Australians are not just happy to pay but, to some extent, desperate to pay for good content. I'd like to hope that at least one of the domestic providers in this space does survive, and I suspect there'll be some consolidation at some point and in a sense that's the market working itself out. I've certainly been spending a lot of time on Stan. I think, right at the moment, Stan actually probably has a better offering than the Australian Netflix because, of course, Australian Netflix is quite restricted, given existing distribution arrangements and that's the market, that's fine.

We think any moves to restrict geoblocking or restrict circumvention of geoblocking as, for example, are included in the Trans Pacific Partnership are, by definition, a restraint on trade and unsustainable and unjustifiable.

MS CHESTER: Could you just elaborate on that, what part of the Trans Pacific Partnership Agreement you feel interacts with Australia's obligations, with respect to geoblocking or circumventing it?

MR LAWRENCE: So I don't have it in front of me, but it's my understanding that there are a number of elements in there which do potentially not just restrict the ability of people to circumvent geoblocking but, in some cases, actually add a criminal sanction to do so.

MR COPPEL: If you could send us that afterwards, that would be helpful.

MS CHESTER: Is that in your post draft report sub that we're yet to get?

MR LAWRENCE: It can be, yes.

MS CHESTER: That would be great, which we're going to get in the next few days, I imagine.

MR LAWRENCE: You were going to get it in an hour but you might get it tomorrow now. Yes, I'll dig that up.

MS CHESTER: That'd be great, thanks.

MR COPPEL: One of the things you mentioned in your initial sub was you thought enforcement arrangements could be made less onerous. Do you have any specific reform in mind that would do that?

MR LAWRENCE: I think we need to accept that the concept of a graduated response scheme is probably likely dead in this country. I think we've seen three attempts to implement one and each time it falls down at the point of who you think is going to pay for it. I can't see any movement beyond that. I certainly can't see a government legislating on that space. That would be, I think, a very, very brave government to go into that arena, I think, given the level of consumer awareness and, in many ways, hostility to these sorts of things that we see on a regular basis and I think that's partly to do with the fact that many Australian consumers do have very long-standing frustrations about the fact that they have been essentially treated as second-class citizens by TV and movie distributors for many years and I think it's going to take some time for people to get past that.

We see the phenomenon now of everything being fast-tracked from the US, which is certainly a recognition of that. But I think the likelihood of a graduated response being implemented here is very low now. I think there's a fair bit of evidence to suggest that they are of limited utility anyway, so putting that to one side. It will be interesting to see how the first injunctions, in terms of blocking off-shore websites and so forth, that are argued to be facilitating copyright infringement, it will be interesting to see how that works. These things are, of course, entirely trivial to circumvent. Literally 10, 15 seconds changing a configuration you can get past these things, so they're certainly not going to stop anyone that is committed enough to getting around it, they can do a quick Google search and work out how to change their DNS proxy settings.

Will they lead to a reduction in more general infringement? I suspect that's doubtful. In fact, in many ways I think one of the things that these cases are showing is just a little bit of what's known as the Streisand effect, where the more you try and hide something the more visible it becomes, in a sense. I think some of the sites that are being sought to be blocked at the moment are probably enjoying a significant increase of traffic from Australia while that court case plays out.

We think that those sorts of enforcement activities are, essentially, futile. Of course, the other thing about site blocking is that, from a server perspective, it's, again, trivial and a few seconds work to jump to a new domain name or a new IP address or have mirrors around the world. The Pirate Bay, for example, is probably the most blocked site on the planet, it doesn't stop it continuing to exist and doing its thing.

So in a sense these sorts of top-down approaches are, I would say, architecturally opposed to how the internet is made and built and therefore they're just not effective. We've always believed, as you found in your report, access timely, cost-effective, convenient access to content and people will pay for it, or the 95 per cent of the population will and copyright infringement is, to some extent, a fact of life and predated the internet. I spent a lot of money on buying blank cassettes in my youth. I think the market has come a long way, particularly in terms of film and TV distribution, in the last 12 months, as we've seen. I think as that continues to pay out we'll see rates of infringement drop.

MR COPPEL: I've just got one final question, it relates to open access for government materials. Yesterday one of the participants made the point that even if it's open, access may be complicated due to things like what was called link rot, as an example, so open, online access. She was suggesting that more is needed to provide that level of access than simply an open copyright for those sorts of materials. I was wondering if you had any views on that point?

MR LAWRENCE: That strikes me as a fairly simple problem to solve, I would think. I mean there are many good online search repositories and search engines that can find content, I think. There's a number of distribution methods now, there are academia.edu, I think medium.com, all of these sorts of spaces that are providing great ability for people to publish material.

I think, in general terms, the way that academic publishing has been controlled and the costs involved do need to be addressed and I think, as a general principle, anything that's produced with public funds should be freely available. How that's suggest, in terms of technicalities, I don't think that's a major issue.

MS CHESTER: Jon, I just have one more question, but I'm also conscious we're starting to run over time. So if this is covered in your post draft report submission then just let me know.

MR LAWRENCE: Sure.

MS CHESTER: You mentioned before, in your opening remarks, about the expanded safe harbour provisions and you mentioned that there would ultimately be benefits to copyright holders. Is that something you elaborate on in your post draft report submissions, or did you want to elaborate on that?

MR LAWRENCE: I pretty much read what we've written, which is by extending the safe harbour program essentially you're brining potentially all service providers coming into the fold where if they put processes in place where a rights holder can come and they can launch a complaint and say, "Look, this is breach of our copyright" they then have a fairly streamlined process to evaluate that and if it's legitimate take it down. Clearly that would potentially be in the interest of copyright holders because it streamlines that process for them.

Where I think many service providers, outside the safe harbour scheme at the moment, just probably simply aren't doing that and they don't have to the clients legal letters and court injunctions, potentially, and so forth, which isn't a streamlined process. So I think that provides some certainty to the service providers, it provides them an appropriate and fairly straightforward process to deal with it. But, as I also mentioned, these sorts of streamlined processes are, unfortunately, subject to routine and widespread abuse, sometimes quite unintentional on the part of the rights holders, so there does need to be some oversight of that process. But we see no reason why a local service provider that's starting a social network for education shouldn't enjoy the same safe harbour protections as Telstra and others.

MR COPPEL: Thank you very much for your participation today, Jon, and we look forward to receiving your post - - -

MR LAWRENCE: I will get that to you promptly. Thank you.

MR COPPEL: Our next participant in Peter Donoughue. Welcome. Make yourself comfortable and then, for the purpose of the transcript, if you could give your name and who you represent and then if you care to give a brief opening statement please do so. Thank you.

MR DONOUGHUE: Thank you. My name is Peter Donoughue, I'm retired from the publishing industry but still actively involved as a sessional lecturer, at Melbourne University, in the Master of Communications program. I lecture on copyright in the industry, that nexus and what's happening in the world of copyright issues and debates. I've got a list of talking points here, which I'd like to read, if that's okay, only one page long. I fully support all the PC's recommendations in this draft report but wish to focus today only on the recommendation to repeal the current parallel importation restrictions. The Commission would be well aware of the antipathy this proposal has once again aroused in the book industry.

I would urge the Commission, in its final report due in a few months, to address the precise reason the industry is so negative. Unfortunately this did not happen in the draft report. That issue is the industry's universal and passionate belief that the Commission wishes to abolish Australia's territorial copyright status, which the PIRs, in inverted commas, make possible. The industry constantly conflates these two quite separate concepts and realities. This misunderstanding needs to be vigorously counted, a stake driven through the heart of it or, as in 2009, the government will be frightened off by proclamations of Armageddon.

Australia is a rights territory naturally, due to its geography, an isolated island with no porous borders and oceans away from the major publishing centres of New York and London, it's population size, which can sustain economic print runs, it's high literacy levels, the fact that we speak English, it's mature and efficient book trade infrastructure, retailers, wholesalers, freight systems, multiple publicity platforms, etc.

Australian publishers can therefore confidently purchase, by contract, exclusive Australian rights and publish Australian versions of overseas titles. They are willing buyers and they'll always be willing sellers. Despite claims to the contrary the PIRs don't grant, enable, instruct or make possible this exclusivity. All they do is protect those publishers who abuse their contractual exclusivity by overpricing and/or underservicing. Book sellers cannot parallel import to offer their customers a better deal.

Provided the local publisher publishes in accordance with the going rate of the Australian dollar, does not indulge in unjustified mark ups, has invested in or contracted efficient distribution and offers trading terms that are deemed acceptable by booksellers and others, then exclusivity can be guaranteed. Operational excellence will invariably secure close to 99 per cent of local demand. It would not be a sound commercial proposition for retailers to buy around.

Finally, I would urge the Commission to undertake another pricing analysis to establish the current state of play in the industry. It could be a truncated version of the excellent 2009 analysis. Today's industry has come a long way from the outrageous pricing practices that analysis showed. This would help confirm, or otherwise, the widely held belief that removing the PIRs would have minimal effect on prices today, which I do believe.

Now, without the PIRs the possibility will exist of parallel importation but, in today's real world, not the probability but at least the competitive threat will always be there. We need to go from "can't legally" to "won't commercially" import. We're at a sweet spot now, in

the industry, where prices and the exchange rate are aligned. The PIRs are therefore neutered, they are benign. They have no effect, either way, on importation patterns. It may well be decades, if at all, before the PIRs are a factor again in industry behaviour. Online and global realities have stunned them. The PIRs grant protection, not exclusivity, but precisely when they shouldn't, when publishers are being uncompetitive. Thank you.

MR COPPEL: Thank you, Peter. I'm still not quite sure of your distinction between parallel import restrictions and territorial copyright. The argument that's been put is that parallel import restrictions are what makes it possible to ensure territorial copyright.

MR DONOUGHUE: Well, that's just wrong. Categorically, conceptually wrong. In practice it's not the way things work. You can gain exclusivity by contract with an overseas publisher or literary agent, without having parallel importation provisions in place.

Now, a number of publishers will say that's not possible, because overseas publishers won't sell you exclusive rights if they consider it an open market, if Australia was, all of a sudden, classified as an open market, as in the Middle East or Africa or South East Asia or Continental Europe. But that's not how the realities of trading in Australia will work. We are not going to be a market where competing editions fight it out. I know many publishers will say, "We may want to buy exclusive rights to Australia, but the overseas publishers will not sell us exclusive rights, they'll only sell us non-exclusive rights." I find that completely and utterly unconvincing. If publishers front up confidently and wish to buy exclusive rights, and pay more for them, then there'll always be willing sellers, that's the way commerce works.

MR COPPEL: So you're saying it's the commercial outcomes, rather than the legal provisions, that allows - - -

MR DONOUGHUE: Yes. The commercial realities are not dominant in the industry, dominant. No bookseller is buying around today. Not just because the PIRs are there, it's just because they'd lose money on the proposition. There's no margin advantage, there's no arbitrage possibility and it would cost them. The air freight is very expensive, return rights are simply non-existent or impossible to indulge in and it's just not, in any way, shape or form, a probability.

There'll always be the rogue outlier, of course, someone who's on the stop, can't get credit from this particular publisher, may buy around from an overseas wholesaler, the American edition or the British edition.

There'll always be that. But compared to the loss of market now, through customers going direct to Amazon or the Book Deposit, it fades into insignificance.

MR COPPEL: You mentioned, in your remarks, that even in the absence of parallel import restrictions the local booksellers would supply 99 per cent of the market, where does that number come from?

MR DONOUGHUE: My own thinking through almost three decades on this issue. From 1989 onwards I've been a supporter of the abolition of these provisions. The point is that I think it's ironic, but I think it's also telling, that the Australian Booksellers Association now are in favour, publicly, of retaining these provisions. That demonstrates, very clearly, their need for and support of local supply.

Australian booksellers are just very, very professional and they rely on local publishers buying rights and supplying, in a distribution sense. They just need that for their business. They would not buy an Indian edition or buy an American edition or a UK edition to somehow thwart the business or undercut the business of a local supplier on whom they rely.

First of all, they'd make a loss. Secondly, they would give a slap in the face to some publisher who supports them, in terms of author tours, functions in their shops, publicity. It doesn't make any commercial sense. It doesn't and will not operate. The ABA have come out and quite categorically said they support the parallel importation provisions, which means, when you deconstruct it, they support local supply, they support local publishers, they want to be involved in this ecosystem locally.

MR COPPEL: A number of participants have made the argument that the local publishers will co-invest in the marketing with book stores, under parallel import restriction regimes, because the risk of that investment being undermined, through a successful book being imported directly - - -

MR DONOUGHUE: By who?

MR COPPEL: Well, current arrangements could be by an individual, it's not illegal to do that.

MR DONOUGHUE: They can do that.

MR COPPEL: But the point is that the nature or the level of the risk and who bares that risk would limit that sort of activity. I'm wondering what your view is on that argument?

MR DONOUGHUE: If that publisher was not publishing with the consumer in mind, in other words, pricing I mean, with integrity and aligned to the current state of the Australian dollar et cetera then, of course, that publisher may well be at risk, but they'll be brought to heel by natural commercial competitive forces. Very few publishers are overpricing today, very few.

In fact the only, I think as a general statement, you could say, the only publishers or distributors who are, compared to the level of the exchange rate, oversupplying today, are American University Presses who don't have adequate distribution in Australia and where the local distributor doesn't get sufficient trading terms to price far more - to lower their prices. Therefore, they might well get bought around, but that's it. So what? It's the competitive pressure they need. But, generally speaking, in the trade, it doesn't happen. There's no overpricing, except in outlier cases.

I think if your new analysis shows, I think what it will show is that most prices these days are well and truly in line, in fact some smaller assessments, over the last few months that have been done by booksellers, have shown that they're, under exchange rate adjusted prices, to their American and British versions, not over.

MS CHESTER: Peter, we did try to seek to focus on the transitional issues around the removal of parallel import restrictions, given the terms of reference we got from the government and the government's response to the Harper review saying that government was minded to do that, but will get the PC to look at transitional issues, and you've touched on a few of those, which we do articulate in our draft report, so the prices have come down since 2009. Where the Australian dollar is at the moment is a pretty good sweet spot, in terms of transitionally managing this.

The other one that we touch on is that we now have quite robust antidumping arrangements, which addresses one concern that the industry has raised. On the issue of prices, we mentioned it a couple of times during the hearings, we are now looking to update that previous analysis for our final report. Are there any other transitional issues that we're missing, in terms of industry adjusting to the removal of parallel import restrictions?

MR DONOUGHUE: No. In my view, no. I mean the Harper Review got it wrong when it assumed that pricing, at the moment, was exactly as your 2009 report suggested, and you've clarified it. The Harper Review was unaware that prices had come down substantially and was unaware -

and strange that the Australian dollar has come down. So you've got two factors at play; they publishers responding to Amazon and the Book Depository, they brought prices down by 15, roughly, and the Australian dollar took them down another 15 when you compare at today's rates. So the Harper Review should have acknowledged that, but didn't. Therefore, their suggestion that there be transitional arrangements, which the government took up, didn't make any sense. There doesn't need to be a transition if you remove something that has no effect.

MR COPPEL: The question then would be why remove something which his having no effect, the key question.

MR DONOUGHUE: There are two or three things that can be said about that. I think they should be removed to stop these zombies from arising at some stage in the future. Secondly, I think they should be removed because every seven, eight or so years we go through this debate, and it's horrible, it's horrible. I'd like to end the debate once and for all. They're the two major reasons. I'm sure that if they're removed, in a couple of years' time publishers and authors will look back and say, "What was that all about?"

MS CHESTER: A lot of people that we've heard from in our public hearings, Peter, have pointed to New Zealand as a case study, as to what will happen in Australia, the Armageddon scenario, if we move parallel import restrictions. It's something that Jonathan have been grappling with, in terms of trying to unbundle a number of factors that may have impacted on where the New Zealand publishing industry is today, given that parallel import restrictions were removed there in '98, but the structural changes to the publishing industry occurred about a decade after that.

It would be good, given your professional background in the industry, to get your insights on what were the factors at play in New Zealand and is that the Armageddon in store for - is it an Armageddon, firstly, in terms of availability of a variety of local content of books in New Zealand and what's happened to publishers there?

MR DONOUGHUE: Well, I was around, of course, in 1998 when the New Zealand provisions were abolished and we had operations, we had a warehouse, we had sales people, we had distribution, obviously, into New Zealand at the time and at that stage, in those years, the price mark ups from publishers who owned both Australian and New Zealand rights were quite high. Of course there was a great difference between the Australian dollar and the New Zealand dollar at that time than there is now, where we're virtually at parity now, $1.04, $1.05. The New Zealand trade, the

booksellers, the educational booksellers, the higher education campus shops were very aware and voiced to us that if the government went ahead and abolished these provisions they would still order from Australia, it didn't make any sense that they'd go directly to the US, that they'd go directly to the UK, but they wanted the freedom to do, when necessary.

Publishers in Australia really upped their game. Everything started to be air freighted, mark ups came down, a lot of distribution operations, particularly warehouses, were closed, that's true, but that's because of global realities. The same thing over the last five years has happened in Australia. Lots of warehouses have closed, publishers have converted subsidiary companies to branch offices, their structures have become global, and those forces that operated out of the 10 years from 1998 to 2008, before the GFC had another effect, they are at play now in Australia and they're at play all around the world.

So I agree with you, in your conclusion I think you quote the Lloyd Access Economics Report on New Zealand, anecdotally I relate to that, I can see that as being genuine. I'm not up to speed on what current publishers in New Zealand feel and do and lament, or otherwise, about the opening of the market. But for 10 years in Australia there was no, no at all, reflection on how terrible that choice in 1998 was. It's only come up now and it's come up in the same way that the importation provisions in the US Copyright Act and the importation provisions in the British Copyright Act have now come into the debate here. I think local publishers, in quoting those endlessly, are wrong also.

They are dormant. If you talk to an American publisher about the importation provisions in the US Act and how it restricts behaviour, or otherwise, they don't know what you're talking about. I mean it makes no sense for an American publisher to buy a British edition of an American book because it would be way too expensive and the cheapest supply is always in the US, obviously.

British publishers are sitting right in the midst of an open market, Continental Europe, and they can buy American editions from Europe, but they don't because the economics of it aren't encouraging. Commercially it doesn't make that much sense. So I just don't agree with the scaremongering by the industry here.

MS CHESTER: Just one other quick question that you touched on a little bit earlier, in some of your remarks, it's been suggested to us that the current arrangements between author, bookseller and publisher in Australia enables an element of risk management and risk sharing with new books coming to market, in terms of advances and in terms of

publishers agreeing to buy back from booksellers unsold books of first releases. It's been suggested to us that the removal of parallel import restrictions would see the demise of those risk management/risk sharing arrangements. It would just be good to get your thoughts around that.

MR DONOUGHUE: I just don't believe it. It's just not going to happen. It's a massive, even virtually demented vision as to how things are going to work out. It makes no commercial sense whatsoever. Now, in 2007, 2008, 2009 when publishers were very, very slow, if at all, to adjust their prices, in the process of the strengthening of the Australian dollar, yes, the fears there were much more grounded that if the PIRs were removed suddenly then there would be a lot of importing. But the publishers would have lowered their prices and adjusted and commercial realities would have got back into alignment. It happened, via Amazon, the pressure from Amazon and the Book Depository. In fact, the Labor government's decision not to proceed with the abolition in 2009, because of the emergency of online realities, Amazon and such, turned out to be correct.

So I suspect that in the industry at the moment I think we're getting a lot of - there are a few thought leaders in the industry and a lot of followers who are really just clueless when it comes to the actual commercial realities of importation and are coming up with all sorts of nonsense.

I'm reminded of the industry here at the moment, in respect of the parallel importation provisions, has been like a small medieval village which sees witches and demons in the woods and they're afraid they're going to come out at night and eat their children. It's a fervent religious belief that the industry is going to collapse if these PIRs go. I just can't understand where that fear comes from.

MR COPPEL: I think we're going to have to leave it here, we've gone a little bit over time, so I thank you for your participation today, Peter, and I call our next participant, who is Dee White. Thank you, Dee, and when you're comfortable if you could, for the purpose of the transcript, give your name and who you represent and then a brief opening statement. Thank you.

MS WHITE: I'm Dee White and I'm the author of 18 books for children and young adults, and I have two new books coming out next year. Despite being an author I do pay tax and I am currently not the recipient of any welfare payments from the government.

All I'm basically asking is for the opportunity to remain self-funding from my writing and to be able to continue to write books that kids need to read and help them deal with the difficulties in their lives, to help them empathise with others who are going through hard times.

My debut trade book, Letters to Leonardo, came out in 2009, which, coincidentally, was when the first PIR thing came about and I was actually there present at that last hearing. The book's about a 15-year-old boy coming to terms with his mother's mental illness and after it was published I received letters from people, from adults and children all over Australia, who told me how much they could relate to the book and how much Matt's experience was like their own life.

There were letters from readers who told me how much it helped them to feel like someone understood their reality. One reader wrote, "My name is Taraka and I'm turning 15 in June. I only just finished Letters to Leonardo 10 minutes ago and I can tell you now, I cried too hard. It reminded me a lot of my own situation and while reading it I often thought about my family. I thank you for writing it." And a grandmother with a mentally ill mother wrote, "I think it's marvellous to have books like this for kids to read and learn about mental illness." These are just two of the examples of why it's important for publishers to be able to take risks with new authors and with important issues like mental illness.

Letters to Leonardo has been used in secondary schools, in class sets. It's allowed me to go into schools to talk to kids about why I wrote the book, about mental illness. It's helped kids who are in that situation to feel like someone understands. It's helped other kids to understand what it's like to be in that situation.

So if PIRs had been removed back in 2009, when Letters to Leonardo came out, and the fair use recommendations had been implemented, I really doubt that most of my 18 books would have been published. Many of them are educational texts and, in Canada, where the fair use provisions apply, educational publishers have gone out of business and creators income has been reduced, in some cases, to less than a quarter of what it was. A teacher can buy one book and photocopy it for the entire class. How is this fair use? If a teacher pays for their mobile phone does that mean that every student in the class should get their phone paid for free?

One of my education novels, Hope for Hanna, is inspired by the true story of a girl growing up in Uganda, where AIDS is rife and children are stolen and forced to join a rebel army. I've also had a huge amount of feedback from readers on this novel, many of them thanking me for telling

them Hanna's story. One group of Australian readers were so inspired by it that they busked to raise money to buy a goat for a village in Uganda.

Books for children have the power to enrich lives, to cross cultural boundaries to allow young readers to share an experience to inspire them to do great things. If what is published in Australia depends on our ability to secure government funding many important stories, like Hope for Hanna and Letters to Leonardo won't be told.

I sincerely believe in the deep importance of what I do, reaching out to young readers, inspiring and helping them through life's hard times. But writing is also my superannuation, it's how I'm planning for retirement, it's a job I'll hopefully be able to do well beyond my 70s. It provides a cumulative income so the more books I have published the more potential future earnings I have. The more readers' know me, the more they look for my books, the more books I have. The broader scope for school visits, where I can introduce even more readers to my books. I'm working towards self-funding my retirement and not being a burden on the taxpayer. But the fair use recommendations and suggestions to abolish PIR restrictions will make that even harder.

When you talk about restricting the copyright to 25 years, it just doesn't work for children's books. Hazel Edwards' book, There's a Hippopotamus on my Roof Eating Cake has just been made into a play, 33 years after it was written. John Marsden's books, more than 20 years after they were written, have just been made into a TV series. Enid Blyton, Harry Potter, they're books that are going to be around for generations to come. They're books that are read by mothers and grandmothers and they pass them on to their kids, so how does that work for children's writers to cut out all of those future generations?

In our user pays society why shouldn't we, creators, be paid fairly for the use of our work? The Commission talks about how consumers bear the burden of having to pay for access to our work, but you don't hear this language being used in relation to goods and services. We have to pay to access electricity services, we have to pay to access water, we have to pay to access telephone services, even if we don't use them. All we're asking, as creators of literature, is that people pay fairly for what we actually produce. We are producers, but we're also consumers and we're taxpayers too. We pay tax on what we earn, including grants and prizes, literary prizes, and we spend money that goes to boost the Australian economy. Book creators are big buyers of books.

On page 130 of its report the Commission states, "Most of the additional income from higher book prices goes to overseas authors and

publishers whose works are released in Australia." Surely the situation will be made even worse by the removal of PIRs because it will make it more economical for Australian publishers to distribute works from overseas parent companies, rather than to produce their own. Even more money will be going to overseas authors when their books are brought into the country and sold, instead of ones produced here. What this means for authors like me is that there will be fewer opportunities for my books to be published in Australia.

School visits are one of the best parts of being a children's author. You get to talk to your readers about your books, you get to share your passion for literature, you get to inspire kids about reading and literacy. A large part of an author's income is derived from school visits. But if you can't get new books, you can't get school visits. If publishers are fighting to stay afloat, they won't have the funds to support authors visiting schools and festivals.

But more important than the financial aspects of this is the fact that author visits in Australia and at literature festivals enrich the lives of Australian children. Our books take them into new and familiar worlds. Our author visits encourage children to pick up books and start reading, to take a journey with us, to venture into our story worlds. Author visits in schools promote literacy and engagement with books and reading.

Where will we get our books published if there are fewer opportunities here? US and UK publishers worry about taking on Australian authors because we're not available to do school visits and it's expensive to bring us over there. So getting published will be even harder, forcing authors like me, if I want to be self-funding, to relocate overseas.

On page 132 of its report the Commission states that our concerns about reduced income would be addressed by direct subsidies and funding. However, in the last few years we've seen funding cuts of $105 million to the Australia Council and the withdrawal of support by the Newman government for the Queensland Premier's Literary Award. The funding pool is getting smaller, not bigger.

I have a few questions for the Commission about their proposal to fund this shortfall of the income through government assistance. What author created income data have you collated in support of this proposal? How much money would be required to meet this shortfall? How would it be allocated? For every author who successfully applies for a grant there are hundreds who miss out, what happens to them? How will they be supported? And where would the money come from to fund something

like this? The taxpayers, the consumers? The very people who are supposed to be gaining from the removal of PIRs. So they might save on books but they're going to be basically having to pay taxes to fund the arts industry.

In this era of budget deficits of $300 million arts funding cuts in the last three years what guarantees can you give us that funding will be provided to stop our industry from dying out like the publishing industry in New Zealand? How would these funding suggestions help unpublished authors? How would unpublished authors get grants for unpublished books when they don't have a track record and nobody to vouch for them? Normally when you apply for a grant you'll get publishers that will write letters, vouching for you. If you've never had a book published you just don't have access to that kind of thing and there won't be grants available for you.

MR COPPEL: Dee, if this is written text, it's perfectly fine if you can submit it because I know we're fairly limited for time.

MS WHITE: All right.

MR COPPEL: So if you want to wrap up your main points and we can have some questions.

MS WHITE: Okay. All right. So basically the effect on me will be reduced royalties, income reduced even further if booksellers can get books from overseas and sell them cheaper, limited opportunities to earn from school visits. The Australian publishing industry currently supports around 20,000 jobs, where's the money for that going to come from?

Basically one of my other main points is that the Commission says that the basis behind this is to generate new ideas and if there's limited access for new authors and creators to come into the publishing industry, how are those new ideas going to be generated when the publishers are going to be forced, because of financial decisions, to stick to tried and true authors with a proven sales record. So how are the new authors going to break in and where are the new ideas going to come from? Basically, how are our kids going to be better off in this world where the access to Australian culture, the access of author's in schools, how are they going to be better off when it's going to be severely limited?

MR COPPEL: There are lots and lots of questions there, we're not going to be in a position to answer them, but certainly I'd like to clarify that in our draft report we do not make any recommendation that suggests reducing the term of copyright. This is something which Australia has

committed to in its international obligations. So the copyright term is not the basis of a draft recommendation in the report, contrary to some of the information that you may have seen in the media. Can I just ask, that misinformation may have come from a draft finding in the report, which suggested the term of copyright of 15 to 25 years is something which - - -

MS WHITE: I think it was you suggested that would be reasonable because the commercial sale of books, beyond a five year period that you said books were not commercial.

MR COPPEL: That's right. And that information came from information from the ABS. I mean you have 19 books so I would be interested in hearing from you how you relate to that, from that information?

MS WHITE: Well all of them are still earning money.

MR COPPEL: Can you give us an idea then as to that profile? Do you typically get a higher level of royalties initially after publication and then see that slow?

MS WHITE: Well some if it is also ELR and PLR and some books are dual purpose. Like my first book, *Jewel of Words*, which is a non-fiction book, it was created for a primary school audience. It's about Australia's national identity, it's a book about Henry Lawson and Banjo Patterson. That has now been repurposed and is being used in Year 12 Australian History classrooms. So kids' books have an ongoing life and they can be repurposed for different situations.

MR COPPEL: So those ABS statistics were saying that something like 80 per cent of the revenue from a new title would be in the first few years after initial publication. You're saying here that it's much flatter than that.

MS WHITE: Yes, and it can change, especially with ELR and PLRs. The more you get out in schools, the more readers get to hear about you the more they'll go to the library and borrow your books.

MR COPPEL: Are you self-published?

MS WHITE: No, not at all.

MS CHESTER: Are you books published overseas and sold overseas?

MS WHITE: Yes, some of the educational titles are published in England as well. So my publishers are Pearson Education and Walker Books.

MS CHESTER: With your arrangements with your publisher in the UK, how does it compare to the commercial arrangements you have with local publishers? I know you're not on the ground over there so therefore you're not visiting schools and the like, but in terms of your royalties and advances and things like that?

MS WHITE: Well, that's all packaged and I only really receive income from the Australian books, at the moment, for those particular education ones, because they were done for a flat fee and I get ELR and I have rising royalties after a certain amount of sales. So most of the income from that is ELR and PLR, which is Australian generated.

MS CHESTER: So just the way the commercial arrangement has been structured you can't unbundle what you're earning from the UK arrangements because it's embedded in the whole contract.

MS WHITE: No.

MS CHESTER: Okay.

MS WHITE: My two new books coming out next year are with EK Publishing and Scholastic, so that will be a different situation again.

MS CHESTER: Dee, I don't know if you were here before, we had Peter Donoughue, who's a retired publisher, did you hear any of his -

MS WHITE: I did hear some of what he said.

MS CHESTER: Did any of that resonate with you, in terms of even where prices have moved from 2009 and the publishers who have become much more competitive and efficient that the removal of parallel import restrictions won't have the impacts that some thought previously?

MS WHITE: Well, I don't feel that way because I know authors that, in spite of what Peter said, I know authors who have books that are being sold or being published overseas and cheaper copies of them are being brought in by online publishers and sold and the authors are not getting much money for them. The books are being produced cheaper in America because the economies of scales there, they've got a larger print run, they're producing them cheaper, they're like disposable books so basically you read them once and then they fall apart.

So those books are being brought in by the online publishers for the same price, or maybe a little bit cheaper than the Australian ones, and that's what they're having to compete with. So I can see already that's an issue and it's going to be made worse. I know at the last Productivity Commission hearing Morris Gleitzman talked about 30,000 copies of his books would be coming in and being sold cheaper.

MS CHESTER: Yes, we heard from Morris in our Brisbane hearings on Monday and had a chance to meet him afterwards and chat further, so that was very helpful.

MS WHITE: I can't see why booksellers, and Dymocks were very heavily involved in the last one, why would they not bring in cheaper books if they can make more profit margins, which is what they're about.

MS CHESTER: I think what the industry is suggesting to us now is that they've become so much more competitive that there's not the price disparities that there were previously. But we're going to do some more analysis around the pricing for our final review work.

MR COPPEL: That's fine with me.

MS WHITE: Basically I think that the Australian publishers will not have the money to - they will not be able to take the risk. I know Walker Books, they're a reasonably small publisher in Australia, they're head office is in the UK, they're already reducing some of their staff. If this is brought in then they will be getting most of their decisions made from Walker Books in the UK. So already you can see that they are choosing UK authors over Australian authors because it's cheaper and they have access to them over there. They can go and do the school visits over there and so it's already getting harder for Australian authors to be published under those circumstances. With the removal of PIRs it will make it even harder.

MS CHESTER: Dee, would you like us to take the full record of what you were - we have to try to limit people to five minutes.

MS WHITE: No, no, that's fine.

MS CHESTER: We could take it as a post draft report submission, that way it will be on our website.

MS WHITE: Okay. Can I email it to you because I've been scribbling all over it.

MS CHESTER: That's fine. If you speak to Ellie, she'll help you out.

MR COPPEL: Thank you very much, Dee, for participating today and also for your post draft submission. Thank you. Our next participant is Peter Gleeson, from Raw and Cooked Media. Welcome, Peter, make yourself comfortable and when you are if could, for the transcript, give your name and who you represent and a brief opening statement. I emphasise "brief" because we are running a little bit behind schedule.

MR GLEESON: No worries. Today I'm just representing myself, contrary to what was originally submitted. Peter Gleeson is my name. As a documentary content creator and producer and as a content creator, I'm very sympathetic to people like Dee and anybody who is creating content out there, and sympathise with the fear that some of these recommendations in relation to fair use conjure. I'm guessing the challenge in any recommendation or report or eventual bill is to be thorough and specific enough to protect the right people and the right publications without being so exhaustive as to restrict usage in the future that is clearly fair. From my perspective much of it comes down to proportionality and of course context.

So today I'm talking from a very specific context, that of documentary production. Documentary and drama don't seem to be differentiated in the current fair dealing arrangements around copyright, and are very different genres with often very different purposes. Documentary is much more, often much more, about critique and evaluation of issues, social, cultural, political, and interrogating the reality that we live in rather than creating a story for entertainment, or for social purposes as well.

So in reference to the Commission's recent report and fact sheet around fair use, I very much agree that the current fair dealing arrangements are too narrow and prescriptive and do not reflect the way people use content, and are insufficiently flexible to account for new and also historical legitimate uses of copyright material. We agree that Australia needs a new principle's based fair use exception in this context which will still protect user rights without undermining the incentive to create.

I think documentary content creators with the current arrangement get a very sour deal when it comes to the use of copyright material, and that's a key word, use, as there are many different forms of use. At present Australia has a very closed interpretation of what is fair in the use of copyright material, and I'm referring mainly here to music composition

and recordings but it might similarly apply to other creative material, be that artworks or other media.

The way in which fair dealing is assessed relies on a very small number of very specific and exhaustive illustrative purposes and if a content creator situation does not fit very snugly within one of these illustrative purposes, or parallels one of these illustrative purposes, creators find themselves facing either great uncertainty and/or financial and legal vulnerability and/or great cost, crippling cost, which forces them to either abandon the creation of ideas and the creation of content, which would be considered totally legitimate in other countries such as the US, or it forces them to modify content in a way that degrades the very essence of that documentary format, that genre in which they are operating.

Documentary or factually based production and consumption, as I've said, is very different to drama. One captures real life, comments on it, reflects upon it, questions it. At its best documentary illuminates truths about ourselves and the way we behave as humans, as we organise ourselves, as we behave as a society, as an economy, as a nation, it equips us with insights and knowledge about ourselves and our culture. But to do so it must legitimately be able to depict reality and all the elements that make up reality, and that includes the creative works and ideas and commodities within that reality.

For what is culture if it's not the way people interact with what is around them, be it ideas of individuals, artists, corporations, politicians, elders, holders of traditions, agitators, be it commercial items or commodities, clothing, food, fashion, buildings, cars, architecture. Or be it other creative work, song, dance, books, stories, public art. Without the freedom to document these elements, documentarians are crippled, the documentary form is reduced and its core asset, the use of reality to relay social and cultural narratives, to investigate and interrogate social mores, to entertain, to reflect, to educate, is degraded.

Fiction and content on the other hand constructs an imagined reality by the use of fictitious scenarios. It is of itself composed from copyrighted elements such as screen play and more often than not composed music in one form or another. Sometimes the music is a dedicated score in which case the copyright of that score is protected, as it should be, from being unfairly appropriated by others. Other times existing music might be applied extradiegetically or performed within a scene as it is written in the screenplay. And in this case of course again copyright protection is applied and should be applied by the use of licensing fees for both the composition and the recording.

In this constructed written the pre-existing musical work is, under the current law, protected - sorry, I'm repeating myself a bit here - from being illegally exploited or appropriated and a licence fee usually paid precisely because it offers up meaning that is utilised by the filmmaker in a deliberate and premeditated way and in which uses the work in a way which replicates the original use. Now in a documentary musical compositions can be used in different ways, and I would like to contrast two ways.

The first way is very similar to the way music is used in drama, a filmmaker will construct a scene out of elements of reality and they apply music or other creative works. And in doing so will add that extra layer of meaning extradiegetically, in the same way that you would in drama. And we should licence that and reward the artist for that. However there are situations in which music and other creative works already exist within the reality that is being recorded by a documentarian and which comes to exist in the footage because it forms part of the reality which is being documented. It might be completely incidental to what is happening within a particular scene.

For example, on a jukebox in the background or a radio or a TV, and have zero relevance to what is important in a scene, or it might be in a scene whereby real people are reacting to the works in a way that illustrates something of importance and in doing so transforms the meaning of the creative work in isolation into something else which will have an illustrative effect. An example, just off the top of my head here, a doco about neo Nazis in which the subjects are shown listening to neo Nazi music as a way to illustrate how neo Nazi messaging might work, how neo Nazi values are introduced or naturalised through ritual, et cetera, et cetera.

So the meaning associated with the song being used does not replicate the meaning of the song itself, and it's considered transformative. And this is an established principle, as you would know, in other countries. It's this kind of usage that needs to be differentiated from normal usage as music applied extradiegetically or deliberately to appropriate meaning from the original work. At the moment it's assumed that all use is deliberate and controlled and so purely incidental music captured in the background of documentary footage is subject to the same interpretation as if someone applied it extradiegetically.

It creates situations in which documentarians are faced with huge licensing costs should they wish to use a creative work that is already embedded in footage as a result of already being embedded in the culture that they're documenting. Moreover it disables them from being able to

truly document reality in that reality arbitrarily or accidentally happens as it - sorry. Moreover it disables them from being able to truly document reality if that reality arbitrarily or accidentally happens to contain copyrighted work and as such, especially with documentarians who work on tiny budgets, they're often faced with coming up - producing a film where sometimes 60, 70, 80 per cent is devoted to paying for music.

Of course, we acknowledge that the use of such footage containing copyrighted material should be fair and proportionate. The interpretation of this fairness and proportionality, however, cannot be encapsulated in any meaningful way simply by applying a tiny handful of impractical exhaustive and limited illustrative purposes. The American university, Washington College of Law Centre for - - -

MS CHESTER: Peter, can I just make a helpful suggestion?

MR GLEESON: Yes.

MS CHESTER: Because we're going to run out of time to have any discussion with you. Because we can only really allow five minutes for opening remarks and I think you're about 180 per cent over that at the moment. We can take that and make it a post draft report submission so it's then in the evidence base. But I think unless there's any really new points you wanted to make I'd rather we have a chance to get into some questions with you?

MR GLEESON: Absolutely, yes.

MS CHESTER: If that's okay?

MR GLEESON: Sure, yes.

MS CHESTER: Because I just saw there's another page to come and another page to come.

MR GLEESON: Yes.

MS CHESTER: Yes.

MR GLEESON: Yes, so I guess my main point is that the crippling costs, the fact that it's very different to drama and the illustrative purposes just don't allow for that. It's been proven, or at least suggested in the literature that I've read, that when fair use is open to interpretation by the courts it does not result in some huge backlog of cases before the courts. It is very rarely in the courts. It happens in the open and people kind of

know the boundaries of what is fair and what is not. At the moment there's a lot of content that just doesn't get produced because of the costs associated with it and there seems to be just an acceptance that if there's music that happens to be captured incidentally that you either have to pay for it or you're going to be very, very vulnerable. We all know kind of how the publishing and record companies go to approach that kind of thing. Thank you.

MR COPPEL: Well, thank you, Peter. I just wanted to pick up on that last point, is it that the default regime is to make those payments even though you think there may be still an ability under fair dealing, under our current copyright law, to use that material as an exception but because it's a little uncertain the safer option is to make the payment for the use of that material? Or is it the - I mean, you presumably work quite a lot in archives, is it the repository that is conscious that there may be a risk from their perspective in allowing access and use of the material in a way that may be in - may be, it's uncertain - in flout of the copyright law?

MR GLEESON: Well, I think with archives it's a little different to observational documentary in that, and I don't have a lot of experience in archival work, but my perception is that archival work is usually pre-licensed. Or if it isn't decisions can be made prior to production, in preproduction, or even in production, as to whether or not there's going to be a certain cost involved. It's a lot more certain than if you just happen to capture something and then try and licence it. If you just happen to capture something and then try and licence it you're at the mercy of whatever arbitrary fee of a record company and of a publishing company would like to put on that.

MR COPPEL: So you're mainly making contemporary documentaries, is that right?

MR GLEESON: Yes.

MR COPPEL: Yes, okay.

MR GLEESON: So there is an attitude where it's just not worth the risk so you pay what you can, or it's just not worth the risk, you just take it out. Or you find a, like a sound alike, in which case you present reality but it's not really reality because you are reconstructing a scene and trying to implant that into observational footage, which degrades your key asset as a documentarian that you're showing reality.

MS CHESTER: And it's primarily music that you have this issue of incidental capture within your documentaries?

MR GLEESON: Yes.

MS CHESTER: So I guess two quick questions. So the first one is how do you deal with that today in terms of is it example by example of what music you're picking up in a documentary film that you then have to go and identify the rights holder or who represents them and then seek permission or make some form of commercial payment, or is there sort of some umbrella arrangement similar to licensing?

MR GLEESON: No, it seems to me that it's very unregulated, there doesn't seem to be a code of practice, there doesn't seem to be some way you can estimate what things cost. Everything is skewed to the advantage of the publishers and the record companies. There isn't supposed to be any favoured nations type negotiating but there doesn't seem to be any regulation around that. There doesn't seem to - I mean, you're just kind of at the mercy of the way that people want to negotiate with you. So what happens as a result is all the money for the production potentially - or a large amount of the money for the production, potentially goes to music costs. It might be one per cent of your actual content but it goes to them and it goes largely offshore I imagine and it stops you from having that money to spend on further productions, other production values if employing people.

MS CHESTER: So if we were to take an example of I think one of your documentary films, Hotel Coolgardie, which I'm assuming is a pub?

MR GLEESON: Yes.

MS CHESTER: There's always music in a pub. How much of your production costs would have been absorbed by paying the requisite fees for the incidental background music in the shooting of that documentary film?

MR GLEESON: I don't want to go into that too much but what I can say generally is that another approach that people take is to stagger their licensing costs. So it may be that you pay for the territories that you can afford at that time or the format that you can afford at that time, whether it be festivals, theatrical, video-on-demand TV, whatever, so it's very uneconomical to do it that way.

MS CHESTER: Are there any sort of concepts that you had, like creative concepts for a documentary film and then you've just thought it's not going to be economic because there's going to be so much incidental music such that it's going to make it unviable to - so I'm just trying to get

a handle on what chill effect is this having on you in terms of what you can and can't do as a documentary maker?

MR GLEESON: Well, again, just speaking generally, yes, it's on everybody's mind. As soon as music comes up and there's - you have to consider that your costs are going to skyrocket. If I shot a documentary about this room that went for - and I shot for the whole day, and nobody came in here with their ghetto blaster, my costs would be minimal. If someone came in here and walked past and had a song playing potentially I would have costs on my hand.

MS CHESTER: I think shooting here wouldn't be commercially successful for you, but - - -

MR GLEESON: Anyway, if you have these local scenarios, if you were - I don't know, if you were doing something on the Tiananmen Square and the guy in front of the tank, this is an extreme situation, and somebody walked past playing a popular song, currently there would be a very strong argument that you would need to licence that, even though it's completely irrelevant.

MS CHESTER: Okay. So with what we're recommending on the fair use with the fair use factors and the illustrative examples?

MR GLEESON: Yes.

MS CHESTER: Does that kind of resolve the issue for you going forward?

MR GLEESON: Yes, we really support that. But I guess being that there's a lot of opposition to the fair use principle in general, if the fair use principle were not to be adopted, if there were just to remain a fair dealing principle, then those illustrative purposes really need to be expanded because they are so constrictive and so crippling to documentary filmmaking in an observational context.

MS CHESTER: It would be helpful for you and it would be quite illustrative of itself if you could sort of just even in an email tell us what would need to change to the fair dealing to bring it up to speed with documentary filmmaking and incidental use of music.

MR GLEESON: Yes, I'd love to do that, yes.

MS CHESTER: That would be fairly helpful.

MR GLEESON: Again it comes down to proportionality because you don't want to be - I mean, you can't feature an entire song or an entire book or anything like that but if there's a piece of work that is featured in your documentary to illustrate a point, to make an argument, and you're not exploiting that for its own, that reflects the original purpose of that song, if it is a transformative use, then I think that's a very legitimate use and that most people would consider that fair.

MR COPPEL: We've had a number of submissions from documentary makers and that made similar points to you, they've also emphasised just the cost of the royalty payments for incidental use, but also the time involved in getting permissions.

MR GLEESON: Yes.

MR COPPEL: What's your experience?

MR GLEESON: Just speaking generally, what the current arrangements allow is for the record companies and the publishing companies to leverage the amount of time you have. When you're creating a production you have a very strict schedule and you have a lot of bouncing balls, there are a lot of things that need to come together at certain times. If you are vulnerable within those arrangements then that's open to complete and utter exploitation.

MR COPPEL: Okay?

MS CHESTER: That's good.

MR GLEESON: Yes, you got it.

MR COPPEL: Thank you very much for your participation.

MR GLEESON: Thank you.

MS CHESTER: Thanks, Peter.

MR COPPEL: Our next participant is Con Sarrou from, yes, the Association of Liquor Licences Melbourne. Make yourself comfortable and then if you can give your name and who you represent for the transcript, and a brief opening statement. Thank you.

MR SARROU: Yes. My name is Con Sarrou. I'm pleased to appear before the Commission on behalf of the Association of Liquor Licences Melbourne. Our association represents the views of bars, nightclubs, and

live music venue proprietors in Melbourne and is run by a committee who work on an honorary basis. I've been a licensee for 20 years and have formal accounting qualifications. The main problem we have at the moment is the high cost of copyright that's levied on businesses, like bars, nightclubs and music venues. What I might do is quickly go over some of the points so you've got more time – a little bit more time for discussion because – yes.

MR COPPEL: So we've got your initial submission and your post-draft submission. We've got the points there. So if you want to - - -

MR SARROU: I just want to probably paint a picture of industry and how we interact with the copyright agencies and give a little bit – a few examples as well on that so I'll just – but we do want to say that we agree with the Productivity's Commission draft finding that Australia's music copyright arrangements are skewed far too heavily in favour of copyright owners to the detriment of both consumers and intermediate users and also that we support the direction the Productivity Commission is taking in attempting to achieve a fairer system which balances the interests of rights holders, licensees and consumers.

The other important thing is we're not saying that licensees should not pay copyright fees, but rather we're saying that Australian licensee should be paying a fair price for that music copyright.

I just want to give you an example, say, of a – the way that the copyright works. Currently in Australia we're paying – we pay money to two copyright organisations, APRA and PPCA, one on the publishing and one on the sound recording. A song in America, for example, a Katy Perry song, if it's played in America they might be paying the equivalent of about 20 cents a person for going into a venue. I mean, all of the licences are structured differently, but we try to get some sort of base level. In Australia we're paying 85 cents a person to APRA and about $1.27 now, I think, to PPCA. So it's over $2 a person.

The impact of that is it's a distribution of money. So the money that's collected in Australia, or in America for a Katy Perry song, remains in America. In Australia, we collect over $2 a person walking into a music venue, and apart from running costs the majority of that is sent back overseas. If it's an Australian artist getting their music paid overseas it's a lot – a small amount of money is raised overseas and the money remitted to Australia is a lot less. We've estimated that the Australia small business are paying probably seven to 10 times more in copyright fees than what overseas businesses pay. I think, in your draft report, you mention that the way that we can work through this problem is going to

the Copyright Tribunal, but that's probably an overly complex forum, say, for resolving copyright issues for small businesses.

Just a little bit about APRA and PPCA, they've got different fee structures and different methodologies. APRA is based on – charge their fees on people attending a venue. PPCA charge on the venue capacity. It impacts the way businesses can make decisions because if you've got a quiet night or a mid-week night, if you decide to open up, you have to take into account the cost of these fees, copyright fees. I did give examples in our previous submissions, like you get a venue with a capacity of 350 people and you want to open up mid-week you'll still be required to pay to APRA 85 cents on the people attending and to PPCA your capacity by $1.27. So if 20 people walk through the door, you'll still be paying 350 people by $1.27. That makes a big impact on whether music venues decide to open or not. That then impacts, I guess, economic activity and employment and all those other things. To be able to play music, you need licences. You can't get away without having a licence, an annual licence, from APRA and PPCA.

With APRA there's a – to give you an example of some of the conditions that you have to sign - you can't negotiate these conditions, they're part of your agreement to play their music – fees are payable in advance, APRA may require a licensee to provide attendance figures in the form of a statutory declaration, licensees must on request provide a list of all music played at the venue in the form specified by APRA, licensees must keep accurate books of account in sufficient detail to ensure that amounts payable to APRA can be properly ascertained, APAR reserves the right to audit and examine the licensees books of accounts, and in the event that APRA establishes that amounts owing to APRA have been under-reported by more than 10 per cent pay the cost of the audit and APRA may immediately terminate the agreement of the licence, or if the licensee does not pay any sums due.

So they're the kind of day to day pressures that small businesses have to undertake outside of the normal pressures of running a business.

I just want to mention a little bit about PPCA. Unlike APRA, PPCA does not provide a list of songs that they represent. To us, it's important to have their song repertoire because being a copyright on the recording, you could have an original – a song that was written and recorded, say, in America, written in America, if a cover version of that is written over here it's possible that the cover version is covered by APRA but not the original version. So without having a repertoire of the songs you may not know if you're infringing copyright.

PPCA's position in the past has been that all music is covered by them, all recordings. Even if they've told me, even if it's one song and musician on that song that's covered by them then you need a licence. If you need a licence you have to pay the fee that they charge basically on your capacity. They're some of the day to day dealings that you have when you're dealing with copyright.

The main issue that we said was, really, the cost of copyright. As a result of the big price increases, they've probably gone up 15 times what they were 10 years ago. We then looked at the overseas copyright agencies to see what they're charging by comparison. We are paying closer 10 times more. It might be five times more. It depends on which country you look at. We then thought well we've tried to reduce copyright fees for business but we've had no great opportunity to do it. That's why being able to be part of the Productivity's Commission review is important to us. Look, there's probably – I won't go into the figures of the tables.

MR COPPEL: I think we got those in the initial submission, yes.

MR SARROU: I've done that. I've got other copies here. I'm happy to provide the spreadsheets where they came from if that helps you verify figures. But that's about it. I should've mentioned also that we've got – they are interstate industry associations like ours and the one in Western Australia and South Australia both wrote to me saying they're supporting what we're doing today.

MR COPPEL: Thanks very much, Con, for those opening remarks and also for the initial and the post-draft submission. You made the point that there's a negotiation between the collecting society, but that negotiation, you suggested, was sort of like a take it or leave it. That would then leave you, if you were dissatisfied with that, with the option of going to the Copyright Tribunal. But you made the point there that it's overly onus. Could you just explain what you mean by the difficulties of bringing a case to the Copyright Tribunal?

MR SARROU: Yes. Okay. We're in a position where the copyright fees have increased about an average of 10 cents a person in 2006 to over $2 a person today. A person, even myself, involved in a venue - it was a large venue - to even think about going to the Copyright Tribunal to put a case, we really don't have the time and the resources to do that when we're running our businesses, and when our time is spent on things like our association. We're just doing it on an honorary basis. We're not big enough to have resources that can follow these things up.

When that case did go before the Copyright Tribunal, brought up by the PPCA, that led to the increase in the costs, I mean, licensees weren't invited into that. We didn't know about it actually when it was happening, so.

MR COPPEL: Who was the case against?

MR SARROU: It was the PPCA had a report from, I think, it was Allan's Consulting about the value of music and they went with that document to the Copyright Tribunal to argue for increase in copyright fees.

MS CHESTER: So they go through an authorisation process with the Australian Copyright Tribunal for fee increases?

MR SARROU: Yes, they went through that in 2006. A bit like, I guess, all licensees and all their – well all – as a licensee back then we didn't receive any notification from PPCA that they were doing that. So as a stakeholder or as a licensee we probably should've done. But, I mean, they went and got a – probably a very expensive and convincing report and - which they took to the Tribunal and the Tribunal agree with them. But one of our issues with that was that the Tribunal didn't probably look at overseas rates or comparisons, they just took that report and made a finding on that. That's where we find ourselves today.

MR COPPEL: One of the reasons that the ability to negotiate can be limited, that's being put to us, is that – I mean, the collective societies have a, sort of, mandate in this space for licensing of copyrighted material. There are codes of conduct. There's a code of conduct in Australia. It's been said that the level of transparency and accountability in those codes of conducts, which are voluntary codes of conduct, are limited. I'd be interested in getting your perspective on the role that such an instrument plays in terms of that relationship between your members and the collecting society.

MR SARROU: There is a code of conduct and if we didn't have the high level of copyright fees that we have then, I guess, the code of conduct is – yes, is for people to have a complaints mechanism. What our people are saying is they wouldn't have to – they wouldn't have a complaint if we weren't paying these high fees. So not many people actually use, that I'm aware of - say would go to the code of conduct.

If I can say it like it's a master-servant relationship. So it doesn't matter what you'd put forward, I mean, if we put forward that they should reduce their fee, well they wouldn't agree to that. So there might be

peripheral issues that they might look at. But they wouldn't look at reducing the fees and that's the main problem that businesses face is actually – yes.

MS CHESTER: So, Con, you mentioned that you can't get a list from PPCA of the artists that they're, effectively, representing. I guess, one of the key issues around transparency and accountability is, I guess, follow the money. Are you able to tell from PPCA reports what they're collecting and then who it goes through to? Is there a sense of what we would call hypothecation, so the $1- whatever it is for Katy Perry actually goes through to Katy Perry as a royalty flowthrough?

MR SARROU: I've had a look, in the past, at APRA's financial statements. I guess I haven't found PPCA's. They're a proprietary limited company, so I'm not sure if they're published. APRA do publish their figures.

MS CHESTER: Can you follow the money through those things?

MR SARROU: Not really. When I've looked at APRA's financial reports, they quote the money – the reciprocal money that comes in from overseas, but they don't quote or state in their public accounts what money goes out. So the fact that we're collecting substantially more in Australia, you would expect, sort of, for the copyright fees and if the majority of music is coming from overseas, you would expect the majority of their fees, or the net collection fees, getting paid to the overseas collection societies in the countries, say, in the Katy Perry. But that's not – APRA don't publish that in their accounts. So it's a bit hard to know the net outflow of money, but it would be significant because the majority of rights holders are overseas.

MS CHESTER: Yes.

MR COPPEL: Is that important to you? I mean, does it really matter?

MR SARROU: Well, it doesn't really matter to us. But it matters to the point that it's impacting the running of businesses because there's an economic impact. So, I mean, APR, because they're concerned that people might be under-reporting, they send people into your business. APRA will say that they introduce themselves at the door, but most – the venues will say they don't. So we've got people – they're hidden people with clickers, that's the – so the amount of money going out and how they run that side of the business is, sort of, it's of no business of ours. But we're just saying in quantum, in quantum, that the level of money going

out is really coming from the pockets of small businesses that are just trying to survive.

MS CHESTER: Yes. The reason I, sort of, asked the question about the transparency and accountability is that given the price disparities that you've mentioned between what a licensee would have to pay in the US versus here to listen to the same piece of music, and given there's no cost differences in terms of accessing that music given it's all digital these days, it would suggest that there's a very different licensing or royalty arrangement that Katy Perry has in the US than what she has here, or the money's been divvied up a different way. So that's why I, sort of, wanted to get a better handle on that.

MR SARROU: Yes. I don't think there's a different licensing arrangement. I think APRA hold the rights, say, to play – they have the rights because they're part of a global affiliate – all the global affiliate organisations, the collection societies. So there wouldn't be a different pricing regime with the Katy Perry song here, it's just that APRA and PPCA charge a lot more for their licences and whatever money comes in, than what they do overseas. Yes.

MS CHESTER: So Jonathan mentioned the voluntary code of conduct for Australian collection agencies. As part of our inquiry we actually went to Europe and also spoke to some folk in the UK. We're not still sure whether the UK is part of Europe but it's – the numbers are coming in as we speak. It's not looking too good.

We spoke to a gentleman who actually heads the, sort of, equivalent of APRA or PPCA in London. He said that the EU has a determination, which we now have a copy of, which requires – and it's compulsory. It sets out the governance arrangements for collection agencies in Europe, and it also goes into issues of how they're meant to negotiate and what's considered to be fair and reasonable. It'd be really helpful if we gave you the details of that, if you could have a look at that and let us know whether or not you think that that might be improve matters for your negotiations and transparency and accountability.

MR SARROU: Yes, I'd appreciate that. I'm happy to look at that. That's one of the things that has been too difficult in the past to actually have a forum to try to get a fairer deal. Yes.

MR COPPEL: Have there been any cases that you've brought, or in other States in Australia, to the Copyright Tribunal?

MR SARROU: No. I mean, we're probably, it's probably something we might need to do in the future subject to – if nothing changes is to get a collective to go to the Copyright Tribunal and probably look at that original case in 2006 and have someone review that, the evidence in that, so.

MS CHESTER: It was suggested to us in public hearings in Sydney that under the voluntary code of conduct that there's a requirement to report complaints to the Copyright Tribunal. So if these two organisations get a whole bunch of complaints, that goes through to the Copyright Tribunal. The Tribunal is meant to do something about it. So it might be worthwhile having a look at that aspect of the code of conduct as well, because it would suggest that the Tribunal might need to act if there's a plethora of complaints without an individual having to actually make – go directly to - - -

MR SARROU: What we did a year and a-half ago, went to the National Small Business Commission in Canberra, and we put the same, sort of - our problems forward to him thinking it's from a – in that forum. Then, I mean, they received, I think, 58 submissions which included four State based industry associations. So they got a reasonable response. It mightn't sound like much but when you include that it includes a State based organisations. But it's been a little bit difficult to get – to convince people that our segment of industry has a problem.

MS CHESTER: Okay. Con, in your post-draft report submission, you mentioned something about allowing parallel import restrictions to be removed.

MR SARROU: Yes.

MS CHESTER: Which doesn't currently apply to music. So I wasn't sure how to connect the dots to how that would help your members.

MR SARROU: Yes. It was just an idea that came up in one of our discussions that the fact that we can import, you can import beer, you can import music CDs. If the prices charged in Australia are that high, our thinking was why couldn't we buy a licence from overseas?

MS CHESTER: I get it. Okay.

MR SARROU: Yes, sorry. Just from a legitimate organisation, it could be from BMI in America or PRK in the UK. It would be APRA's affiliate. It might be difficult to manoeuvre something like that because they're all as – probably they've got regional arrangements. But in the

bigger picture we're saying, like, if APRA and PPCA say, "There isn't really a problem here, the rates are fair", then we would have no objection to somebody, a business in Australia, say, buying their copy of it – basically buying their copyright licence from overseas and they'd be paying the fees, probably provide a song list, and the overseas association would just distribute that money like they would normally to a local business.

MS CHESTER: Okay. So what precludes you now from entering into a licensing arrangement with the collection agency in the US? Is it that there's territorial allocation of those rights?

MR SARROU: I think it's territorial. We actually tried. We just did it as a bit – our association did it a few years ago. They said, "No, no, you'll have to deal with your" – "the Australian collection agency". They wouldn't deal with us. But that's not to say that doesn't have to change, yes.

MR COPPEL: Was that a legal requirement on them or was it simply that they had their network and therefore to - - -

MR SARROU: Yes, I'm not sure. I think it might be more. Probably an agreement they've got amongst themselves. So they do belong to a – sort of, a global – yes, a global network. So they'd have to have probably their own rules in there.

MR COPPEL: Yes.

MS CHESTER: Okay.

MR COPPEL: Well thank you very much for participating today and also thanks again for the two submissions that you've put in.

MR SARROU: Okay. Thank you very much.

MS CHESTER: Thanks, Con. Con, the team would be interested in the underlying data and where you sourced it.

MR SARROU: Beg your pardon?

MS CHESTER: The underlying data that you had.

MR COPPEL: The spreadsheet.

MR SARROU: Yes, yes.

MS CHESTER: The spreadsheet.

MR SARROU: I can send that.

MS CHESTER: We would be interested in seeing that.

MR SARROU: Yes, yes. Okay.

MS CHESTER: Thank you.

MR COPPEL: Thank you. So we're going to take a short break so people can stretch their legs and get something to eat, and we'll reconvene at 20 past 1. Thank you.

LUNCHEON ADJOURNMENT **[12.44 pm]**

RESUMED **[1.20 pm]**

MS CHESTER: Folks, we'll resume our public hearings and welcome back. I can already welcome to the table our next participants, Julie Burland and Briony Lewis. If you would mind just stating for the purposes of the transcript your name and which organisation you represent and then if you could make some brief opening remarks, that would be appreciated.

MS BURLAND: I am Julie Burland, CEO of Penguin Random House Australia.

MS LEWIS: I am Briony Lewis, general counsel, Penguin Random House Australia.

MS BURLAND: Penguin Random House is Australia's largest trade publisher, a truly global publishing house with a strong tradition of publishing the very best Australian writers. We work closely with Australian booksellers to connect these writers with the widest possible readership. We employ more than 500 people in Australia and have four sites around the country, including two distribution centres.

Today we want to address the proposed removal of parallel importation restrictions as contained in draft recommendation 5.2. We understand that the Federal Government has indicated it favours the

removal of limited territorial copyrights and the Commission has focused on that in its response to the terms of reference. We are concerned that the Commission has chosen to draw attention to the alleged benefits of removing territorial copyright, without proper analysis of the basis on which Harper recommended these changes.

The factual basis of Harper has changed. The price and availability arguments relied on by Harper are no longer present in the market and as a result we feel it's premature for the Commission to advise on transitional arrangements. It remains open to the Commission to find that the previous concerns about the possible effects of the Act on availability and price are no longer present and we urge the Commission to do just that.

An overriding question that we have is how can the Commission consider transitional arrangement recommendations when it has acknowledged that the pricing and availability and other market data in its draft report are outdated. Given that the government's stated aims were to reduce book prices and increase speed to market of titles, the use of outdated data is a fundamental problem. Today we want to emphasise our concerns and urge the Commission to advise the government that there should in fact be no change to territorial copyright regime in Australia, because on balance the costs to consumers are just too great.

For the purpose of this hearing, we want to draw the Commission's attention to three key issues that any change to territorial copyright will need to address. How do we protect low prices and high diversity for consumers? How do we protect Australian local investment and how do we avoid what has happened in New Zealand happening to this market.

We know that you have heard these points over and over again. The pricing data used in the draft report is outdated and incorrect. Book prices have gone down in real terms and not just as a result of foreign exchange impacts. Book diversity has gone up. Digital disruption has been made as well by the local publishing industry. Foreign exchange rates fluctuate and so does the impact in the industry. The current system champions consumer choice but why would the above positives from the current model be seen as a good reason to dismantle an existing economic structure.

The Commission must make the government aware of current industry realities and confirm that the Harper rationale for change to territorial copyright no longer exists. We appreciate the references to culture and the cultural landscape might appear flippant or trite but we passionately believe that the change proposed will have a lasting effect on our culture, our literary landscape and our national identity. This belief is

based on actual knowledge of how our industry works, including what returns we currently get on our significant investment in local authors. Every acquisition of a new book is a gamble. In fact, we think of every new acquisition of a book as a start-up and, to be honest, some work and some don't.

The appropriate economic structure that we have in the form of limited territorial copyright allows us to take that front and sometimes we back a winner. In fact, we are privileged to be the publisher of a number of global award-winning authors. The reason why we have been able to compete so well on the world stage with our books, well it comes down to Australian talent, as well as appropriate economic structures in place to support local investment in that talent.

Man Booker prize winners don't just roll up at your doorstep. They are nurtured and grown in an industry that can support them, as they help Australians participate in the global literary landscape. It is pretty clear that the current system is not broken. Why change it?

I will briefly explain the financial basis of our business. In a market without territorial copyright, local publishers compete from the point of first publication with foreign publishers for the same sale of the book. Mass foreign imports are a real threat to local publishing. Foreign publishers pay authors less as export royalties or nothing for remainders. Right sales are also an important aspect of our business. In the absence of limited territorial copyright, the local publisher is less inclined to sell rights to foreign publishers, because those foreign publishers would be able to supply and export an edition of the same book straight back into the Australian market.

We also make foreign titles available to local consumers. Territorial copyright enables us to import titles with the confidence that they will get a reasonable return on investment. This increases consumer access to foreign books and the relative investment certainty means that local publishers can use the return on their sale of foreign works to invest in local authors.

If local publishers like us have to compete on this uneven commercial ground with mass foreign imports, it would naturally result in less investment in local authors and content, particularly new Australian authors, less financial incentive for us to pay authors adequate advances, less money to invest in marketing and publicity campaigns that benefit consumers, local authors and local booksellers, reduced economies of scale to enable us to offer favourable terms and competitively-priced books.

We do not consider that the current anti-dumping regime in this country will be adequate in the terms of responsiveness or adequate support for our industry to alleviate the inevitable influx of foreign editions. We consider it an inappropriate replacement for the current system, because it's a slow process and titles involved are likely to be time sensitive. If a remedy is imposed a few months after, it may be too late. The remedy itself is inadequate, the imposition of a duty, not the prevention of the actual import.

While we consider that on the face of it mass foreign imports would qualify as being products that would be sold below their normal value here and be something that would cause material harm to the industry, the additional compliance, policing and investigation costs for Australian publishers is a burden that we do not need in an environment with such tight margins already. Would publishers, authors and booksellers really have a big enough voice or deep enough pockets to compete against the steel producers and chemical manufacturers for the attention by the ADC? We don't think so.

A close example of the removal of territorial copyright is New Zealand. As you know, New Zealand repealed its equivalent legislation in 1998. Since that time, Penguin Random House New Zealand has contracted with severe job losses. Our two physical distribution centres have been moved to Australia and our investment in local New Zealand writing has reduced considerably. Title count in our business in New Zealand has reduced by 75 per cent.

We note that the Commission has previously questioned whether the changes in the New Zealand market are due to digital disruption. We welcome that question. When you compare the two markets that are both subject to the same digital impacts, with one retaining a limited territorial copyright and the other removing it, which market looks healthier following the impact of digital? We say Australia. That is a compelling example of the right economic model being in place to enable local publishers to respond to these types of market disruptions. Why tamper with that when there is no overriding consumer or industry to be achieved?

We urge the Commission to remove draft recommendation 5.2 from its final report. As outlined above, there is no price or availability question to be answered by the Australian publishing industry. The removal of territorial copyright would have a drastic and detrimental effect on the local publishing industry and local authors. The current system gives us flexibility and dynamic market with fair competition rules

to withstand shocks like digital disruption, financial crises, et cetera, to the benefit of the consumer.

The current rules encourage investment and they encourage risk taking and entrepreneurial behaviour. The current environment seeks local publishers working closely with local booksellers and authors. It is open to the Commission to confirm to the government that the pricing and availability arguments of Harper no longer exist. Australian narratives and a strong creative industry are important to Australians. Australian children deserve Australian stories. Thank you for your time.

MS CHESTER: Thanks very much for those opening remarks, Julie. I might begin where you finished with respect to Harper. Thank you for understanding that our terms of reference actually required us to be mindful of the government's response to Harper which was that they would move to remove parallel import restrictions and we were asked to look at the transitional issues.

UNIDENTIFIED SPEAKER: Could you speak up a little bit. Sorry, I can't hear you at all.

MS CHESTER: Sorry. Could you say the last bit again? Sure. Sorry, I'll just get a sip of water which might help with my clarity of voice.

MR COPPEL: Feel free to come forward. You can come forward if it helps.

UNIDENTIFIED SPEAKER: No, no. You were very quiet this morning. I don't know whether the microphones are on.

MR COPPEL: No, they're not.

MS CHESTER: They're just for recording. They're not for projecting.

UNIDENTIFIED SPEAKER: Thank you.

MS CHESTER: The government's response to Harper was they're minded to remove parallel import restrictions but wanted the Productivity Commission to look into and advise on transitional issues, which is very much the focus of our draft report. While you're right, Julie, in saying that our draft report didn't replicate the pricing analysis that we did in 2009, our draft report did actually provide some commentary narrative using high-level statistics on developments since 2009 to inform where we landed. So we did note that a confluence of events have occurred. Prices for Australian books have come down materially since that time. The

industry, through its own proactive initiatives, are mindful the government at any time could reconsider parallel import restrictions to go for the new 14-day code of conduct arrangement of getting books to booksellers.

We looked at sort of a suite of transitional issues then in terms of what had changed, so prices having come down, where the Australian dollar is today, recent reviews of the robust anti-dumping arrangements that we have in Australia. I think that that all made us view that the transitional issues that would have been present in 2009, aren't present to the same degree today. That said, we are very mindful that industry is a bit concerned that we haven't updated our pricing data and we've had some partial pricing data from the industry which suggests that prices now are very competitive globally, Australia versus US and Europe, and so we will be looking at updating that data for our final report.

Just coming back to the point though then on the transitional issues, I guess my first question would be, apart from those transitional issues that I've just mentioned, are there any others that we haven't identified in the report that we should have?

MS BURLAND: As in?

MS CHESTER: I've identified a bunch of factors that we think were important as the backdrop to considering what transitional issues might be faced by the industry. Are there any other issues.

MS BURLAND: Well I think the subsidy. I mean it's been recognised but I also think the subsidy is an issue as well, how much money we invest in local writing, local investment, local marketing publicity and how will the government - as we've heard from other people, we're having cuts in arts, so how will you really actually fund what we do? Like you may fund an author but how do you also fund the publisher, because it takes an author and a publisher to make a book. A book just doesn't just arrive to us made. So how would you, fully ready to go, how would you do the funding? I know you mentioned that it would have to happen but in reality, how does that funding actually take place.

MS CHESTER: I guess what we're suggesting is, given the industry's now asserting that it's become lean, mean and competitive and it's competitive on pricing terms. We wouldn't see that there would be a flood of imported books into the Australian market vis a vis what could have been expected in 2009. I think, Julie, you might have been here a little bit earlier when we heard evidence from Peter Donoughue, a retired publisher, who painted a very different scenario of what he would expect

might happen within the publishing industry post removal of parallel import restrictions.

MS BURLAND: Yes.

MS CHESTER: He didn't paint the sort of doom and gloom scenario that yourselves and others are suggesting.

MS BURLAND: I mean I don't know when Peter retired but the publishing industry has changed dramatically since I have been in it in the last 15 years. It's changed very dramatically. The risk that there is to how global we are now, I mean we just had an example this week of Tim Winton, one of our leading authors, a book was available from him in a store here in Melbourne. It had come in because it had been remaindered in the UK and there is one of our bestselling authors sitting in a store for $10 because it's remaindered by somebody. That means that there's absolutely no income for Tim at all because on a remainder sale you don't get any income. I mean just seeing that is just an impact because these books will make their way in and that was coming through a remainder merchant. At the moment we can call the store up and take action on that but in future you'll have bestselling award winning authors, you'll have checked copies in stores.

MS CHESTER: If we just maybe set aside the issue of remainders for a moment and we'll come back to remainders and dumping.

MS BURLAND: Yes.

MS CHESTER: If the industry today now is price competitive and you do have the advantage of the differential transportation costs of getting books to Australia, why is it that you think there's going to be a flood of imported books with the removal of parallel import restrictions, if you have become competitive on a pricing basis?

MS BURLAND: I still think it goes around to - all we're doing with this is actually making the US wholesalers stronger and that they may be able to negotiate good terms because they do buy off a bigger publisher than we are in the US or the UK. I mean it would probably more so be the US, and so they might buy something on great terms. Again, this is going to be overstocks and remainders as well. They'll be sitting with a whole lot of stock there and they'll be selling it back into the market cheaply, and so we won't be able to take the risk on publishing a book. It won't be the bestsellers because they probably would take that risk. It will be the new writers that suffer the most because we will be seeing - we won't be able

to make the sales, the right sales, or anything like that, because we will be worried about those books entering the market again.

MS CHESTER: In a scenario where remainders came in or books - so just with remainders and sells, when they come in, are you suggesting that they're sort of at below cost when they're sent to countries where there aren't parallel import restrictions?

MS BURLAND: Remainders, yes. They're coming in at whatever price the wholesaler wants to sell them to. I guess they've got to just have a look at what they've bought them for which tends to be very cheap. I mean the example that I've got is actually the UK, they do export. They do airside trade paperbacks. They don't put it into their own market. They just airport trade paperbacks and then they sell those to people who are actually leaving the country. They don't put them into their bookshops and so all of a sudden these editions are entering our market, editions that they wouldn't actually put into their own market. So I think that's a telling thing.

MR COPPEL: These are sold in airport shops; is that so?

MS BURLAND: We call it "airside". They sell them airside, yes.

MR COPPEL: What is it that is about a remaindered book that removes the royalty payment to the author?

MS BURLAND: The contract. In the contract that we don't pay royalties on remainder sales.

MR COPPEL: What then determines classification of being remaindered or not remaindered? From the picture you're painting, it seems very easy just to classify a book as a remaindered book.

MS BURLAND: If the publisher has an overstock, it will be classified as a remainder and they sell at a certain price. It will be classified as a remainder and so no income will go to the author.

MR COPPEL: We haven't heard from any authors, other than the connection or parallel import restrictions of that is an issue which is a bit surprising because it doesn't sound too complicated to classify something as a remaindered book.

MS LEWIS: I think what happens in reality is that if in an environment of no parallel importation, books are released simultaneously or "in a foreign jurisdiction or close to the (inaudible) release". The foreign

publishers again, economies of scale, large print runs, give it a punt on the basis of sales that have happened in Australia, on the basis of marketing and other activities that are happening in Australia. If it doesn't sell in the foreign jurisdiction, they can ship it back here very cheaply at a remaindered rate.

MS CHESTER: Okay. So what's the percentage of say books sold in Australia today that would be remaindered books?

MS BURLAND: I don't know that. We can find that out for you.

MS CHESTER: It would be good to know what it is sort of internationally. Do you know what the percentage of remaindered books are in the US?

MS BURLAND: It's more of a bookseller question.

MS CHESTER: Yes.

MR COPPEL: What about remaindered books by Penguin.

MS BURLAND: Yes, we sell when we have overstocks. Yes, we do.

MS CHESTER: What percentage of your annual sales? Maybe it would be best to look at it in terms of the number of books Penguin sells in Australia each year. What percentage of them are remainders?

MS BURLAND: I would have to get that information.

MS CHESTER: Okay. Can you get that information for Penguin globally?

MS BURLAND: I will try, yes.

MS CHESTER: That would be helpful. You mentioned, Julie, and other publishers have as well, and we understood sort of the book ecosystem of the local author, the local bookseller and the local publisher and we do understand that that's an important relationship. How does that relationship differ in a business model sense for Penguin Random House globally? Is it unique here in Australia in terms of what you do with your advances, your royalty payments, your treatment of remainders, your ability to take back unsold books from booksellers? Is that not replicated anywhere else globally?

MS BURLAND: We run very independently of our parent companies in the US and the UK and so we have the relationship deal with the booksellers and the authors. So we have a relationship. Our UK and US companies don't have the relationship with our authors and our booksellers.

MS CHESTER: Yes. So how do authors get by then in the UK and the US if they don't have that sort of relationship that authors have down under?

MS BURLAND: Are you talking about an Australian author?

MS CHESTER: Yes. I'm just trying to work out whether the Australian business model across the three is unique and, if so, why. Then secondly, if it's not replicated in the UK and the US, how do local authors there - - -

MS BURLAND: Well local authors would have the same model. So local authors in the UK would have the same models with the booksellers and the authors as well, but with an Australian author, obviously the home, we've nurtured that author. The closer relationship is here and then you've been able to get the author out into the stores, work with the booksellers, et cetera. But just because a book is published Penguin Random House Australia, doesn't mean it's published by Penguin Random House UK and US.

MS CHESTER: Yes. I was talking about the local authors in those jurisdictions. So Penguin Random House in the US with the local authors in the US would have the same sort of business model with royalties, advances, taking back unsold books and remainders?

MS BURLAND: Yes.

MS CHESTER: Okay. We've heard evidence that in the US, effectively there are no longer parallel import restrictions. I know it's not exactly a like comparison because they have the right of original sale, but given Court interpretations there now, and as we've heard from submissions and other evidence, that effectively they don't have parallel import restrictions. Yet that business model of author, publisher and bookseller is still in place.

MS LEWIS: I just think you cannot compare an Australian market to the US market just due to size. I mean it's the very reason why we need the current system to be maintained. America does not need these sort of legislative provisions in place just due to their actual size. I mean in and of itself that's how they operate and they don't need these sort of things.

We are a completely different market and we're a completely different size and that's why we do.

MS CHESTER: Okay.

MS BURLAND: Sixty per cent of Penguin Random House business is international books and 40 per cent is local, so you've got to protect that smaller percentage, where over there it's just 100 per cent is theirs.

MS CHESTER: I guess if you're price competitive now, where's the protection? Do you see what I mean?

MS LEWIS: It is because of the current - I suppose what we're struggling with, to be honest, is that it doesn't seem that logical to have a system that's working where there is high availability, high diversity and low prices and then to use that as a reason to get rid of that system.

MS CHESTER: Yes. I guess it's kind of central to competition policy that contestability is very fundamental. So while the industry has come a long way in six, seven years, which we identify in our report, the only way that we would know that the industry would stay that competitive over time would be if there was that sort of level of contestability through the potential for parallel imports to come in.

MS LEWIS: There is contestability in our view due to things like the Amazon effect. I mean that does keep us honest. We are driven by consumers and consumer demand and that is also why, to be honest, we don't rely on provisions like this in the Act in order to improve our business model. We have clearly efficiency drivers, including what consumers demand. We all live in the world and we all live in the world of Game of Thrones where things are required that very same day and that's how we operate and that's why we've improved.

MS CHESTER: Julie, you touched on the New Zealand experience for Penguin Random House.

MS BURLAND: Yes.

MS CHESTER: It would be great if you could just talk us through the timelines for those structural changes, noting that the parallel import restrictions were removed in 1998 and what were some of the other factors, really the economics of what was happening in the New Zealand market and globally for the costs of publishing and other competitive forces?

MS BURLAND: In 2003, we closed the - we're a merged company now for Penguin Random House. We closed one of our warehouses and last year we closed the other, but it has been a big impact in terms of what they actually publish locally.

MS CHESTER: Sorry, so the 2003 closure of an initial warehouse was because of a merger.

MS BURLAND: No, no, sorry. We were running our businesses separately before 2013. So in 2003 we had an instant reaction and we closed one of the warehouses. The amount of local publishing has dramatically increased. You go into New Zealand stores and you can see that there are American and UK books in stores. I mean they've had the digital and so we have we. We've had the digital. They actually went into a recession. We had the GFC. When you look at the pricing as well, our pricing has dropped more than their pricing. So even though it is an open market, our pricing hasn't managed to drop more, so our system is obviously working, where they have had a bit of a drop but yet their availability has absolutely shrunk. PIR removal has not worked for them and I think that's just such a risk to think that that could happen to this industry and to think that our local publishing list could drop by 75 per cent and not see some of the Australian. I think, in particular, children's authors would be impacted by that. When I look at our New Zealand publishing list, we hardly publish any children's books any more. The thought of our children not reading children's books would be heartbreaking. They've gone through everything we've gone through.

MS CHESTER: Maybe if we could just go through the timelines again. So when parallel import restrictions were removed there in '98, there were no other sort of structural changes until 2003?

MS BURLAND: No, we did have some shrinking of our workforce at that stage.

MS CHESTER: When you mentioned that the local content or the availability of local content in New Zealand had changed over that timeframe, when did that change occur and from what to what?

MS BURLAND: I've got from 2007 we had 350 local titles that we published and we now publish something local 70 local titles a year. So that just shows you the amount - - -

MS CHESTER: What was it back in 1998 though?

MS BURLAND: I don't know 1998. We actually tried to find that out but we couldn't get that.

MS CHESTER: I think that's probably the useful reference point for us because doing it nine or 10 years after that to then three years after, there's a lot of factors.

MS BURLAND: Yes. I can tell you the workforce has dramatically decreased since then, the size of the offices that we've had have dramatically decreased after that. Even you when you look at that they lost Red Group, we lost Red Group. Everything has been the same in both markets and it's interesting to see which market has survived and stayed strong.

MS CHESTER: Yes.

MR COPPEL: You mentioned also that prices for books dropped in Australia more than they did in New Zealand.

MS BURLAND: Yes.

MR COPPEL: Is that also true for Penguin Random House books sold in New Zealand, that there was a difference between the Australian market and the New Zealand market?

MS BURLAND: Yes.

MR COPPEL: Could you then talk us through how you determine the recommended retail price of a book?

MS BURLAND: We've got financial modelling. We have to work out margins that we need to keep the doors open and exist. So we do a lot of financial modelling on that but we also have to make sure we look at our competitors and what the competitors are doing. That's our local competitors but also our international, the Amazons and all that. So we go through a big process of looking at what the price is internationally versus what the prices are in the local market. But more so now, we have to look at what's being charged internationally. We can work that out. With New Zealand, the economies of scale just aren't there for them with the pricing. So we have to look at the pricing that's out in the marketplace as well.

MS LEWIS: Combine with that a removal of a very limited territorial copyright, then it just reduces the investment certainty again.

MS BURLAND: Yes, because we have to pay bills. We have to keep things open, and this is why, as I said before, international books do actually cover some of our local investment, and so that's a big factor as well. We do very well with our international books and then we have to make sure because of the risk, all the risk we take in the local books, and to keep the local sector vibrant, we do cover some of our expense there as well.

MR COPPEL: So if in an international price, in a sense you're saying that there's sort of less market power in New Zealand than there is in Australia because of the smaller size of the market, maybe the cost of a direct import is higher than it would be for someone purchasing a direct import online book in Australia. So you price to market essentially is what you're saying?

MS LEWIS: That's one factor.

MS BURLAND: Yes, one factor. We've got other factors.

MR COPPEL: Have those factors changed over time?

MS BURLAND: Yes. Now that consumers can get books from Amazon so quickly, we have had to change the factors, very much so, and just our cost bases as well.

MR COPPEL: In your submission you give evidence on the price of books in Australia and other international markets where I think you've taken a list of 150 books. Is that data something that you can share with us?

MS BURLAND: Yes, did we not?

MR COPPEL: I think we've got the results but is it possible to share the actual titles that you've used, how you've determined those titles.

MS BURLAND: We used our bestseller list there.

MS LEWIS: We can provide that.

MR COPPEL: Yes, thank you.

MS CHESTER: Okay. Thank you very much. I think that covers the questions that we have for you this afternoon.

MS BURLAND: Thank you.

MS CHESTER: Thanks, Julie. Thanks, Briony. I'd like to call our next participant, Richard Hamer, from the Law Council of Australia. Welcome, Richard, and thank you very much for the initial and post draft report submissions that we've received from you. We've also met with some of your other colleagues earlier in the public hearings.

MR HAMER: Yes, I understand that.

MS CHESTER: If you could just state your name, which organisation you represent, for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks. Imagine I've got a debating bell and I'm going to ring it at five minutes, if you wouldn't mind.

MR HAMER: Sure. My name is Richard Hamer. I'm representing the Law Council of Australia.

MS CHESTER: If you'd like to make your brief opening remarks. Thank you.

MR HAMER: Sure. We're in a slightly different position, I think, from a lot of the people who have come to this inquiry in that we support quite a number of your recommendations and we certainly support the approach that has been outlined of recommending policy changes based on a careful analysis of the actual evidence. I did want to make a couple of overarching comments really, rather than get into the detail, because we've I think filed some probably 80 pages of submissions dealing with a lot of detail. I'm happy to answer questions, if I can, but the overarching points where I think where I see some weakness in the report which could be I think dealt with.

The first is that a lot of the underlying analysis is directed to whether intellectual property rights result in innovation and so the assessment is to what extent has the existing intellectual property right caused innovation to occur. I'll explain why we can say something about this as lawyers in a minute, but it seems to us that there is a fundamental problem with that. It's a bit like saying a property in land is conferred in order to cause people to create land. If you do a study into that you'll find that actually very occasionally people reclaim some land but basically land is not created because there's property rights in land; rather, the property right in land is primarily conferred in order to enable people to build on the land and can carry out transactions with it.

Similarly in the case of intellectual property, our experience is that it is all about the - it's partly about certainly development of intellectual property in the first place. A large part of it, 99 per cent, is about the development and commercialisation of that intellectual property. So as lawyers we see every day people engaging in financing transactions starting from angel investors through private equity, through venture capitalists, stock exchange floats, where a primary question that is always asked is what is the intellectual property, what is its term, what is its validity. That's something that's essential to investors and without that intellectual property, the idea, the innovation, never goes anywhere. It seems to be a critical matter that the report should consider not only is intellectual property causing the innovation to be made but what is the impact of intellectual property on its development and marketing. That seems to be a key issue.

We were conscious that there were very limited studies on this and some of the studies just didn't seem to demonstrate what the report concludes from them. For example, there was reports that in many industries people were not particularly concerned about intellectual property and that was taken as supporting the view that intellectual property was not important to innovation in those industries. It's not really a logical conclusion because there are many industries where people are making commodities; they're making generic products where they're not concerned with innovation. They're concerned obviously to cut costs and IP is to them a nuisance. If you're looking at the people who are innovating, the IP is of great importance to them, or that's been our experience and observation.

I have some other comments but in light of the timing I'll reduce them. The second overarching matter was I think also important and that is that in the report there are some general recommendations and there are some quite detailed recommendations. There's detailed recommendations about what the obviousness test should be in patent law going down to the legislative drafting. It does seem to us that that's not an appropriate way to proceed, that whether you apply an administrative test that is used in the European Union and say we should make that part of Australian legislation, is something which I think is not an appropriate way for the Productivity Commission to proceed, rather it would be appropriate to set out some principles that this should be evaluated and have it evaluated by a body which can look at it in the context of the overall legislative scheme. So it seemed to us that that was a sort of fundamental issue that closed through quite a number of the recommendations and we've dealt with that in the report. They were the two overarching issues I wanted to talk about but in that context I'm happy to talk about any of the pages of submissions that we're putting in if I can.

MS CHESTER: Thanks very much, Richard. I do appreciate you keeping it brief. We have read your submissions so we do have some more detailed questions that we'll get to.

MR HAMER: Sure.

MS CHESTER: Maybe if I just begin by commenting on and asking you a few questions about your opening remarks. We were given broad terms of reference to look at all the intellectual property arrangements and we were asked to say are they getting the balancing act right in terms of the needs of creators of inventions or creative ideas from authors through to plant breeders.

We did look at sort of assembling quite an extensive evidence base and I think the surveys that you refer to were just one small component part of that. In terms of trying to get a sense of if innovation is the common thread across intellectual property arrangements, be it creative or scientific or technical, what role do the intellectual property arrangements play amongst the many factors that can influence innovation. So it was us just trying to get a sense of if government's looking at the intellectual property arrangements as purely the only lever of encouraging innovation to occur, then what role might it play in different sectors. Indeed that's why we have different rights within the current intellectual property arrangements. Investing in a patent is very different to investing in a new breed of plant and thus we have different tailored rights. So it was just for us to get that sort of sense of how important it was within those different sectors, but as I said, that was just one sort of component part.

On your other comment around our more prescriptive recommendations, I guess looking at the patent system and whether or not the current settings as assessed against our sort of framework were getting that balance right and based on the evidence base that we received and some that we established ourselves and also in terms of trying to assess the quality of patents, it became clear that we did have a large rump of low-quality patents. So we then were mindful of looking at where's the threshold for patentability in Australia today. These are the other jurisdictions. Have we fallen below that? So we were mindful that the government had already done the raising of the bar, which had improved things.

But then when we looked internationally and we looked at the EU, it seemed that there was a gap around the obviousness test. So that's why we did make such a prescriptive recommendation there which the Commission does in many of its inquiry reports when we have it in mind

that we want to get to a certain threshold. So, I guess, if we go to that issue in itself and certainly in your draft report and post-draft report, you seem to sense that there isn't any need to adjust the threshold to align it to what occurs in Europe.

MR HAMER: I think that's correct. We don't see any need to change it because, in fact, the principles are very similar. There are differences, I think, in detail as to precisely which art is considered and so on. But the idea that you take a single piece of prior art and you add to it the common general knowledge and then you consider whether that's obvious to the skilled addressee are basically the same. To the extent that the detail of the administrative test, which is not the legislative test in Europe but the administrative test used by the patent office right at the moment in Europe, should be written into our legislation seems to be a concept fraught with difficulty and doesn't seem to be helpful.

Well, I'd need to give you some, I suppose, historical context too. I hesitate to sound like the previous people. But in the 1990s there was a period when the Commissioner was required to grant patents unless they were clearly invalid. So a lot of patents were granted in the 1990s which would not be granted today because the rules - that rule was reversed and then later we had the raising the bar provisions which further increased the level.

So it's not at all clear to me, as a general principle, that the issue of lots of invalid patents is still true today as a general issue. Then dealing with the specific issue of obviousness, it's not at all clear that our law, which states the test in very similar terms now after raising the bar to Europe, needs to be amended to align us in general with Europe.

Certainly it's not my experience that you see patents that are found to be valid in Europe, sorry, valid in Australia and not valid in Europe. In fact, I've just had some recent experiences with precisely the opposite, i.e. where the patent is valid in Europe and not in Australia. So, I think this concept that Australia has a much lower standard, or even significantly lower standard of patentability than Europe is no longer right.

MS CHESTER: Richard, are you familiar with the work of Professor Andrew Christie in the patents area?

MR HAMER: Yes, I know him. I used to work for him.

MS CHESTER: There you go. Obviously well trained. So Andrew has been very actively involved in submissions and roundtables and was here at our public hearings yesterday.

MR HAMER: Yes.

MS CHESTER: So he's just one example of evidence that we've received from other people expert in the area that suggest that there is a gap between the Australian threshold and the European threshold, regardless of whether it's via legislation or administrative decision. But they've done some analysis around the scope of the patent that's approved in Australia versus other jurisdictions, because the scope is very important in terms of effectively the underlying quality of the patent itself.

MR HAMER: Yes.

MS CHESTER: That would suggest that Australia is much broader than Europe and the US in terms of how our patent examiners apply the threshold.

MR HAMER: Well, so we were previously talking, I understood, about the inventiveness threshold. You're now talking about scope of the patent and that - - -

MR COPPEL: It's the breadth of the claims.

MR HAMER: The breadth of the claim, and that - - -

MR COPPEL: So an indicator of quality of the - - -

MS CHESTER: Yes.

MR HAMER: The breadth of the claim, and that is the issue that was very specifically dealt with. It was, I think, fairly an issue, and it was specifically intended to be and, I think, has been dealt with as far as I'm aware, and as we've pointed out the raising the bar amendments have not had time to go through. But those amendments were very specifically directed to the breadth of the claim and ensuring that the claim was based on, and no wider than, the disclosure that was conferred. So I haven't looked at what Andrew said about that, but I – to the extent that we're talking about that issue, those provisions are very closely aligned now, I believe, to the European provision.

MS CHESTER: I think the area where we felt that there was still a disparity is that even with the raising of the bar, we can still grant inventions of patent here when the innovator is led directly as a matter of course which is disparate to what's required in Europe, as we understand it.

MR HAMER: The specific wording is different, although the wording of the legislation, remember, is not different really at all. So there is a difference in the way this is applied to some extent. But I'm not sure to what extent that makes the formulation of words that people use actually makes a difference in terms of outcomes. I've seen no evidence of substantial difference in outcomes.

MS CHESTER: Okay. Is there an evidence base that you can point to there, because we've – I guess, it's the wonderful world of - - -

MR HAMER: I can talk to my experience, but I can see if we can find some evidence. But I can certainly point you to patents that have been granted in Europe and are invalid in Australia, for example.

MS CHESTER: Yes.

MR HAMER: So it may be possible - - -

MS CHESTER: Because we're getting evidence from academics which is conflicting with that saying that there is a disparate threshold issue that still remains even after raising the bar, and some of the issues that we're trying to deal with in our report in terms of any potential, sort of, misuse of the patent system, we felt that the most direct way of dealing with that was to make sure that that inventive threshold was as robust as possible.

MR HAMER: Yes, look I can certainly see if I can – if there's some way of getting together that data for you, if that's helpful.

MS CHESTER: Okay.

MR HAMER: But in terms of actual – which patents are granted where, I think you'll find it's the grant of patents is very similar in Europe and Australia.

MS CHESTER: Okay. The other area that's caused some consternation and conflicting views amongst the legal practitioners, justices and legal academics, is around the relative merits of an objects clause. Indeed, this was a matter that was subject to some consultation by IP Australia a couple of years ago. Now, I think maybe the Law Council's position on this has evolved over time. It didn't seem, previously, that the Law Council took umbrage to the idea a few years ago by IP Australia of having an objects clause in the Patents Act, but now it's causing some consternation. So it'd be good if you could just elaborate on that.

MR HAMER: I'm not sure about the – I can't recall the position in relation to the IP Australia provision – the IP Australia proposal. But it's pretty clearly been, in my recollection, the Law Council's view that an objects clause is not a good idea. And that's simply because it simply causes confusion and disputes about the construction of the legislation when you've effectively got one piece of legislation sitting over another. So instead of carrying out the exercise of construing a clause, you're having to look at what some – how some other clause impacts on that. That's one element which is just a general principle. I think I'm right in saying that's a general Law Council view, not just an intellectual property one.

MS CHESTER: Okay. So that's across the board for any objects clause in legislation?

MR HAMER: I believe that's the case. I'd better check. I'll confirm that for you to make sure I'm not misstating it.

MS CHESTER: Okay. That'd be good because - - -

MR HAMER: But, I think more importantly, the sorts of things that were proposed to be put into the objects clause, such as social benefit, would be things that would be very difficult for any patents office, but even a Court, to determine and would be things that are liable to change. Something as a social benefit one day may not have a social benefit later and vice versa. So they seem to be principles that are very awkward to apply in any case and certainly a long way from clear, simple, straightforward provision is understandable, which is, in our view, what legislation should be where possible.

MS CHESTER: Yes. We also appreciate there's a difference between something that's in an explanatory memorandum accompanying a piece of legislation through the Senate versus an objects clause in legislation.

MR HAMER: Yes.

MS CHESTER: But, I guess, when we hear from the Office of Parliamentary Counsel and from some of our Federal Court Justices that, at a high level, explaining the underlying purpose of the legislation, which is what we were trying to capture with the idea of an objects clause that that actually does help them over time in their interpretation of the legislation, which is what we're, sort of, really trying to get to, given that we want that legislation to be as adaptive as possible in terms of its interpretation. The other area that would be good to touch on is pharmaceutical patents, is that an area that you're able to talk about?

MR HAMER: Sure.

MS CHESTER: Your submission notices that if pay for delay were monitored guidelines should be published and, indeed, that's something that we've countenanced in our report that we felt that if the ACCC were to play a similar role to its US counterpart in monitoring those agreements, that there would then be guidelines around that. Does the Law Council have a view about what, sort of, issues those guidelines should cover? Is this an area where we should be given guidance on the guidelines to the ACCC in our final report?

MR HAMER: I suppose I should say at the outset that, to the best of my knowledge, pay for delays is not something that happens significantly in Australia, but there might be other people with other information that, so – because of concerns based on existing legislation, apart from anything else. I'm sorry, having said that, I've now forgotten your questions.

MS CHESTER: So, if we were to give guidance – so we've said that it's very difficult to get an evidence base around pay for delay because with that, sort of, behaviour, unless the ACCC has access to those agreements, we're not going to be able to identify it. So one of the things we've tried to do is work out is there anything structural different about the Australian market for pharmaceutical products disparate to the US and other jurisdictions where there is evidence of pay for delay. So we do say well, let's perhaps let the ACCC have a role for five years, that those agreements be lodged with them, and that way they can be monitored so therefore if the ACCC does detect any pay for delay arrangements within those agreements then it can be subject to the competition laws. What, sort of, key elements would you see in the guidance that would accompany the ACCC having that new role from the Law Council's perspective? Are there, sort of, a handful of things that you really want to make sure are covered in that guidance?

MR HAMER: No. I'd like to take that on notice.

MS CHESTER: Okay.

MR HAMER: It's not something I've given thought to. No. We'd considered that.

MS CHESTER: While we're on competition law - - -

MR HAMER: Sorry, you did raise a point which I, perhaps, can answer. You said, were there differences between Australia and the US? I think

there is because of the US ANDA Scheme. There is a single generic competitor that comes in and there is a benefit, in a sense, in paying them off by a pay for delay settlement. In Australia, there's no similar scheme so you have potentially, usually, multiple generic companies coming in, so the idea of paying them all off is not – doesn't make the same sense as in the US. So there is a fundamental reason that's not associated with the competition law at all why pay for delay usually doesn't make sense in Australia.

MS CHESTER: Okay. That's the sort of issue that we're trying to get our head around as to whether there is anything that's structural different. So that's helpful, thank you. The other competition policy matter that we raise in our draft report, and it follows on from the Harper Competition Policy Review, is looking at the section 51(3) repealing that where licensing arrangements are not subject to the competition law under that current provision. I guess, the submissions and the evidence today haven't really given clear examples of licensing transactions that might be prohibited due to competition law.

MR HAMER: I'm not sure I can talk about them now, but I can probably send such examples to you. I think we did look at putting some together for the purposes of the submission. I think that would - - -

MS CHESTER: That would be helpful because this is an area where we're, sort of, lacking in an evidence base which then just takes us to principles, and if we would go to principles there would be no reason why not to repeal section 51(3).

MR HAMER: Sure. Sure. Essentially, the categories would be the categories that you can see in, for example, the US block – sorry, the EU block exemptions. I don't know whether the EU still exists, but it's present - - -

MS CHESTER: We're near the latest tally.

MR HAMER: But the EU block exemptions which give examples of the sorts of licence provisions which they were concerned would be caught by the competition law, but for the exemptions and, like you said, putting in place those exemptions.

MS CHESTER: Yes. I think, the government has already addressed the issue in its response to Harper in terms of some of the things that might be inadvertently captured if you repeal section 51(3) so – and that was what was underpinning the original hesitation of the Henry Ergas Report in this

area. So if those issues have been resolved, the repeal of section 51(3), we still can't identify whether there'd be any inadvertent - - -

MR HAMER: Capture.

MS CHESTER: Yes.

MR HAMER: If that would be useful, we could put together a list of those things which are certainly matters that have concerned members of the audience Law Council.

MS CHESTER: That'd be great. It was wonderful to see in your submissions that you did talk about governance in institutional settings, because it is what we think could be a very enduring element of our report, getting the governance settings right for policy around intellectual property arrangements. You cite the example of the UK where there's been a consolidation of the responsibility for IP policy. We note in our report, indeed we spent about half a chapter on it, that we do have disparate allocation of responsibility across government departments for IP policy with the Department of Communications with copyright, Department of Industry, Innovation and Science with, sort of, the industrial intellectual property arrangements, and then you have IP Australia which is the rights administrator and, for all intents and purposes, probably the major heavyweight in policy advice on IP matters.

MR HAMER: Yes.

MS CHESTER: It'd be good if you could just elaborate a little bit more on, firstly the issue of the merits of consolidation of IP policy advice, and then the other issue around what role would be appropriate from a governance perspective of the IP rights administrator in the policy advice.

MR HAMER: Yes, okay. We gave a number of examples, but there are many where you have overlapping intellectual property rights. So I know one of the issues I wasn't intending to talk about unless you wished to, on software patents, and I know other people have talked on that – about that issue, for example. But that's an example where you have copyright in code and you have patent rights co-existing and you may also, in association with the same equipment, have circuit layouts and, in other words, you – a whole lot of different intellectual property rights are combined in relation to the one product.

Similarly, trademarks and copyright are often associated. There's trade mark and copyright in the labelling or in the logos, and so on, or there can be trade marks on goods that are protected by other rights. So

it's very common and indeed the norm that there are multiple intellectual property rights covering any particular product. So in that context it's a bit bizarre that different aspects of the intellectual property should be dealt with by different departments.

Certainly the feedback that we've had – I'm not sure that I've got anything I can give you in terms of hard documentation, but the anecdotal feedback we've had from the UK is that the consolidation into a single department is – has been beneficial in terms of ensuring cooperation and coordination between the various intellectual property rights applying to any particular product.

As far as the role of IP Australia, I think – I do think there is perhaps an issue which, I think your – well, I do think there is an issue with the body that is administering the patent and trade mark system also being the body that's deciding policy. It does seem to me that there is some sense in having a ministry that is responsible for the policy and for the non-regulatory procedural intellectual property, like copyright, overseeing IP Australia, which would then have a responsibility for the actual administration of the system and, no doubt, would have involvement in the policy decisions but wouldn't be the policy decision maker. I would see that as being an appropriate structure and it makes sense.

MR COPPEL: If I'm not mistaken, the UK model, both the administration and the policy, are in the one agency. I think there may be a separation between – well, clearly there is a separation between those that administer the applications and those that work in the policy area.

MR HAMER: Yes.

MR COPPEL: If there is a separation within a single agency, do you think that is sufficient to overcome some of the potential tensions between a regulatory and a policy maker in the one institution?

MR HAMER: Yes, I think that would be an acceptable, alternative way of achieving of what I think I'm saying. I think that'd be acceptable. I think I'd prefer the structure where the regulator was an independent organisation.

MR COPPEL: Thank you for your post-draft submission because it's extremely comprehensive. It covers, virtually, every aspect of the draft report. One area that's come up in the hearings relates to designs and it's particularly an issue with respect to registered designs for furniture. It has been suggested that a grace period would be one mechanism that could help, particularly furniture design, protect their intellectual property. I

note in your draft-report submission that you think the notion of a grace period is not one that you would endorse. If you could then elaborate on the thinking behind that position?

MR HAMER: I'd probably prefer to take that on notice, actually.

MR COPPEL: Okay.

MR HAMER: That was part of the report that I didn't draft, and I would be – I have my own views about that, but it might be better to provide that separately.

MR COPPEL: Sure. Okay.

MR HAMER: So I'll make a note on that.

MS CHESTER: Related to that is the issue of fees for patents and design rights. In that sense, and it could reflect multiple authors as well of your submission, there was a suggestion that where we landed in our draft report about calibrating the fee renewals to – as a bit of an incentive to make sure that people are taking patent renewals out for the right reasons, good commercial reasons as opposed to, sort of, strategic misuse reasons. Much of your submission argued against that, but then, I think, in the design area there was a suggestion that the renewal fee at the 10 year stage should be increased with a view to providing an incentive to renew for only those registrations having sufficient economic value.

MR HAMER: Yes.

MS CHESTER: So we were just a little confused as to whether there was one in-principle position on calibrating fees for the right type of renewal conduct or not?

MR HAMER: I think part of the reason for the difference in approach is that design – you're looking at very different fees for designs and patents. So in patents the sort of renewal fees that were being proposed would've been very substantial for small to medium business. I don't think they would've achieved the result you're talking about because if someone was filing or maintaining patents strategically it's usually because there's a lot at stake and the costs, however high you make them, are not going to deter them.

MS CHESTER: Okay. So it was less an in-principle position that your anti-calibrating fees against strategic behaviour - - -

MR HAMER: Well, they are calibrated already but - - -

MS CHESTER: Yes.

MR HAMER: Yes. But it's just making - - -

MS CHESTER: As opposed to the starting point for designs was so much lower than the starting points for others?

MR HAMER: Yes.

MS CHESTER: Okay.

MR HAMER: Exactly. Yes.

MS CHESTER: Okay. All right. No, that helps. Anything else?

MR COPPEL: Yes, that's fine.

MS CHESTER: No. Richard, thank you very much. That covers all the questions that we wanted to – and again thank you very much for such a comprehensive post-draft report submission.

MR HAMER: That's all right. I've got some homework, apparently.

MR COPPEL: Yes.

MS CHESTER: There's a little bit of homework. We appreciate that.

MR HAMER: Yes. Okay.

MS CHESTER: Thank you. I'd like to welcome our next participant, Alex Orange from Qualcomm Incorporated and I think you're joined with somebody as well, but we'll find out who that is when you join us up at the table. Welcome, gentlemen, and thank you very much for joining us this afternoon, and thank you also for your post-draft report submission to us. Perhaps if, once you're comfortable, if you wouldn't mind each just stating your name, the organisation that you represent, for the purposes of the transcript recording. Then if you'd like to just make some brief opening remarks. I'm not sure if you heard me earlier, I have an imaginary debating bell which will ring at five minutes. Okay.

MR ORANGE: Okay, thank you. Thank you, Commissioners, and thanks for allowing us to come and be present at this hearing. My name is Alex Orange. I'm Director of Government Affairs for South East Asia

and the Pacific for Qualcomm International. This is my colleague, Mr Phillip Wadsworth. Phil has over 40 years of experience in patents. He's worked with companies such as Motorola, IBM, and Qualcomm in the US. For Qualcomm he was the chief patent counsel and for 10 years headed the global patent policy at Qualcomm. Myself, I've been with Qualcomm for the last seven and a-half years and I bring to the table almost 20 years of experience in international best practice around telecommunications regulation. I guess, it's indicative of the importance that we hold with respect to your draft report and the consultation process and the hearing, in that I've travelled from Hong Kong to be here. My colleague, Phil, he's travelled from New York to be here. We came precisely for this hearing.

MS CHESTER: Okay, the debating bell's gone under the table. You can take a bit longer.

MR ORANGE: Thanks very much. I guess, just one more note before I turn over to Phil for our introductory remarks, is that Qualcomm is a technology development company. It's core technologies are central to the ideas of - or to the delivery of 3G, 4G and 5G communications. It's fair to say that without strong intellectual property rights regimes that those core technologies could never be commercialised and those technology ecosystems could never be developed. So with that I'll turn over to you, Phil.

MR WADSWORTH: Yes, yes. Thank you very much for inviting us today. If I may start with a prepared statement, hopefully, give you some more insight to our perspective and where we're coming from.

Our fundamental business objective is to be the leading technology enabler for wireless communication devices around the world. To achieve this objective, our business model has two primary components, namely the development of leading edge chip sets and supporting software that provide the core functionality or brains of the mobile telecommunications devices on the market today. As noted in our submission, we are the largest (indistinct) semi-conductor developer in the world. The other key component of our business model is that we openly licence our patent portfolio to any entity that wishes to manufacture mobile devices for end-users anywhere in the world.

We refer to our business model as a virtuous innovation cycle which includes risky and expensive R & D to continue to stay on the leading edge of technology development, the integration of the inventive and innovation fruits of our R & D efforts into our chip sets and software the sale of which generates revenue for further R & D, and protecting

inventions resulting from those same R & D efforts by obtaining patents in countries around the world, and licensing those patents to generate royalty revenue. We use a significant amount of those sources of revenue, approximately 5 billion every year or about 20 per cent of our total revenue, to invest in ongoing R & D to maintain our competitive edge in the market place.

However not all of our extensive and expensive R & D is the subject of a patent, and not all of our patents become the basis of a product or a licence because it's not always possible, even in a very sophisticated R & D environment to make the correct calls every time. However, the risk associated with billions of dollars invested in R & D over more than 30 years now at Qualcomm are mitigated somewhat by the existence of robust and - patent systems with certainty in most countries of the world which ultimately enable a reasonable return on those investments.

A robust patent system creates a check and balance for brought unsupported claims, ensures that enabling knowledge is made available to all, and ensures that even a granted patent is challengeable. As can be seen, patents from – form a critical part of our business model. So, as sophisticated and reasonable users of the global patent system, we are keenly interested in sharing our expertise and knowledge relating to developments and patent law in all jurisdictions around the world.

With regard to Australia, Qualcomm currently has 795 active filings, which include granted patents, allowed and pending applications, and new inventions instructed to be filed in Australia. With this in mind, and primary focus on the points raised in our submission, we look forward to a fruitful discussion with the Commission members this afternoon. Thank you again for inviting us to attend this and we look forward to your questions, thank you.

MS CHESTER: Great. Well, thank you very much, Alex and Phil. We do appreciate how far you've travelled. I didn't need to worry about the debating bell because you kept it pretty concise anyway.

MR WADSWORTH: Yes.

MS CHESTER: Thank you for your post-draft report submission because it did give us a bit of an idea in terms of the issues as they confront your business model globally. You've already touched on what forms of IP you use within your business model to protect your intellectual property.

If we go to one area first, perhaps, business methods and software patents which was, I think, one of the key points of contention in your post-draft report submission, it would be good for us to get a sense firstly of – for software, what role of different IP protections play? So we know copyright has a role over coding, patents have a role over the software and the business methods involved around it. We also know trade secrets play a role. We also know where it's the shorter commercial life, first advantage mover plays a role. So it'd be good to get a sense of across the business model of Qualcomm, the respective roles of those different forms of IP protection.

MR WADSWORTH: Sure. If I may premise that a little bit on our view on the section on business method and patents, which we hope could be addressed maybe going forward in the future. There seems to be a conflation of the discussion of business method and all software, and then converging on a conclusion that goes across both those areas of technologies, if you would.

We think that there should be a separate discussion between business method and even, maybe, some more granularity in the discussion of software patents because many jurisdictions in the world make a distinction between non-technical software patents and technical software patents. We think that, for the efficiency of time, your time and development of the report, I think the business method issue is pretty much moot because across the world now it's almost impossible to get a patent on a business method. In the US, with the Alice case, which I think that former speaker mentioned, I doubt that we'll ever be able to get a business method case again.

So on the patent side, there's been a phenomenon over the – since Qualcomm started its business way back in (indistinct) because our core technology, which is still used in 3G technology, was originally implemented fully in hardware semi-conductor devices and we had no trouble getting patents on that functionality. That's a key thing, I think, to keep in your back of mind what we're getting protection for are inventions related to the functionality of the product, no matter how it's implemented.

What's happened over the last 30 years is that now because of the efficiency of actually distributing new functionality, correcting technical errors in the functionality and things like that, software has been the development and implementation vehicle of choice, so to speak. So what we had 30 years ago in our core technology implemented hardware is now fully implement 100 per cent in software, but it's the same exact functionality.

So we advise caution in trying to jump to a conclusion that there's a big difference between hardware because there isn't in our case. Key to that is that the R & D expenditures that are made are developing new functionality that keeps our product competitive in the marketplace, and then afterwards it's decided whether to implement that - those new inventions in hardware and software and, as I said, most of the time it's software now.

So it seems a little illogical to us to come to a conclusion that if you implement otherwise patentable inventions in software it's not patentable but if you implement in hardware it is, because that doesn't really reflect the commercial viability or commercial realities today. So we think if it was like ATWAY(?),that would be true and the paper does allude to that a little bit by recognising that software pervades many, many different sectors of the economy nowadays.

I think the conclusion is very limited in that it assumes that all there is to developing software is what the programmers do they sit down and write the code. But like I said the R & D expenditures are really up front in developing the new technology inventions. Just for example, our original products were about 11 million lines of code in 2009 and now each product has about 25 million lines of code in it. So you can see that's doubled over just a few years and we shift from 330 million lines of code total in 2009, now it's 3.3 billion lines of code. So software is really a critical form of getting our technology into the marketplace. So we really that's an important thing to recognise.

That's why, I think, the first line of protection that we always look to is patents because again it protects functionality and so anyone that uses our inventions, no matter how they implement it, would be infringing our patent. Whereas we do realign copyright because what our business model is that we sell chip sets to customers who manufacture the cell phones, for example. But along with that we also provide to them all these lines of code that they load into each chip that allow it to perform all the functionality that's included in the software. So there is a copyright component.

But copyright is very limited and around the world it's becoming more and more easy to avoid copyright infringers, just because of the way the copyright's law has evolved with regard to software. So number one, it saw the copyright law only covers really literal infringement of the text which is rendered either in the source code, which is human readable form. So someone copies verbatim program source code, then you might be able to make a case of infringement. The law's evolved so much that

there's a granular review of each module and the software to see, well maybe this was already in the public domain, or maybe this is a well-known algorithm that's being implemented. So there's a lot of ways for alleged infringers to get around it. But nonetheless, it's still valuable, in some cases if there is an exact literal infringement.

Then, of course, because we licence a lot of our software, trade secret is very important to us. But trade secret is quite dubious, I think, because you're relying on the integrity of your licensee that you provide the code to that they're going to agree to keep that code in confidence. Difficult to police. In some areas of the world, not Australia necessarily, there's a lot of concern about the integrity of some of the new players in the field, so. Yes?

MR COPPEL: I was just going to ask you, because you mentioned chip sets, does Qualcomm also rely on circuit layout rights as a form of intellectual property protection?

MR WADSWORTH: No, we don't rely on that. I was involved with that a long time ago when I worked for IBM when the law was first passed in the United States and because it was new we just, to make sure we protected ourselves, we did what we could to try to protect our chips in IBM.

But, I think, over time for our business model it's – you have to weigh the cost benefit, I think, and it's pretty costly to – the materials and provide them to seek the protection, and then there's an issue of confidentiality too. I mean, when you do file you're allowed to black out some of the circuits to try to prevent total disclosure. But in the long run, we decided not to do that.

The product cycles in that regard do play into that analysis because our chip designs, our product designs evolve pretty quickly over time, so the circuit layouts will change quite frequently. So that's kind of a – it was a business decision not to seek protection there. Generally, my understanding is that it hasn't been used a lot in many jurisdictions, even though the rest of the world kind of followed the US after the US implemented its Act. So it is available in many parts of the world as well.

MR COPPEL: Our draft report has an information request on circuit layout rights where we've asked inquiry participants if they have any views on what would be the consequences of repealing the Australian Circuit Layout Rights Act and it's partly based on the same point that you've made that very few people are actually making use of circuit

layout rights as a form of protection, apart from that period at the very beginning when they were introduced.

MR WADSWORTH: Yes. I think that bears out in the US. I'm only aware of maybe two or three law suits where the Act was actually used, so.

MR COPPEL: Would you have any comments vis-à-vis that information request? Is that something that you could talk on? Do you think if - - -

MR WADSWORTH: In a follow up sort of thing?

MR COPPEL: If circuit layout rights were to be repealed in this context, it would be in the Australian jurisdiction, do you think it - - -

MR WADSWORTH: Yes. Well, I mean, another pragmatic fact, I guess, is that we don't have any semi-conductor chip manufacturers in Australia right now. So it probably wouldn't be too helpful. But at some point if there were and – because of the way that our products evolved so fast, I'm not sure that we would do that just – the administrative cost of keeping up with that and gathering all the materials and submitting them is pretty significant.

MS CHESTER: Phil and Alex, also underpinning some of evidence based narrative around computer software and patents was the commercial life of the underlying IP. We've had some sort of – and it is a very, sort of, diverse range of IP that we're talking about though.

MR WADSWORTH: Yes.

MS CHESTER: We do understand the difference between apps and something that could be quite enduring. But it would good from Qualcomm's experience across your intellectual property embedded in certain products what, sort of, is the average commercial lifespan?

MR WADSWORTH: Yes. Yes, I recall that aspect of the report. I think there was a conclusion that because product life cycles are only five years that that may bank for a shorter term for patents. But product life cycles are – no matter what the term is, don't resolve in an entirely original different product from the product that it replaces, and that's especially true in our case.

We embed in the technology that goes into 3G devices called CDMA and our original patents were granted way back in the 80s, some of the core ones that are really important to even have the technology work.

Today, that technology is still in our products, so the product life there was 30 years. So some of our core patents have already expired that would still cover that, so that – and some of the other ones that were filed in the 1990s, or 1996 even or a little bit afterwards are still in our products today. So I think it's important to consider that and recognise that the products are not discrete and distinct in themselves as far as patentable functionality.

So we think that the 20 year term is reasonable, especially when you're looking at trying to obtain a reasonable return on your investment because, I suppose, if you shortened the term then that could have some unintended consequences of driving up royalties because now you're trying to recover R & D expense in a shorter amount of time. So we think it's important to keep the present 20 year term as well.

MS CHESTER: Yes. We weren't looking at altering that, given we've got international obligations with respect to term. But I guess the issue was, if we're looking at software as an eligible form for patents, then if commercial life has reduced across the broad range of software for patents, then the relevance of a patent is very different in terms of first mover advantage might be a more relevant commercial form of protection of that IP, i.e. you're in the market first and if it's only got a life of four or five years?

MR WADSWORTH: But again, I think to some extent, we need to talk about the copyrights separate from the patents because they're two distinct rights that protect two different things. As I said before, the copyright is of limited value because it only protects the literal code, whereas patents cover inventions and those inventions, no matter whether the code changes or not to implement those inventions, would still be covered by the patent. So that just looking at the aspect of the product life doesn't necessarily tie into how long the term of the patent should be because follow patents may still have those same inventions in them.

MS CHESTER: Okay.

MR WADSWORTH: I hope I answered your question.

MS CHESTER: No, no, you did. I guess it would be quite remiss of us not to, given how far you've come and your post-draft report submissions, to better understand if our draft recommendations were implemented, what impact or what – how would that change Qualcomm's business model and licensing approach in Australia?

MR WADSWORTH: Okay. I can talk about a few things, I think, that we briefly touched on, I think, in our submission and I think you discussed it with the previous speaker. I guess, the object clause, trying to look like we're trying to add another point of analysis for whether should be patentable by looking at social value or whatever, that's the way I read the report anyway.

But we think that would just add another level of ambiguity, subjectivity, and confusion to the process. I mean, it seems to me you could look to the US constitution as to what a – if you really want an object that's helpful and that's to ensure the progress of science and inventors will be given a limited period of exclusivity in return for disclosing their invention to the public. So the object is that continue the progress of science in return for that limited period of exclusivity and the sharing of the information, which allows people to build on it. Having said that, I don't think you necessarily need to have that written in the patent law. I think, to me, it's become axiomatic to all patent laws that that's a fundamental premise for a patent system and I think it's borne out to be true time and time again.

Patent fees, raising patent fees to discourage filing, again, seems to be antithetical to the object I stated anyway, and again, it may have unintended consequences. I think when we look at the economies around the world, especially the innovative aspects of economies that the main drivers of R & D and job growth are small and individual entities. I've been told and that's true in Australia too that a large portion of the economy is driven by small entities. So they're already strapped with limited budgets to begin with. So, I think, that raising those types of fees may have the unintended consequence of stifling innovation and having maybe a negative impact on Australian R & D and job growth.

Normally the maintenance fees that are charged are factored into the equations, I think, of most patent offices of trying to recover costs, most of the patent offices having pretty rigorous economic modelling now. We had an analysis to try to make that come true. The maintenance fees at the end are really used, I think at the end of the day, to try to perhaps have the opposite effect that seems to be a question and import of making the upfront fees lower so that there can be more participants in the system to get the initial patent.

Then once it's granted, if it no longer has value - and I think that's a point to some extent, the existing patent system already is self-policing from the standpoint – with existing maintenance fees and post-grant fees because if the patent is not being used or not getting revenue or not allowing parties to maintain their exclusivity in the market place then

those fees are already high enough to discourage continuing to maintain them over time. So I guess I'd just advise caution in maybe raising fees to try to discourage participation in the patent system.

In that regard too, I think, we have heard a lot of rhetoric around the world that there's too many low value patents, but the data doesn't seem to totally substantiate that. I guess anyone that gets sued for a patent infringement is going to say, "Well, that's a low quality patent anyway". So - - -

MS CHESTER: So in our report we did have a go at trying to come up with some proxy measures to profile the quality of patents in Australia. It did suggest that we did have a large rump of low quality patents. I understand from some work by some academics in Europe it wasn't too far disparate from the analysis that they had done. I don't know, and I don't expect you to have read this, it's not a best-seller but it is a door stopper.

MR WADSWORTH: Yes.

MS CHESTER: I don't know if you had a chance to have a look at the methodology that we used there and whether or not you had any thoughts on its appropriateness, because it's very difficult to do and we used six or seven measures?

MR WADSWORTH: Yes. No, I didn't have a chance to get into that – some of the – but again perhaps one area where that's already being mitigated, and we discussed briefly, is the business method area because now most of those types of patents or patent applications are rejected for not meeting the patent law subject matter requirements. We have a lot of experience in the US patent office in the appeal process. Now all the business method patents are being found invalid.

I think that's where most of the litigation was by NPEs, which I know aren't really a problem in Australia, thank goodness, just because the NPE problem is somewhat unique to the US because of our litigation system, it's so expensive and costly that it kind of triggers some of this behaviour because it's cheaper to settle than it is to go through the litigation and the evidentiary process.

MR COPPEL: Does Qualcomm licence its technology in other countries?

MR WADSWORTH: Yes, global. We have licensees in all the industrial countries and all the emerging countries in the South East Asia region, China, India, Europe. So - - -

MR COPPEL: Yes. Are there difficulties in licensing your technology in other countries?

MR WADSWORTH: No.

MR COPPEL: Is this an area where there are obstacles?

MR WADSWORTH: No, not really. It really went back on our former protection in essence or our licence agreements are forms of protection in their own right too because they set forth the terms and conditions of use of the patents and if those – any of those terms and conditions are violated then we can enforce the patent rights against the breacher of the contract. So it's not a traditional IP right but - - -

MR COPPEL: Is it prospective licensees that come to Qualcomm or do you proactively seek to licence the technology and hunt down potential good parties to reach an agreement with?

MR WADSWORTH: The short answer is both because, I think, our portfolio, the quality of our portfolio is recognised throughout the world and people realise it's necessary to get a licence with us to make mobile phones and introduce them into the market. Having said that there's companies out there that don't come to us first. So we have a program to try to identify new prospective licensees and approach them to take a licence. So we really haven't had any litigation in a long time where we're the plaintiffs so - we've been more defendant. So because we have an open licensing policy we don't try to stop manufacturers from making products, but if they are without a licence then we'll approach them for a licence and we've been very successful in getting them to sign up agreements.

MS CHESTER: Yes. So, Phil, just getting back to my earlier question because I think you began with some commentary giving us further feedback on our draft report and some of the relative merits, but I'm still a little unclear about if our – the recommendations in our draft report were adopted by the Australian Government, what impact would it have on Qualcomm's business model and licensing arrangements in Australia? I'm just trying to understand. Folk, like yourself, come and talk to us when we get something wrong, but also because it's going to have an impact on you.

MR WADSWORTH: Yes, okay. So we can talk about the patent fee issue again specifically in the context of Qualcomm. So I'll try to make it short too. Every corporate patent department has a budget, annual budget. So if the fees were raised that would just mean that we would probably file less patent applications in Australia. We already have a pretty rigorous program to try to identify the value of each individual invention and corresponding patents. So we would probably file those patents and we'd probably discontinue maintaining some of the lesser value ones in Australia. But I don't think we would totally stop our participation because Australia is, apparently, a large market for handsets and mobile phones. So we've got to make sure that we can protect - - -

MS CHESTER: And just so we get an idea of relative order of magnitude, given the size of Qualcomm, the number of patents that you have afoot in Australia at the moment, what's kind of the average annual cost of lodging and renewing for those patents in Australia?

MR WADSWORTH: I did not get that information but, I think, as I said we have 795 accumulative patents, pending patent applications and - - -

MS CHESTER: In Australia.

MR WADSWORTH: In Australia, yes.

MS CHESTER: Okay. I didn't know if that was a global.

MR WADSWORTH: No, no, that's just Australia.

MS CHESTER: No, I didn't think so.

MR ORANGE: But are you, sort of, referring to the total amount – total cost of - - -

MS CHESTER: Yes.

MR ORANGE: Both including fees and professional services to eventually have a patent granted? So you're talking about that total cost or just the - - -

MS CHESTER: No, no, just so if we changed the cost of renewal fees.

MR ORANGE: Okay, just fees.

MS CHESTER: I'm just trying to understand what's the denominator?

MR COPPEL: But if you have an idea of what the break up is between the attorney cost and the actual filing fees?

MR WADSWORTH: Since Australia is an English speaking country, thank goodness, the filing is only whatever the administrative fee is which I don't think is a – what, $1500 or $2000 for a patent. Then there's fees, of course, to prosecute the patent and they typically run between 3 and $5000 depending on how much communication there is back and forth. Then the patent is finally granted. So I think Australia is like the US, like, there's annuities, there's three years and seven years and 15 years or is that annual? It's annual so - - -

MR COPPEL: For sure. It is, but it also changes beyond the period, yes.

MR WADSWORTH: Yes, yes. So if they are raised, sure, it would have a fiscal impact but it's hard to quantify, I guess, the exact impact it would have on us because patents are so important to our licensing model.

MS CHESTER: The material impact of our draft recommendations to Qualcomm's business operations in Australia would be a response to potentially higher patent renewal fees and therefore you'd be doing some revisiting of the economic merits of those and some potential pruning of how many patents you lodge here and how many you renew?

MR WADSWORTH: Right, yes.

MS CHESTER: Okay. Are there are other material impacts on the Qualcomm business operations in Australia?

MR WADSWORTH: I think you addressed the inventive step pretty well with the earlier speaker and so, as long as inventive step is similar to international jurisdictions and somewhat harmonised, again that has a positive fiscal impact because as was said once we get a patent granted in the US or Europe then it's easy to just conform the final claims of those particular applications with all the other jurisdictions. If the tests are similar then that should really limit the amount of cost in getting the patent granted in those other jurisdictions.

MS CHESTER: Yes. Just purely from a commercial perspective and given you are lodging patents globally, you would get a birds eye view sense of where the threshold of patentability is in reality in different jurisdictions. What's your pecking order in terms of who's the toughest threshold to clear, both in terms of you're seeing it holistically the legislation and also how the patent examiner comes to a landing?

MR WADSWORTH: Unfortunately, I think I agree with the previous speaker, if I understood him correctly, that it's probably Europe because they have a similar inventive step test, but the way the administer it and apply it is much more timely and very regimented, I guess, so that results in more process time and more attorney's fees sometimes to overcome it. But - - -

MS CHESTER: This is the EPO process because we actually went and met with them in Munich.

MR WADSWORTH: Yes, the EPO and some of the individual countries as well do that, so.

MS CHESTER: Okay. Well, Phil and Alex, that covers all the questions we were hoping to run through with you this afternoon. Is there anything else that you wanted to say that you didn't get a chance to cover in your opening remarks in our Q & A session?

MR WADSWORTH: Yes, just if I may because software inventions are really important to us and I know there was some comments, I think, that were derived from concerns from the open source community in the report. I don't think that at the end open source is a panacea for all software development because again we spend a lot of R & D money on developing proprietary functionality that we're not willing to share with our competitors so to speak. So for that type of R & D investment open source software just isn't a good business model.

But having said that, there's definitely a place for open source software. So we do use open source software solutions where it doesn't necessarily help to differentiate our key technology and allows us to stay competitive in the market place. You're probably familiar with the Android operating system that's used on many cell phones. We fully support that even though it's open source and we – open source software that we created that works in connection for that. But I don't think the concerns raised by the open source community reflect the realities of companies that are sinking large R & D investment into key functionality.

I think the other thing is that we, kind of, agreed that - I think there was a statement in here about perhaps abandoning innovation patents and having a stronger inventive step provision might go a long way to get rid of low value patents. But nonetheless the recommendation is it still makes sense to eliminate protection for all software patents – patent protection for all software patents. So we would encourage more deliberation on that and quashing it in going that far. Hopefully, what we shared with you today shows that it would have a dramatic impact on our business model

and many others that are using software now for their core technologies, implementation of their core technologies.

MS CHESTER: Okay. Great. Well thank you very much for joining us this afternoon and travelling from so far.

MR WADSWORTH: Thank you.

MR COPPEL: Thank you.

MS CHESTER: Thank you.

MR WADSWORTH: Thank you very much.

MS CHESTER: Okay, folks, we are going to take a short break for some much needed caffeine and a stretch of the legs. If we could aim to resume at 3.15, so if we could just take about an eight minute break that'd be great.

ADJOURNED **[3.06 pm]**

RESUMED **[3.18 pm]**

MS CHESTER: I'd like to invite our next participant, Michael Caine, to join us.

MR CAINE: Do I get to sit in a special place?

MS CHESTER: You do. Sorry, Michael. If you can join us up at the table. Michael, firstly, thank you for joining us this afternoon and thank you also for IPTA's involvement, very active involvement in this inquiry, both through some earlier consultation, an initial submission, the post-draft report submission and involvement in roundtables and the like. Just if you could say for the transcript your name, what organisation that you represent and then if you could make some brief opening remarks. But I do have the debating bell back and will be ringing it in five minutes, so if you can keep your opening remarks as brief as possible. Thank you.

MR CAINE: I'm Michael Caine, I'm here on behalf of IPTA, I'm the vice-president of IPTA. I should also say IPTA is an organisation representing the Australian patent communities, both in corporate practice and in private practice, we're not lawyers generally, we're scientists,

we're engineers, chemists, biotechnologists and so forth. We work with inventors from the beginning, from the start of conception of an invention, we help them, we prepare patent applications for them, we work with them and their companies to get patents overseas and locally for them. We also act for overseas companies in getting patent applications granted here in Australia, we also act for accused infringers and patent owners, both sides of the spectrum, we act for pharmaceutical companies, we act for generic companies, we represent them all. We're involved in the whole process of patenting from the start to finish.

I guess that's the key point, we are actually hands-on with the whole process and, if you like, we've got a vested interest in anything that sort of promotes innovation, so anything that's good for innovation is good for us and that's really important to understand from where we're coming from because we feel that we haven't been given – that our views haven't been considered in the draft report, we don't get the sense that our message has got across and so hopefully, through this session now, I can perhaps provide some more information and perhaps more convince you to a greater extent that what we're saying is correct, because we are very, very disappointed with where the draft report is going.

I might also say just about myself, that I'm also the chair of the International Patents Study Group of FICPI which is an international organisation, over 7000 members, 80 different countries. I chair the International Patents Study Group, we make submissions to different patent offices, different courts around the world on different issues that affect sort of patentability of inventions and IP rights in general. I have in the past been a member of the Client Liaison Board of the New Zealand patent office. I've visited the Japanese patent office, the Korean patent office, the Japanese patent office and Chinese patent office and made submission to them, I've given presentations to Chinese patent examiners. I've been involved in this IP system for 27 years and I feel that I'm well-placed to sort of represent the views of our profession, particularly in relation to pharmaceuticals but not just in relation to pharmaceuticals.

MS CHESTER: Thanks very much, Michael. We have heard from other colleagues of yours who have got other expertise that complements yours, so in earlier public hearings. Thank you very much for those opening remarks and thank you very much for keeping them brief. I might begin with, I guess, the overall objective of the patent system. One of our recommendations which we're getting sort of conflicting feedback on, that is the relative merits of having an objects clause. I know that IPTA was involved in IP Australia's 2013 consultation process around doing something very similar, it seems that your thinking has evolved since 2013. It would be good to sort of better understand how and why your

thinking has evolved on the relative merit of having an objects clause in the Patent Act, and then, secondly, there's some terminology that we have used in what we have suggested that is obviously causing some concern.

MR CAINE: I suppose our overriding concern is, if we do have an objects clause, I suppose our position is we don't think we need one but we could probably live with one. We don't think we need one, that's important to put on the record, but we could tolerate one or have one so long as it didn't impact on the job of IP Australia and I guess the job of the courts in assessing patent, the validity of a claim. It's complicated enough, the whole process of examination, looking at novelty, inventive step, sufficiency, claim support, you throw does it meet the objects clause, I don't think examiners would be well-placed to sort of make any assessment of social value or these sorts of things.

MS CHESTER: Well, maybe if I could clarify that. It's not meant to be a guide for the examiners, it's based on advice and feedback we've had from both the Office of Parliamentary Counsel and some of the Justices, IP Justices of the Federal Court, it's just meant to provide a sense of adaptive interpretation of the legislation to the judiciary by explaining what's the underlying intent, what's the policy underpinning what the following clauses are going to ask you to be interpreting over time.

MR CAINE: Yes, look, it's a fine line. I think that's why I guess, because until we see the clause we're not going to be keen to support it until we sort of see it. There is scope for it to be problematic if it is something that gets taken into account in every court action, every court action you've got to deal with the objects clause, not only prepare your case on all the other grounds, but what if the judges get caught up in the objects clause and think my invention, this particular invention, doesn't promote whatever invention is meant to do and to have the patent rejected, that patent being rejected for somehow being in conformity with the objects clause. That's the fear that we have.

MR COPPEL: Is there any basis for that fear materialising, because my understanding is an objects clause is not something which would be used in the interpretation or decision, it's more like guidance and a bit of context for the purpose. I'm just trying to tease out a little bit.

MR CAINE: Plainly then we would be very comfortable, we'd sort of put the plain, vanilla sort of objects clause. But some of the suggestions I've seen for objects clauses, it's sort of going to promoting public health, I mean that's a bit too specific for an objects clause. I think it would just have to be quite sort of general and not specific enough to interfere with

individual inventions that could be taken into account to reject a particular inventor's patent.

MS CHESTER: Not meant for the examiners, just interpretation of the clauses over time.

MR CAINE: Yes.

MS CHESTER: The other area that there has been quite a lot of discussion is around we did our own analysis and we got a lot of evidence around the extent to which the current patentability threshold in the Australian Patent Act is appropriate or not. This isn't an area of perfect science, nor does it lend itself to quantitative assessment, but based on the analysis that we did it did suggest that there was a large rump of low quality patents in Australia. But as we understand it from some academics in Europe, similar analysis over there comes up with a not too different result, a little less than here. So, it would be good if you could just run through your understanding of the threshold test in the Australian Intellectual Property Arrangements related to patents and those in Europe and what's the delta between the two, both in terms of in a technical sense but also in practice.

MR CAINE: Well, I think pre-Raising the Bar Act, I think our law, particularly in relation to full description or sufficiency and claim support, the threshold was very low for that. So, you could actually get away – and I shouldn't use the expression "get away", but the office would allow, and rightfully allow, a broad claim based on very little support and little description, so these broad claims that would be granted by IP Australia and completely in accordance with our legislation. If you talk about low quality patent, is a valid patent a low quality patent? I mean it might be broad, it might not withstand scrutiny in a different jurisdiction but it meets our very low bar that we had prior to the Raising the Bar.

I mean, is a low quality patent a valid patent? I mean low quality in the sense that perhaps not the sort of patent that would be granted in Europe, I'd accept that characterisation. I think this study that Andrew Christie is doing that's actually comparing claim scope in Australia with claim scope overseas, that's comparing the old law, as claims go, against the scope of corresponding patents overseas, I think that will be a very useful study and I think it will show that claims in Australia are broader, so broader but valid I think, under the old law.

Our new law, and I know you focus on inventive step and you talk about sort of low quality patents, I know an academic, or Hazel Moir, has sort of been pushing this barrow for a good while and I disagree with her

completely, I don't think our law on inventive step has been the problem all along. I mean we have amended our law with the Raising the Bar Act and we have raised the threshold for inventive step because we've now introduced a broader class of prior art reference that can be used to attack a patent, because we have removed the qualification that the reference had to be ascertained, understood and regarded as relevant, that language has been removed and also the common general knowledge has been expanded to include the common general knowledge in the art as a whole and not just in Australia. I think we have, with the Raising the Bar Act, increased the threshold for inventive step.

But we've also increased the threshold for description, this was more important than inventive step actually. When you talk about this study of Andrew's, it's not about inventive step, this claim scope, it's actually about description and it's important to understand that. Inventive step has never been the issue, even though Hazel Moir would disagree with me there, the issue has been full description here and that's been fully addressed. Our inventive step test now is comparable, I think, with the European test, the US Test.

MS CHESTER: I think this is where we struggle a little bit, and rest assured our views on the threshold were not informed by any one single participant, indeed we got a large number of submissions, and indeed we've heard from a large number of people at public hearings being very supportive of our recommendations around changing the threshold test. Our objective, and the way we've described it in the report, is to try to align ourselves more so with the EU. It would be good just to get your thoughts on, is that not what we're achieving with what we're recommending?

MR CAINE: I think we've achieved that already, so I think we're already very much aligned with Europe. I know I shouldn't say Hazel, but she would disagree with me on this, and I've never met Hazel by the way. But what they do in Europe, they create this artificial construct, this artificial problem, what they do, they look at all the prior art that's been cited and they pick one based on criteria that are not unlike criteria that we might apply in Australia, that would be directly led as a matter of course, these sorts of criteria are applied to single out one reference which is the closest prior art. The assessment in Europe, because the European patent office, they've got lots of examiners from different jurisdictions - sorry, different countries, different languages, whatever they need, they have very tight procedures and processes in the European patent office, and they do this by having a very rigid approach to assessing inventive step where they pluck out one reference, they don't want examiners looking at 10 references.

Australian examiners look at 10 references, I mean inventive step in Australia is judged against any number of reference, you can come at it from any which way and say, look, it lacks inventive step in light of this reference because of this, it lacks inventive step in light of this reference because of this. This is also why it's not appropriate for the inventor or applicant to be trying to say what the inventive step is, because what the inventive step is in Australia depends on what reference you're talking about, it's inventive over something because of a particular reason, because of a particular dissention. In Europe there's a single reference and they've got this formula for selecting it. Now, we've got a formula for assessing inventive step, but we can assess it against any number of references, we're not limited to one reference. I think when you look at the two processes, in the end, it would be very unlikely that you will get a very different result, inventive step hasn't been the issue for us, inventive step is not the issue.

I know they refer to that Omeprazole case saying, look, the Omeprazole case, that should never have got up, but that just shows a complete lack of understanding of the technology associated with Omeprazole. I mean, that's the trouble, the people who write these papers don't understand the technology, they just dismiss a formulation patent as, well, it's just a new formulation, it's just a new form, it's just a new use. But the amount of technology that goes into trying to deliver a drug to a particular receptor in the gut where the drug decomposes on contact with acid, the stomach, it's got to act there, so the way you get it into the blood stream, the way you get it into the blood, back to the stomach lining to be able to deliver it to stop acid going into the stomach, I mean that's quite sort of amazing technology and Omeprazole, the drug, without that technology would be useless. I know Hazel doesn't like that patent and she refers to that patent.

MS CHESTER: Well, rest assured, as mentioned before, our recommendations on patents do not rely on one individual submission or one individual academic's work. If we then turn to pharmaceutical patents, which is an area of your expertise, and in the area of extension of term. Sort of as part of our role and our Terms of Reference we go back and we have a look at, well, there was a policy objective underpinning the government's decision to move to allow the extension of term around pharmaceutical patents and that was with a view to encouraging greater R&D in pharmaceutical medicines in Australia.

The extension of term introduction didn't result in that, that increase, so it makes us then think, well, on what basis now could we justify a retention of the extension of term for the pharmaceutical patent given the

very substantial cost that comes with that, I think it's been assessed at about – for part of the cost, being about a quarter of a billion dollars annually for the Australian taxpayer. It would be good to get a sense of any examples that you've got of where extension of term for your clients has resulted in new R&D in pharmaceuticals occurring in Australia.

MR CAINE: Where to start with that. I mean I disagree with a lot of what you just say about the facts, that's the trouble.

MS CHESTER: Well, maybe we could just start with a specific question.

MR CAINE: Look, I'll just give you one example of why a patent term is important, I mean really important for local clients. It's really important for overseas clients and companies, to encourage them to bring us their drugs, I mean that's important, it's an international field, pharmaceuticals, everyone in the audience here would be using drugs that have been invented overseas and luckily the pharmaceutical companies have seen fit to bring it to a country like Australia which represents one per cent of the market, so we want to keep encouraging them to do that and the patent term extension provisions are very important for that.

But for local clients, our local research industry here, very inexperienced, so I work with research institutes, universities, we sit down with them, the first step is all this free clinical research that goes on, eventually they try to get some interest with a pharmaceutical company, they have business development managers in these universities, they go and try and get some interest because the money has got to come from somewhere, and either - - -

MS CHESTER: Michael, maybe if we could just bring it back to answering the specific question.

MR CAINE: Well, this is it, this is what - - -

MS CHESTER: Can you point to where an extension of term - - -

MR CAINE: I can, I'm about to say why.

MS CHESTER: Thank you.

MR CAINE: A lot of these inventions fall over because of lack of patent term, that's what happens because we take so long in the process. It's an iterative process everywhere along the way, you decide to do a toxicology study, for example, they cost money, you've got to gain some money and

it's all about how much term, where's the patents, what patents have you got, how much term is left as we go along, then you do a Phase I clinical trial, how much term is left along the way. Australians are not very good at running Phase I clinical trials, better to get a pharmaceutical company involved, but they still try because if they can add value they'll make some more money, Australian get greedy as well. They then try to go to Phase II, again, chewing up patent term while they're inexperienced, trying to get their drug approved by the FDA, this takes time. If something goes wrong with that Phase II clinical trial, which happens, then they've got no money left, they've got nothing to do but all they can do is sell off their IP, but if there's not enough patent term left no one wants it.

This is what happened to a very, very promising drug, and if you let me, two minutes to explain this particular drug. It was isolated from a Cone Snail grabbed off the Barrier Reef and it treats pain in patients that are no longer responsive to morphine or anything when they're in their late stages of cancer, pain, not responsive to morphine, this drug was just fantastic. The Phase I clinical trial, they had 20 patients, they gave the drug to the 20 patients and some of these patients who had been in bed for, like, months, were getting up, mowing the lawn, and it was lasting a couple of weeks, just from one dose, this was an amazing drug.

The trouble was the company got greedy and instead of doing a clinical trial based on cancer patients they thought, let's take healthy patients, let's see if we can come up with a pain killer to treat healthy patients. Now, if a healthy patient should need a therapeutic window, a huge therapeutic window, you give healthy people a toxic dose and a therapeutic dose, you need a big gap between them, right, for cancer patients it can be smaller, so they took a big risk. They didn't get there with their Phase II, but close, but not enough, they didn't have the money to continue it on.

The net result is that this drug will never see the light of day, patients will never get this drug and there is no drug that does what this drug would have done. It didn't get any backing because patent term ran out. Even with patent term extensions, I'm saying even with the current 25 years, and extra term that you get in Europe and the US, time ran out on this one. Time runs out on heaps of drugs. There already isn't enough patent term and patent term is an international thing, it's patent term internationally, it's not just Australian patent term, I don't think you'd be suggesting that Australia would expect the US and Europe and Japan to pay for all the research costs associated with new drugs and that we don't, we just free load, I don't think you'd – I hope you guys would not be suggesting that. The price to be paid for the billions of dollars invested in

coming up with these new drugs is the patent term, I mean that is patent term.

MR COPPEL: But in that example, what stops a pharma company, because it was an expired patent term, taking up the drug and continuing with the clinical trials?

MR CAINE: They won't have exclusivity because it's all been published, it's all been disclosed and they won't have protection and so a generic company can just come in and make it.

MR COPPEL: Or a generic company? You said it's lost.

MR CAINE: It's lost. The generic company won't do it because they're not going to spend the billion dollars on the clinical trials.

MR COPPEL: On the clinical trial.

MR CAINE: Yes, it's the clinical trial that is going to cost all the money. You need patent term in the end to justify the big expense.

MS CHESTER: I guess it's important that we actually bundle, so we now report, we do say that for pharmaceutical it is the arch-typical, archetypal, except that it does need patent protection because of the very large, upfront sunk R&D costs, I guess the example that you've just given us, the clock was ticking away so furiously because of poor commercial decision-making. I'm not sure why we should have an extension of term to reward poor commercial decision-making.

MR CAINE: It's not always poor commercial decision-making, it's often just the way things go, it's not predictable like the route to market. That's why it's not just you look at how much patent term you've got and you'll definitely go ahead and take the drug through clinical trial, it gets tested all the way along because there's all these milestones that you have to meet along the way and it depends on when you get there relative to how much patent term there is left. So, in the end, knowing that there's that extra five years or extra four years or whatever it is, factors into the decision to actually go ahead and do the clinical trial.

So, lots of drugs, they don't get put through the clinical trials because, in the end, there's not enough term anyway. If you're talking about sort of taking that term back, getting rid of that patent term extension then there's even less term to recoup the profit that is necessary to encourage companies to spend billions of dollars before they sell a pill.

MS CHESTER: I guess to go back to maybe the original question then, we currently have the extension of term in place which doesn't have any caveats attached to it, are you able to point to, across any of your client base, where R&D investment has occurred in the pharmaceutical space that would not otherwise have occurred without that five year extension of term?

MR CAINE: This whole question that you're putting to me is sort of very much a Hazel Moir question, I mean the patent system has got so much more to do than what you're just putting to me.

MS CHESTER: No, I'm actually just taking it back to the government's original policy objective and asking can you give us any examples?

MR CAINE: The Australian patent term, I mean, look, you can talk about patent term extension in general and patent term in general, look, I don't think anyone could argue, right, that because of Australia's five year patent term extension, that a Danish pharmaceutical company decided, yes, look, we're going to invest $5 billion and come out with a new diabetes drug because Australia has got a five year patent term extension that – no way. But along the way they will test where they're at with patent term as they're going through the clinical trial process and they'll look at patent term generally, including the Australian patent term, and they will decide whether or not to continue on based on the amount of patent term left internationally, and Australia gets factored into that but it's not the sole factor.

MS CHESTER: We understand that, we appreciate that we're only two per cent of the market at the end of the day, so can it really be a tipping point for a decision made in Europe. But I guess we then look – we're also very mindful in our report that because we do import a lot of our intellectual property that relates to pharmaceutical and medicines, that we have to be mindful of do we depart too far from other jurisdictions and their patent arrangements there, because that could then have a flow-on effects of what medicines do come to Australia. If you could just talk us through whether or not – and our draft recommendation is not abolishing the extension of term, our draft recommendation is the original policy objective hasn't been achieved, so putting a caveat on that extension of term to any unreasonable delays from the TGA, do you see that there would be any unintended consequences from that in terms of the decision, globally, for pharmaceutical companies to bring medicines to Australia?

MR CAINE: Yes, I think there would be a very – I think there's already lots of negative policies. I mean there's lots of things that would discourage a pharmaceutical company already, not just a small market and

whatever but the aggressive approach to pricing, the PBAC, two years to get them to agree to a price after you've actually got the drug approved to sell, that's the big disincentive, according to information I have, has involved companies just walking away, so we're not going to get certain drugs because of that.

Also, I don't want to sort of go into it in too much detail, but the government policy of going after unsuccessful patentees to claim under the undertakings as to damages, just because of the way that is set up and how it's absolute complete double-standards where the government actually profits from infringers and have gone and set up a system that allows them to actually profit from infringing, patent infringement, it's just hard to justify that to companies who want to deal in Australia, that we've got such a double-standard.

MS CHESTER: Michael, maybe if we could just bring it back to if you can talk us through the logic, so we can better understand it, to if there was the change that we recommend around extension of term, how would that impact the commercial decision-making of a pharmaceutical company, globally, to bring medicines to Australia? I just want to make sure I understand those links.

MR CAINE: Yes. Well, from my understanding, and we primarily deal with the overseas companies but we have got the local subsidiaries here, the local subsidiaries are absolutely dependent on the money that's generated during the patent term here, so they are so concerned with patent term. When you say what impact it would have if you were to get rid of – and although you're saying that you're not proposing to get rid of it I think that's what will happen if your recommendation is adopted, just dealing delays in the TGA, I think, effectively, that's getting rid of patent term extensions.

So, that means there will be sort of potentially five years less patent term, five years less to generate money in Australia for the pharmaceutical company. This Australian subsidiary is funded and supported and whatever by the money generated by selling pharmaceuticals in Australia, it's that function, that is, out there scouting around our universities and our research institutes trying to partner up, because none of these drugs actually end up on the market without a pharmaceutical company. We've got Bionomics with Merck, we've got the Gardasil, Merck, Cervarix with GSK, any Australian drug gets partnered up, even Spinifex is partnered with Novartis, none of these drugs hit the market without the involvement of big pharmaceutical companies.

We want big pharmaceutical companies and we represent the local biotech industry, they are really concerned, they want these pharmaceutical companies to feel favourably and feel good about dealing with Australian researchers and Australian research institutes. If these companies get the feeling that the government here has got no interest in what they do and does not actually appreciate what they do, which is what came out of the Pharmaceutical Patent Review report.

The two things which caused such a negative feeling towards Australia were that Pharmaceutical Patent Review because of the biased panel, there was not one person on that panel that had any experience whatsoever in research-based pharmaceuticals and there was no way they were going to accept anything that that panel recommended for that reason, from the start, that was a really big negative thing. You have 30 references in your report to that report, that report should not – the government who commissioned it didn't release it, the government who came in afterwards didn't release it, it was actually released because of an FOI request from a patent attorney, that's why it was released. 30 references in your draft report to that, that draft report, or that report as a final report by Nick Gruen who was well-known to be affiliated with the generics industry, and you had Tony – I forget what his last name was.

MS CHESTER: I think we just need to be a little bit careful about the content of your evidence because some of it could be misconstrued as defamatory, so let's just take a little bit of care.

MR CAINE: No, that was all in my written submission to that panel, exactly about the bias, how biased it was. No, they were good people to have on the panel, don't get me wrong, but have someone else on that panel with that background, that was the submission that we made, so that was the context of the criticism of the bias of the panel, not those members.

MS CHESTER: No, it was just your commentary about someone and whether they're influenced by a particular industry sector. I'd just caution you to take a little bit of care.

MR CAINE: Well, you can read reports on the ABC and whatever, you can hear what Nick Gruen has said in the past.

MR COPPEL: I just have one question which comes back to the filing process. In our draft report we had an information request to seek out more detail on the possible costs and benefits of a two-part filing process, of which one part was to put on the filer the onus to explain why the

invention was non-obvious, I'm wondering if you've got any comment to make on that or any information to submit on that information request?

MR CAINE: Well, just that I don't think that you don't have to do that anywhere else, in any other country you don't have to do that.

MR COPPEL: True.

MR CAINE: The reason is because inventiveness is judged against a prior art reference or a combination of prior art references, and until you see what is actually being cited against you it's very hard to actually then explain why what you've got is inventive over that combination of references, or that particular reference if something is inventive over reference one for a different reason for why it's inventive over reference two, and it's a different reason again why it's inventive over a combination of references one and two.

You have to look at – it's just how it works, the system. The system works by the searches being done, the objections being raised and then arguments being put. They're either arguments that sustain and support inventive step, full description, support, novelty, whatever, or they don't, and it's up to the patent office to assess these arguments and decide whether or not to grant a patent, and if they do grant a patent then it's up to the court.

MR COPPEL: Yes, so that's how the arrangements work. But you could argue that the inventor is in a very good position to explain why it's not obvious because, (a) they made the decision to file for a patent, they've got some sort of sense that this is inventive, it's not a solely on the basis of that that a decision would be taken, there would be independent assessment by the intellectual property office, but it would provide some basis for informing that assessment as to non-obviousness.

MR CAINE: Well, there is lots of information that has to be put in the patent specification now to meet – so you've got to disclose a utility, you've got to explain how it's useful, you've got to provide a full description of how to use it, how to make it, you've got to support the claim, we now have quite onerous description requirements so these specifications that you're talking about are a pretty good description of this invention.

So, as far as trying to pre-empt what an examiner might cite, I mean it's very hard to pre-empt that until – so you've made a decision to file it, you think it's inventive, you think it's novel and the examiner gets to look at it. The time that the inventor goes on the record and says, "It's

inventive because", is when the objection gets raised. I just can't imagine what I would, if I was required to put something down before anything was cited against me, I'd almost have to raise an objection against my client's application and then defend it and then raise another objection and defend it. We have a patent specification that is referring to all the relevant prior art and explaining why it's inventive over each of them and combinations of them, it's tough enough and expensive enough to be describing the invention, let alone going through this sort of exercise prior to any objection being raised, you might be pre-empting things that the examiner isn't even going to raise or think is an issue. I just can't see how it would work in practice without adding red tape and cost.

MR COPPEL: I think the process that you've just elaborated on, that you as a patent attorney would think of how it could be objected to, the idea that's being put is that having a requirement for the filer to explain why it's not obvious would be on the record and that could be a basis then for subsequent objections, that's the idea that's been put forward, I'm just curious as to it.

MR CAINE: Well, yes, I don't think there's a problem, I mean I don't think this suggestion is in response to any sort of problem. I think if you've got evidence there's a problem here with being able to work out what these inventions are about, I mean I don't think there is a problem.

MR COPPEL: It's all linked to the earlier discussion, how to ensure the quality of patents that are granted and it sort of comes in as part of this filing process and requirements that are needed.

MR CAINE: Well, the quality, you want a good patent profession dealing with patent office, you want well-drafted patent specifications and you want patent examiners that are well-trained and going a good job. If you've got that then we've got quality patents, I can't see what more is needed. IP Australia, as far as I know, has gone through a rigorous training program with their examiners, I mean we've seen it there with the Raising the Bar Act, the objections that we're getting now are far more extensive than we had in the past, I mean they really have gone to a great effort to train their examiners.

Let's see how it goes, I mean give them a break, let's give them 10 years, let's do an assessment in 10 years and compare Andrew Christie's results in 10 years and see whether what we did with Raising the Bar, which was all aimed at trying to improve the quality, when I say quality, quality relative to overseas patents rather than whether they're valid or not, I mean if a quality patent is a valid patent then we had some valid patents that were of a very low quality internationally.

MS CHESTER: Michael, thank you, I think that covers off all the questions that we had for you this afternoon. We do appreciate your very active involvement, IPTA's very active involvement in our inquiry and the submissions that you have provided. Thank you.

MR COPPEL: Thank you, Michael.

MR CAINE: Thanks very much.

MS CHESTER: I'd like to welcome our next participant from The Text Publishing Company of Australia, Michael Heyward, Kirsty Wilson and Marcus – I know I'm going to get the pronunciation of this surname wrong so I'm not going to go there, you can help me out when you - - -

MR HEYWARD: Fazio.

MS CHESTER: Fazio, thank you.

MR HEYWARD: And Kirsty is not with us.

MS CHESTER: Okay.

MR HEYWARD: There she is, she is with us.

MS CHESTER: You're not going to opt out now.

MR HEYWARD: Sorry, I didn't see you sneak in.

MS CHESTER: Gentlemen, thank you for joining us this afternoon. Thank you for your post-draft submission to our draft report on Intellectual Property Arrangements. If you could each just state your name and the organisation that you represent, just for the purposes of the transcript recording, and then if you could make some brief opening remarks and if you could limit those too, to five minutes, that would be much appreciated.

MR FAZIO: My name is Marcus Fazio, I'm a director of Text Publishing. I'll leave remarks to my - - -

MR HEYWARD: I'm Michael Heyward, I'm a publisher at Text and I'll do my best with five minutes, so just ring your bell in an imaginary way.

MS CHESTER: I will.

MR HEYWARD: I've been working in this industry since 1992, the company that I work for, Text, was founded in 1990 and became an independent publisher in 1994, our office is just around the corner, we have 22 people working for us and our revenues are north of $10 million a year. I've been involved in all of these debates since I joined the industry, about territorial copyright, and in my experience none of the inquiries has ever come to terms with the cultural value of Australian writing, book retailing or book publishing. Publishing is a fantastic success story and my question is what is the value of this success.

I want to limit my presentation to you, I know you cover a number of aspects that affect books but I want to limit it to parallel importation arrangements. The debate, to my mind, has always been a debate about benefit versus costs, do the current arrangements bring benefits, if they do what are they, do they impose costs, if they do what are they. They're the terms that Harper found in his inquiry, that's the way he posed the question.

I was a bit surprised arriving here today, to learn that you are dealing only with questions of transitional arrangements and I think my question to you is, is the commission not able to discuss the whole issue independently, in three dimensions, while I understand that you also need to deal with possible transitional arrangements. The focus on transitional arrangements has seemed to me, as I've listened today, to be very narrow.

I'm also surprised at the suggestion, having been told for 25 years that we should abandon territorial copyright because our prices are too high, that now we ought to abandon territorial copyright because prices are no longer too high. This is my question, how did prices fall in real terms, not just foreign exchange terms, in spite of the supposed upward pressure of PIRs, how did prices fall in the context of continued industry success, they're interesting questions about our industry.

The success of our industry is due, in my view, to the 1991 reforms and the way they balanced the interests of all sectors of the industry and championed the interests of consumers. The reforms anticipated digital disruption and therefore applied downward pressure to price while encouraging an appetite for risk. In my view that's what you want, you want downward pressure on price and you want to maintain and encourage appetite for risk. Our job as publishers is to create and add value by working closely with our writers and our booksellers, the benefits we bring to the writer also flow through to the bookseller and to the consumer, those benefits include every aspect of the publishing and selling process, from intensive editing to book tours.

In this country the consumer wants quality and diversity, the consumer wants competitive prices, the consumer wants cultural value, the consumer wants innovation, book buyers want to discover new writers, they especially want to discover new writers who hold the mirror up to their own culture. To satisfy consumer demand requires investment and appetite for risk and comprehensive cooperation with booksellers, and that is the culture that has evolved in Australia.

A healthy market is defined by its diversity, by its capacity to encourage competition and by its resilience, we have a healthy market which has absorbed major shocks this century but our job is not yet done. We have made extraordinary progress but, in my view, we still have too few publishers in Australia to fully develop the potential of our writers, it's been an historical problem, we've made tremendous gains over the last few decades but there's still a way to go, in my view.

The evidence of how much better we are doing is everywhere. Are books cheaper in real terms, are books more widely available, is there greater diversity of bookstore ownership and retail culture, are more books and authors being published in Australia, are more Australian authors being published internationally, are more Australian authors becoming international bestsellers and prize winners, is the quality of editing and book production and bookselling higher, is the market share of Australian books greater now than in 1991, has the value of Australian book exports increased? The answer to all of these questions is yes.

Our company, Text, is the child of the 1991 reforms, Territorial copyright has allowed us to take risks and behave entrepreneurially. Our authors have won just about every prize in the planet, but here are some statistics I am especially proud of. One in every two of our debut authors, that is authors publishing first and second books, is shortlisted for or wins an award. We sell foreign rights for about one in three of those debut authors. We pay our authors more than $4 million in royalties per annum and almost three-quarters of that goes to Australian authors, 6 in every $10 we pay our Australian authors comes from selling their foreign rights on their behalf. Under the current rules we can trade in rights knowing that the playing field with the US, the UK and Canada is level. Without territorial copyright this rights trading is at risk, there is a real danger that we will no longer be able to treat Australia as an exclusive market when buying and selling rights.

I disagree with Peter Donoghue's evidence, to my mind, abandoning PIRs will diminish appetite for risk, and why would you change the law if you don't expect behaviour to change as a consequence of changing the law. I think there's an idea around everything is fine, we'll change the

law, it will all be okay. If you change the law, behaviours will change, how they will change I don't think we know, but that is, I would have thought, the purpose of changing the law.

Australia's limited PIR arrangements mean we operate in a market which is virtually open. There are many, many titles on the market to which PIR's do not apply because the terms of the legislation or of the industry agreement, 14/14, have not been met. There is one category of books to which PIRs do apply and which will suffer disproportionate harm if they are removed, and that is books by Australians. Australia is the largest market in the world for books by Australians and our country will become the dumping ground for international editions of those books if the rules are changed. Dumping is, in my view, inevitable and I do not know how it can be remedied.

Australian authors will earn no money from the sale of foreign remainders of their books and low export royalties from other sales, it is inevitable that author incomes will fall if the rules are changed. Australian publishers who trade in these rights internationally will be punished for their entrepreneurial behaviour, and the last thing you want is for publishers to become (indistinct).

At the same time, abandoning PIRs will make life more difficult for many booksellers, the networks of cooperation that have evolved under the 1991 reforms will be put at risk, the culture of sale or return will be put at risk and the foreign exchange risk will be transferred from the publisher to the bookseller. The beneficiaries will be foreign wholesalers and retailers, there are many Australian booksellers who will be disadvantaged if the law is changed. Abandoning our limited PIR arrangements will cause the whole industry to shrink, my question is, how will abandoning PIRs benefit Australia's productivity.

New Zealand, I know we've talked about it a bit, is a really interesting comparison. We reformed our law in 1991, four years before Amazon, New Zealand reformed its law, threw territorial copyright out in 1998, three years after Amazon, both territories have been subject to the same forces of digital disruption, in my view, our precise forms of PIR, balancing the interests of all the sectors, have acted as shock absorbers so that during the financial crisis and when the eBook revolution was in full swing, they gave us continued incentive to invest and take risks. I mean I think if you could wind the clock back and you go, all right, it's somewhere in 1990-plus, am I going to go down the Australian route or am I going to go down the New Zealand route, how will we deal with this issue. I think, in retrospect, we made the right decision in Australia, the evidence out of New Zealand I think is comprehensively savage.

I should also say, even though we are about one per cent of the Australian book trade, that since 2008, during this period when being a publisher felt like driving through a blizzard to be honest, our own revenue at Text has grown by more than a third. I think that's because we continued to take risks in difficult conditions and we've continued to explore intellectual property, often with startling success.

I just want to make one last point, and that is in this debate, this time round, there is an effective consensus across the industry, among booksellers, authors, publishers, literary agents and printers about the widespread benefits of the current arrangements. These are the people who have worked to transform our industry into one of the most successful publishing territories in the world, the consumer has been the winner and we should keep it that way. Thank you.

MS CHESTER: Thanks very much, Michael, for those opening remarks and thank you for keeping them so brief, that's much appreciated. Perhaps it might be best if I begin with partly, a little bit of a point of clarification, but partly responding to one of your first questions, that was around why our focus on transitional issues in our draft report. We, effectively, undertake our inquiries based on the Terms of Reference we get from the government of the day, our Terms of Reference required us to, effectively, advise the government in our final report on transitional arrangements. It's not obvious from a first blush read of our Terms of Reference because it says that we're meant to be mindful of the government's response to the Harper Competition Policy Review, we then go and look at the source, the source then says the government will be repealing parallel import restrictions and will be asking the Productivity Commission to advise us on transitional arrangements, so that's what we've been asked to do.

MR HEYWARD: I understand that. My question is why is that the only aspect of our industry that you're looking at in terms of your brief from government?

MS CHESTER: Because that's what government has asked us to look at, the transitional issues that would occur with their decision to move to repeal parallel import restrictions, that's in our Terms of Reference, but we are very mindful that, in looking at transitional issues, that we need to do that from a contemporary evidence base. And while we didn't, at the time of our draft report, update our previous pricing analysis we did have some higher level commentary and metrics around what's happened to prices since 2009, what's happened to the structure of the industry since 2009, what's happened in terms of some of the key performance metrics

like the 14 day rule being followed and things like that. So, we did try to contemporise it and we will continue to do so for our final report, we will be looking to update the pricing data for government as well.

In terms of the transitional issues that we did identify, there were kind of four that we thought mattered, I guess I'll run through those very quickly because I wanted to see if there were any other transitional issues that we haven't identified. The first one was that if you're looking at it from a transitional perspective, 2009 versus today, given where prices have come, and from what we've heard from the evidence base from submissions from folk like yourself, the industry has become far more competitive, publishers have become far more competitive locally on price point.

Also, secondly, in terms of the competitive dynamics of the timeliness of getting books to booksellers, and we appreciate that that was very much a proactive initiative of the industry. I guess, thirdly, where the Australian dollar is currently, in a timing sense, if you were to look at removing parallel import restrictions there's some advantages to where the dollar sits at the moment. Then, finally, there's been some reviews more recently of Australia's – and some reform to Australia's anti-dumping arrangements such that they've sort of gone through recent review and considered to be incredibly robust. So, they're the sorts of transitional issues that we identified, are there other transitional issues that we should be looking to?

MR HEYWARD: Yes, there are, I just respond perhaps to the last two. Now, in the time I've been a publisher the Australian dollar has been at 50 American cents and at 110 American cents, so right now we have a snapshot in terms of FX, but we're building an industry for the long-term. We need to make sure that we have the conditions in place to allow our industry to thrive in the long-term because that is what is going to benefit consumers. If you're a consumer in New Zealand right now wanting to read New Zealand books, you're probably not getting what you want. We know, we have learnt, there is tremendous appetite and, as I said, I don't believe we are yet able to meet it amongst consumers here for books by Australians. It's been a tremendous privilege to be part of an industry that has started to really speak to Australians with wonderful books. So, that's sort of the foreign exchange thing.

The dumping thing, I've had a look at the language about dumping, I don't know anything about remedial action in dumping, but when you've got books which will be coming into the country in a manner of ways, some of which we might be able to anticipate now, others which we can't, it's very hard to see how it would be anything but shutting the gate after the horse has bolted. The compliance cost of trying to chase down

dumped books all over the place would sort of be ludicrous for an organisation of our size.

MS CHESTER: The current dumping arrangements apply to all Australian industry, Michael, there's no other arrangements that address the concerns around dumping apart from books and parallel import restrictions, so the rest of Australian industry does rely on the anti-dumping arrangements for that concern.

MR HEYWARD: I mean, imagine I'm a publisher in New York and I've bought rights or I have rights in a book by an Australian and I hear that the law has changed, my model, business model, anyway is about overprinting, the American market is a high remainder market, a high return market, particularly the hardcover market has always been like that. I've got an author, I know this author is a bestseller in Australia, it's going to be really rational for me to overprint, I'm going to lower my unit cost, I'm going to increase my profits in the US and I'm not going to have to worry about what I do with my unsold books, I can sell them off at cost, below cost, I've already won. In my view, that behaviour will become typical.

MS CHESTER: Maybe if we come to the - - -

MR HEYWARD: Sorry. Just in terms of other transitional issues, I have never seen any modelling by the PC, by the ACCC about what I've just tried to describe to you about our business model where a third of our revenue is coming through selling rights, I've never seen any attempt on the part of the PC to understand how that works and the impacts that might be felt by a company like ours, our model is not to make money by distributing other people's books, our model is to make money by selling rights, and of course most of those rights are books by Australians.

We travel very frequently to international book fairs, we spend a lot of money promoting our books internationally, promoting our rights internationally, and I just don't know how those conversations about trading rights, where suddenly I'm the person trying to do it on an unlevel playing field, are going to go. Because it's very to anticipate, we've got a market out there of, what is it, 500, 600 million English speakers, just thinking about US, Canada and the UK, where the offers are going to start being couched in terms of, well, we want non-exclusive Australian rights, the law has changed down there. At that point, my appetite for risk and my instinct to behave entrepreneurially has been shot out of the sky, because if I accept such an offer, I'm cannibalising my own market, my business model has eroded. So, that is a profound transitional issue from our point of view.

MS CHESTER: We have heard a lot from publishers like yourself around that business model and the risk-sharing arrangement across local authors, local booksellers and local publishers. As we understand it, the main concern is the remainders, with the removal of parallel imports.

MR HEYWARD: The remainders is the concern that we can identify now. But as I said to you, if the law changes, people will change their behaviour so that their behaviour can be accommodated by the law. There is no doubt we will see out of wholesalers, out of retailers and out of publishers, different behaviours apropos of this territory than we currently see, because at the moment our territorial copyright is internationally respected. I'm not forecasting to you what those changes will be, I'm telling you they are certain to happen.

MS CHESTER: We've heard evidence that suggests that this sort risk-sharing business model that publishers, authors and booksellers have is, for many publishers here that are part of international publishing groups, does occur in the UK and the US as well. Given we've received evidence and advice that the US, in substance, is opposed to form, doesn't really have parallel import restrictions in place any longer, does that not suggest that that business model would still remain in place in Australia?

MR HEYWARD: I don't know the source of your advice, I assume you're referring to the Kirtsaeng case and the Supreme Court judgment. American copyright law has not changed, congress has not had a debate about American copyright law in terms of changing it and so there will be no changes, in my view, in market behaviour in the US if and until congress acts. So, in terms of my business transactions with the US, it's a closed market.

MS CHESTER: Well, I guess we've received evidence that parallel imports are now alive and well in the US and so I'm just trying to – it's very difficult - - -

MR HEYWARD: I would be grateful if you'd pass it on to me because it's news to me.

MS CHESTER: Well, happy to hear your evidence base as well. It would be good then for us to get a sense of the role of remainders in the market at the moment. In Australia, what percentage of book sales today are remainders?

MR HEYWARD: Australia has a very intermittent and anecdotal remainder market, it's not a significant part of our market. A publisher

like Text, I mean we have policy that we will not remainder Australian authors in this market, we don't want their works devalued, we don't want them sitting with shoddy covers in wire baskets out the front of newsagents, so we will pulp books for which there is no longer a market rather than remainder them. The US is entirely different, the remainder market is substantial in the US. At the moment those are, in terms of Australia anyway, those books are quarantined in the US, they can't come to Australia. If our law changes those books will come to Australia. It is an invitation to American wholesalers to become free-riders in this market.

MS CHESTER: Are there statistics that we can look to in the US to give us an idea of, one, the order of magnitude of remainders in that market at the moment, and then of that remainder market what percentage would be representative of Australian authors?

MR HEYWARD: I guess if I was trying to find that information I'd go to the American Publishers Association, maybe the American Booksellers Association, I'd ask the industry organisations.

MS CHESTER: Sure. No, I just thought you may know yourself, given your longstanding interest in this area. I guess one of the other issues that you raised earlier, Michael, was around, well, you wanted us to remove parallel import restrictions when prices were high, you want to remove them when prices are low.

MR HEYWARD: No, you want to remove them, it's not - - -

MS CHESTER: I guess perhaps if I could elaborate on that a little bit and it would be good to do so to allow you to sort of respond. I guess we're very conscious that one of the factors in play, or in the backdrop of a context to the improvements in Australian publishers sort of becoming the lean, mean machine that we've heard that they've become, is the competition, the "Amazon factor" as some people refer to it, with individual consumers being able to purchase online, and that's injected an ongoing competitive dynamic. I guess from the commission's perspective, allowing the removal of parallel import restrictions also provides an ongoing competitive dynamic to the industry and so when you're looking at it from the transitional perspective, if you were looking at introducing that change, best to commence it when the disparity is as low as possible because it would have less of an immediate disruptive effect.

MR HEYWARD: Well, I mean if you'd committed to making the change that's a form of logic that I guess you would find. If you go back

to 1991 and you say we've got to solve a problem, we've got to solve a problem about price and availability and we've better get a wriggle on and do it because Amazon is coming, you would have been entirely right, the 1991 reforms were very prescient. So, the Amazon effect is not an effect of the last six years, it's an effect since 1995, and Amazon was the darling of American publishers because it provided a counter-balance to the big box stores, to the superstores, to Borders and Barnes and Noble and so on.

You might remember that, back then, the great threat to independent bookselling in America was coming from the superstores. Then Amazon got bigger and bigger and bigger, I forget the numbers, but if you go back to 2000, Random House in the US would have been a $3 billion company and Amazon would have been a $2 billion company, obviously you look at Amazon now is a $100 billion-plus company. This is the first time in the history of book publishing that retail has been in the hands of these mega corporation and it's an entirely new experience for us.

In my view, downward pressure on price incentive to risk have been – call one the Amazon effect and call the other the entrepreneurial effect, or whatever you want to call it, they have been constants in our market since 1995, at some points they become more manifest and at other points they become less manifest and there's complex factors which will influence that. But the '91 solution is a beautiful solution because it provides an incentive to publish while it also provides an incentive for highly responsible behaviour apropos consumers.

MS CHESTER: One other benefit of the improvements in the industry since 2009, Michael, is that we have seen what others have referred to us as a bit of a renaissance of independent booksellers in Australia, a lot more local content, indeed, I was talking to a friend recently and wanted to know my top five reads in the last couple of years and I looked back and thought, well, four of them were Australian authors, so that's a pretty nice thing to be able to see. But I guess the issue is, given where the - - -

MR HEYWARD: Can I just interrupt you there, just to say we have easily the best independent sector in the English speaking world. For my company, sales to independents on bestselling books, I'm not talking about books that are selling 3000 copies, I'm talking about books that are selling 80,000 copies or 120,000 copies, we can't do it without the independents and the independents may well be 30, 40, even 50 per cent of those sales. Our independent network is one of the most valuable things about our industry. The renaissance, to put it in longer historical terms, isn't about the last five years, I mean when the (indistinct) hit in 2010, that's when it hit our market, there were lots of people who

suddenly could read the future, miraculously clever people and they were prophesising that we would have no bookstores.

I'll just say one more thing, the renaissance in independent bookselling, with bookstores by Readings, independent bookseller of the year, there are many other stores I could name, is in fact decades old and it has enabled our publishing, the publishing that we do and many other publishers do. Because those bookstores are all about community, they're incredibly important to the shopping strips where they occur, they are places for people to congregate, and the key thing in terms of our market, apart from all the social benefits, is that they are places, as you have, where people discover books. It's much, much harder, no one has really worked out the business model of discovering books on Amazon, but people go to bookstores to discover books, that factor of discoverability is critical, I mean the independent bookstores are an absolutely essential part of the network.

MS CHESTER: That kind of leads to the point I wanted to raise with you, that is that the way it's kind of been described to us, and this intuitively makes sense to me as a consumer in that part of the market, that actually the health and the thriving independent booksellers in Australia at the moment provides the local authors and the local publishers with a competitive advantage to the online world and to what I'd call different bookselling models.

MR HEYWARD: I would agree with that and I would also say the competitive advantage goes both ways, because we send our authors to these bookstores, they're welcomed there, we bear the cost of getting the authors out into the community and out into the bookstores, we spend significantly to help bookstores with their promotions. The network that has evolved, as I say, is unparalleled in the English speaking world, though I must say, in the last few years, I mean I think the American independents probably got as low as 10 per cent but they have made a comeback in the context of Amazon, and there are some brilliant entrepreneurial retailers running independent bookstores in the US right now.

MS CHESTER: Michael, they are all the questions that we had for you this afternoon. Thank you, both, for joining us and thank you very much for your post-draft report submission, much appreciated.

MR HEYWARD: Thank you.

MR FAZIO: Thank you.

MS CHESTER: I'd like to ask our next participant to join us, Wendy Orr, an author. Hello, Wendy, welcome and thanks for coming along to join us this afternoon and thank you also for providing a submission to us following our draft report. I'm glad to see you've got some hard copy books with you. Perhaps if you're comfortable now, if you could just state your name, for the purpose of the transcript recording, and then if you'd like to make some brief opening remarks.

MS ORR: I'm Wendy Orr. You can tell by the funny accent I was actually Canadian born but I've been in Australia since I was 21. I identify myself as an Australian author and I'm internationally recognised as an Australian writer, and my books as Australian books. My first book was published in 1988 and I've been a full-time author and the primary income earner in my family since 1993. I write primarily for children and young adults. Michael has actually really beautifully covered a lot of what I wanted to say about how a publisher supports an author through an apprenticeship and taking care of the risk; we gamble with our time significantly.

My works have brought in substantial money to the Australian economy, the film, Nim's Island, brought in about $37 million, produced in Queensland, the Australian sequel was smaller of course but it still had a budget of $6 million and has had substantial export sales. Several other titles are optioned or under agreement so they may or may not bring in further money to the economy, but overseas publication rights in 27 countries for different books continue to bring in money, and will into the future. I guess my question is though, would I have been published if I was starting out in the climate that I believe would result with the removal of parallel import restrictions and also the Fair Use.

My very first book, Amanda's Dinosaur, was a full colour picture book, these were very, very expensive to produce, therefore risky when you've got a totally unknown author. It sold for 18 years in North America and Australia. But I doubt that it would have been published in that climate, it had no particular moral or deep message, it was just a nice, little book. In 1994 Ark in the Park was published and it was a very unusual length, Harper Collins, after several years of deliberation, actually started a new format which went on to be successful, but they didn't know that it would. Peeling the Onion was considered a very dark, riskily dark novel when it was published, hard to believe now, but it was at the start of the era of sort of dark YA books.

Now, both those books have gone on to win significant awards, significant overseas publication, they're still in print. But, again, would they have been published. I wrote a few smaller books in between and a

few educational titles that were too Australian to be exported, but that shows the type of apprenticeship that a publisher, as Michael described, gives to somebody who is living on an isolated farm, working part-time at first, for those first few years, and then just with no support other than what my publisher could give me.

Even if a book like Nim's Island – say could I have sold it to the American market and Australia would have still got the film rights, I don't think it would have been published first in the US, I mean it sold I don't know how many copies in the US, but it is a more risky book for the US market because the father is not an attentive enough father and several North American publishers objected that he was a bad model for a parent. Obviously a publisher is going to be more risk-averse to an overseas author as a buy-in first. I don't think that we really have the alternative of seeking out overseas publishers as our initial publishers, I think that's a bad thing anyway, but that's just me.

My point is that I fear that some of these changes will – I think they'll be devastating for established authors, but I really fear that they will just about annihilate up and coming new authors except for those very rare people who burst on to the scene like an Athena, fully formed, who have this amazing book and don't need any editing or help with it, I think that they're about as rare as Athena.

The Fair Use, I know that it's slightly different from the Canadian Fair Dealing, but I think the principle is very, very similar. I received an email from someone on the Canadian Access Copyright Board yesterday morning because they'd just had the Writers' Union general meeting dealing with this, and the problem is that the schools and universities have all decided they no longer need a license, they no longer need to pay their license fees. Because the rationale is that since they could photocopy 10 per cent of everything for free, the licenses were redundant because the licenses should cover the 10 per cent. So, they now are buying perhaps one copy for a class copy and photocopying it or making their own anthologies by taking chapters from different books. The Canadian copyright fee paid to authors is expected to drop to zero, she told me, this year.

Of course the educational publishers are failing – I believe you may have heard this before – but the PWC's report and John Degan of the Canadian Writers' Union says, "Nelson Education have sought bankruptcy protection, Oxford University Press and Emond Publishing, whose annual sales of high school texts dropped from $1 million to $100,000, have both stopped publishing textbooks for Canadian high

schools and teachers are now struggling to find Canadian content to teach".

I would say, as a personal anecdote there, I was an air force child, I actually did a year of Canadian history, I spent in the United States and I studied Canadian history in an American school, at the end of the course I remember a child coming up and saying, "It must be awfully uncivilised up there with all those Indians and Eskimos running around". Needless to say, our textbook hadn't been Canadian.

I have to say, if we want our children to grow up knowing more about Australia than kangaroos and koalas – kangaroos and koalas will always be included, I don't think that's a problem, I can tell you from personal experience you can't have goannas in an American book, but kangaroos and koalas are cute, we will have those, I don't think we'll have a whole lot more. The problem is much, much greater than the spelling change or whether it's morally right to say "pinafore" instead of "jumper".

Michael has said quite a lot of PIRs, and I will actually just repeat what a children's author said to me, quite a successful children's author, in a private email said, "Our industry has, effectively, ended. If I say I'm a children's author people are really surprised and they say, 'I didn't think we had any'".

We've talked about price, but I do want to give an example, the US paperback edition of Nim's Island is $A8 in the US, retailers supplying it here charge $14 compared to the $15 for the Australian edition. As an author, for the American edition, after all commissions have been taking out, I receive 25 cents, obviously depending on exchange rate, the Australian I receive $1 after commissions. That's quite a big price difference for me for the consumer saving a dollar. I would like to point out that in the paperbacks the American edition is an inferior quality, I brought these because they were easier to see, with Peeling the Onion, it's obviously a lot, lot smaller. If you were buying this online you do not know that this is not identical and you do not know that if you open it the papers will crackle and it's probably a one-read book and obviously you have to be very young to see the print.

On the question of remainders, they do sneak in. I actually just Googled Nim at Sea, the UK did a huge print run, remaindered it and it obviously gets taken off but every once in a while – I just found it on Fishpond for $10, I know that they offered a box to me, so the UK publisher offered a box to me at $1.50 a copy, so I doubt that Fishpond will have paid an awful lot more. Obviously, my publisher and I don't receive anything on that sale and therefore, Nim at Sea's Australian sales

have dropped.

I'd like to say something now again about what happens if we really stop having Australian publishing for practical purposes, if Australian publishers become more like importers. When I arrived in Australia at 21 it was really important to me to read Australian literature, the first thing I did was to go to the library in this little country town and get out all sorts of things by Australian authors, just trying to understand this country.

Look, I realise that, from an economist's point of view, children's books can seem really frivolous, especially fiction, so my books very rarely teach hard facts. I am a passionate believer actually that fiction's truth is much deeper than that, it teaches wonder, it teaches a willingness to explore and to have curiosity and it teaches empathy and resilience. That is shown, I believe, in the letters that you get back from children who say, "I'm just like Nim because I'm a boy on a farm", which obviously Nim is a child on a tropical island. Children tell me that they are hoping to be as brave as Nim, people tell me they have got through the worst times in their lives, the number of people that write and say, "Your book saved my life", and it can be something that is heavy like Peeling the Onion or it might be Nim or something else. I will wind up.

But I think my example of that is not just the people who tell me that they were able to identify, from being sexually abused or some other trauma which is nothing to do with anything of my characters. A young woman wrote to recently, unfortunately to tell me that she had loved Peeling the Onion in school when she was 13 and she's now 28, she has bone cancer, the first thing she did on being hospitalised was to ask her mother to go and search for her high school copy of Peeling the Onion because she wanted her family and her doctors to read it, to understand how she felt.

Now, to me, that is the power of fiction and that sort of fiction needs time and support from our editors, the financial support from our publishers who, yes, take us to a festival and do that type of thing, but it's still a gamble because the only way that you can create really good fiction is to experiment and push boundaries, and the more you push boundaries the more likely you are to fail.

I've got a new book coming out on Monday – this is not a push, I do not have a copy with me – it's taken me five years of experimenting and two years of full-time writing on it, sometimes I think it's the best thing I've ever done, as we often do, sometimes I wish my friends would stop tell me I'm brave. Now, if it fails because the world hates it that is fair, I mean I'll be really disappointed but it's absolutely fair. But if it succeeds,

I should be allowed to reap that reward. If classes set it as class text, I would hope that that would mean they would buy 20 or 30 copies, not one and photocopy, and that they would not bring in a really inferior copy which actually doesn't pay me or the publisher who has taken the risk on a book that I'm sure they thought was probably quite a big gamble.

The point is, no matter how passionate I am about my work, it is a small business and my aim is to earn a living, and actually as good a living as I can, if I can't do that I won't actually continue to produce books because I do have to make a living somehow. Maybe I want to tell my children stories, my grandchildren if I get grandchildren, I'm not going to spend 60 hours a week working on a book, on answering fan mail if I have to sell five books to get one stamp.

So, I really hope that in the broader scheme of this transition, which I really think will damage Australian innovation in literature, I hope we can consider what it means for future generations if they don't get the chance to read Australian literature.

MS CHESTER: Wendy, thank you. I hope you might appreciate that I resisted any temptation to ring the imaginary debating bell, because sometimes it's better for commissioners to sit and listen than it is to ask probing questions. Listening to your story was worth not ringing the debating bell for, so thank you.

MS ORR: Thank you.

MS CHESTER: I just had two quick thoughts to share with you and then one question. I'll start with the question. The book that you're releasing next week, are we able to know the title and what target age group?

MS ORR: It's Dragonfly Song and I think it's probably 10 and up.

MS CHESTER: 10 and up, okay, thank you.

MS ORR: I was not going to do a promotional thing.

MS CHESTER: No, no, I was just wanting to know particularly the age group that you were targeting. The two thought I wanted just to share with you first is I know we're a bunch of dorky economists at the Productivity Commission but we do incredibly value literacy, we understand very much from the evidence based on social welfare and educational achievement gaps, that literacy is key, and early childhood literacy is pretty fundamental there, so rest assured we do get that. Having grown up in the 70s where I had to read really bad Golden Circle books

and now I look at what my kids get to read, and a lot of it is local authors, we do appreciate that.

The second comment I thought was a little bit more – and maybe partly to allay some of your concerns around folk have drawn parallels between what happened in Canada and what might happen here with the introduction of fair use. You were right in pointing out that there is a distinction in terms of Canada retained a fair dealing system but that went with some additional exceptions, they also changed their approach to education statutory licensing. So, in Australia, what we're recommending is that we move from fair dealing to fair use, but we're not recommending any change to statutory and educational licensing. That's not to say that moving from fair dealing to fair use won't change what might happen within the license, because it will inform the negotiations.

But certainly the evidence base that we have received from CAG, which is the group that represents the educational licensing across the different States and Territories has suggested that they don't see, if works are still commercially available, that it's going to make a material difference to what is licensed today. I just thought I'd mention that as well. I didn't have any other questions for you. Jonathan?

MR COPPEL: Just one question, Wendy, because you're not the first person to talk about the difference between the royalty payments that you get for a book published in Australia and for the same book that's published under license in another country. Are those differences ones which are enshrined in the commercial agreement when a book is licensed for publication in another market, and what degree of power do you see in terms of reaching an agreement for the licensing of your works, you mentioned you license a lot of works or a lot of the revenue you receive comes from jurisdictions other than Australia, I'm interested in getting a sense of how much scope do you have to change the conditions in those licensing agreements?

MS ORR: Very little I would have thought. I usually give my Australian publisher the publishing rights, partly because they have taken that development risk and partly, quite frankly, because I believe that my publishing rights sales is so good that I am probably better off to get my 75 per cent of what she sells it for.

MR COPPEL: That's in an international jurisdiction?

MS ORR: Yes, so if she sells it, so for Nim's Island, Allen and Unwin sold the rights to Random House in the US, so Random House, they negotiate that contract, obviously Allen and Unwin will be wanting the

best contract possible, I don't think there's an awful lot of leeway with the US publishers, and then Allen and Unwin take their sort of 25 per cent commission and I take 75 per cent. Now, obviously, if I negotiate that directly with an American agent instead of giving the sale to my publishers I will then get 100 per cent of the sale.

But what actually happens in the US is they normally publish in hardback first, they do a small – well, not a small, but they do a hardback run, so on standard publishing agreement, say for a novel, say you would get 10 per cent of that, then they bring out the paperback and then you only get 6-and-a-half or 7 per cent. Then paperback sales, as I said, Nim's Island in the States sells for $US6, so $A8, then your royalty percentage is then cut and of course if it's illustrated you get more, so it's because of the way they structure it. Whereas in Australia, because we tend to publish in a good quality paperback once only, therefore I get the straight royalty rate and that can go up after a certain number of sales. Very, very difficult to get the rising rate I found in the States. I mean the point is they have very big publishers, they have a lot of clout and I find it very difficult to negotiate, even with a US agent.

MR COPPEL: Thank you.

MS CHESTER: Thank you very much, Wendy, for coming along this afternoon for your submission.

MS ORR: Thanks.

MS CHESTER: Folks, we're just going to take a quick, five minute break, it's unscheduled I know, but we'll resume in five minutes which will be about 5 to 5. Thank you.

ADJOURNED **[4.46 pm]**

RESUMED **[4.52 pm]**

MR COPPEL: Welcome back. Karen has left the proceedings for this afternoon because she has a flight back to Sydney, which is where we will be reconvening the hearings next Monday. We have a couple more scheduled participants for this afternoon. We are quite a bit behind schedule, so I'd urge all of the remaining participants to keep their opening remarks as brief as possible. The next participant is Henry Rosenbloom from Scribe Publications. Welcome to the hearings. For the

purposes of the transcript, if you could give your name and who you represent and a brief opening statement. Thank you.

MR ROSENBLOOM: Sure, thank you. My name's Henry Rosenbloom. I'm the found of Scribe Publications. I suppose I'm also the CEO and the publisher. Scribe has been in business for exactly 40 years this year and three years ago we set up Scribe UK. So I suppose we're officially a kind of independent multinational. We employ over 20 people in Australia, many of them women with children, so they're part-time. We employ four people in our London office. A couple of those are part-time as well.

I don't particularly want to repeat what's in my submission. You've got that and presumably it will become available publicly.

MR COPPEL: It is.

MR ROSENBLOOM: Already?

MR COPPEL: Yes.

MR ROSENBLOOM: Thank you. So if I can perhaps try to cut to the core of what I think my main concerns are. I think first of all there are a number of ironies that arise from the situation the publishing industry finds itself in a result of this inquiry and a number of irritations to be frank. One of the ironies is that for years we were told that parallel import restrictions should be abolished because there was a big problem with price and there was a big problem with availability.

In the PC's most recent report, there's virtually no discussion of availability as a problem and there's no attempt to discuss what current prices are vis a vis US prices or UK prices for comparable books. So all of a sudden the justification or the rationale for the abolition of PIRs has disappeared from the Commission's concerns. It doesn't appear in the report. It's asserted but it's not demonstrated. I know that the Commission has picked up on this obvious weakness and is now talking about doing further research to establish what prices are, which is a case of sentence first and trial later. That's another one of the irritations and ironies of the situation.

The other peculiar problem I think for the industry is that in a sense we're being judged harshly or being punished for doing well. One of the extraordinary comments in the Commission's report is that, and I'm quoting, "In the light of subsequent developments, most notably existing actions by the publishing industry to improve its efficiency and a protective effective or lower exchange rate, the Commission recommends

that the transition to an open-book market be quicker than previously recommended, no later than the end of 2017".

In other words, because prices have come down, because the industry is more efficient, the industry is saying, "Well you can now stand on your own feet, can't you?" This is the kind of reverse of the position of eight years ago, where we were being told the opposite. Because you're so inefficient, because prices are so high, because bookshops can't get hold of your books, PIRs should be abolished.

The clear implication to anybody with any sense is that the Commission has a pre-existing predisposition to want PIRs to be abolished, because it gets in the way of their understanding of how a free market should operate. I understand that and I appreciate that. Intellectually, the existence of a PIR attends to the creation of benefits being appropriated by the players in the industry to the disadvantage of consumers. That's a legitimate concern but it needs to be proven.

One of the great frustrations for this industry, and I can't speak for the whole of the industry, is that it's one of the most altruistic industries in the country, in fact, around the world. The people in it do it for the love of it. The pay is low. It's essentially psychic income, not real income. There's no corruption. There's no special favours. There's no deals that are done that consumers can't see. It's an industry that produces material that it thinks is in the welfare of the whole community, and for that we're being attacked and assailed every few years.

We're being asked to do away with the foundation of our existence which is territorial copyright. It's an extraordinary proposition. Nobody thinks that the AFL Grand Final should be capable of being played on Channel 9 or Channel 7 simultaneously. No one thinks that a top-rating US television series can be brought from an American network and displayed in Australian television on two competing channels simultaneously.

Why does the Commission think that books can be bought and sold twice? Why on earth is there any kind of belief that this makes sense in any kind of market? The whole world depends on the acquisition of rights and the disposition of those rights and the exploitation of those rights. Book publishing cannot exist without the disposition of territorial copyright. Whatever you say and whatever you argue, it is a sine qua non and it's recognised as such around the world. It makes literally no sense to imagine a publishing industry which does not have territorial copyright in its own territory; it's an oxymoron.

Michael was talking before about the importance of exporting rights and that's a very important argument. I'd like to draw attention to a kind of converse, the other side of the coin, which I mentioned in my submission. We're in a situation where people will know, we acquire rights from overseas publishers in many cases. It's probably more than any publisher our size in Australia. What are we doing? We're acquiring rights within Australia to publish books that are originated in overseas territories.

If PIRs are abolished, all of a sudden the worth of the Australian right disappears or else is gravely endangered. We can no longer tell what that right is worth because we can be competed against from the people we buy the rights from, or from a third party exploiting the fact that Australia is an open market in this brave new world that's being contemplated. It so happens that we acquire those rights for perfectly sound economic reasons because often those books are very well written, very well edited, very well presented and they turn out to be profitable. In essence, they underpin the profitability of our business. It's part of our business model and we're not Robinson Crusoe.

The same is true of the television industry. The same is true of the film industry. Why do they go to America? Because those products are so powerful, so sophisticated, so well produced and they deal with international themes which resonate with Australian audiences.

It's the same with book publishing. That acquisition, the ability to acquire those books, is essential to us. If PIRs are abolished, all of a sudden we no longer know whether there's any point in acquiring those books. That fundamentally but undermines the capacity of an Australian publisher like us to remain an Australian publisher. It's not just that we no longer can acquire those foreign-sourced books but our profitability and our turnover is diminished. Our appetite for risk is diminished. Our ability to service our authors is diminished.

Now what is all this going to happen for? What is the reason? The reason is because you believe, you institutionally believe that PIRs, in principle, are a bad thing. Even if I agree with you, the argument has to be made, is it worth all of this trouble, all of these consequences for publishers, for authors, for booksellers, for the culture as a whole, for a possible gain, for a problem that you can't even prove exists.

MR COPPEL: Thank you. Let me say that you're not the first who has made the point about the 2009 report from the Productivity Commission, where we looked at several thousand book prices and we established a quite significant differential between imported prices and Australian

prices. It was particularly for certain types of books, text books. The reason that we drew on that report, but we didn't update that analysis in full for this draft report, was that we were asked in our terms of reference for this report to look at the transitional arrangements, following the release of the Harper Report and the government's response, which was a response that indicated that the PIR would be lifted and the Productivity Commission was to advise on those transitional arrangements. We have done that and we're interested in hearing whether you have any points on those transitional arrangements. Given your remarks, you probably don't accept the premise of that.

MR ROSENBLOOM: No, I don't. I understand your predicament though institutionally, I do.

MR COPPEL: The other point though that I'd like to make, and it's been made also before, is that we will be updating some of that analysis for the final report. We do recognise that there have been changes in the industry between 2009. A lot of submissions have made the argument that prices have come down and so that analysis will be looked at. You make the point that the industry would essentially disappear with parallel import restrictions removed. I would make the point that we do have the possibility for an individual to bring in a book from overseas. That is used to a certain extent. We're trying to get an idea of the extent to which it's used and that may be one of the forces that are acting on putting pressure on prices in the Australian market. So that's a second point that I'd like to make.

Let me put it back to you on the specific area that we've been asked to look at in the draft report, and that relates to the transitional arrangements. We've made a comment in the report that you've sighted that the industry is probably in a better position that it was in 2009, where the argument was made that there would be a longer transitional period, but if you could comment on that, that would be helpful.

MR ROSENBLOOM: I think the point I would make is that we're looking at different parts of the problem. You're looking at the consumer end and that's a terribly temporary matter. If the Australian dollar drops 10 per cent over the weekend, Australian book prices are suddenly going to become very cheap. The Australian publishers haven't done anything over the weekend to their pricing but we're going to look terrific. If the dollar rises 10 per cent, we're going to look not so good, but nothing to do with us.

Just putting that aside, that to me is the least important part of the problem. I am talking about the fact that if PIRs are abolished, you are in

effect dismantling the basis of Australian publishing. I'm not saying it's going to happen tomorrow. I'm not saying that all of it's going to happen in the near future. But it stands to reason that if you take away the basis of the industry's existence, it must be adversely affected, and I would say severely affected. I'm not going to say it'll disappear. I think it will change dramatically in a bad way. That's probably the most simple way I could put it. It seems to me that it's an extraordinary position for an economically rationalist economic institution, let alone a political party or members of a political party who are meant to be conservative, to contemplate doing massive damage to an industry without asking themselves whether there is a point to incurring that damage.

See you don't even know as an institution, first of all you don't know whether prices will fall if PIRs are abolished. Then if they do fall, you don't know whether it will cause sales to go up. I argue, for instance, that in some cases prices will go up for books, because publishers will be damaged. They'll seek to recoup income from somewhere and what local publishers will do, they'll recoup that income by raising the prices of local books. I think that's what will happen. I can't prove it.

I think you're in an extraordinary situation where it's the opposite of the Hippocratic Oath, as it were, first do no damage. You're proposing damage and then you're proposing to find out later on what you might do about it in terms of transitional arrangements. Well by then it's too late, mate. We don't have the bedrock of the industry. We can't function. There's no transitional arrangement you or a government can introduce if you take away parallel import restrictions. We are, by definition, an open market at that point.

As Michael said, all contracts will say that access to Australia will be made available on a non-exclusive basis. As he said, if we try to sell rights in our books to American publishers, they will demand the right to sell that book back in our market. If we sell the rights to an Indian publisher they will demand the rights to sell that book back in our market. You might say, "Well, what does that matter? The consumer's got books available from two or three sources". Well, that's true but they won't have many publishers left to produce books for them.

MR COPPEL: I think this is sort of one of the points that's contested by the different submitters on this issue of parallel import restrictions. People like yourself are saying that the competitive hit from the removal will be devastating. Others are saying forces like the ability to import a book will be more limited because there's a cost associated with it, there's time involved, and there will still be a competitive advantage from publishers publishing in Australia and distributing in Australia.

You've also made and others have made the point that prices have come down. They're probably comparable. So whether there's further changes on prices vis a vis the full lifting of parallel import restrictions is an open question. The others would say that there'd be fairly limited effect there. So you could think of two types of effects; one is the effect on price that sort of direct consequences for competitiveness. Then there are a whole bundle of other impacts that have been suggested which is a shift in the nature of the risks of the publisher or the bookseller or the author. Can you give me a sense as to which of those two types of impacts you see as being the more significant on price or on the sharing of risk or on who bears the risks?

MR ROSENBLOOM: Look I honestly don't think I could. One of the things about publishing which I'm sure you've come to appreciate, is that everybody from the outside thinks they understand it, but it's a very complex industry. It's a very complex ecosystem. It's terribly hard to know how it will change when you eliminate a vital part of that ecosystem or if you damage a vital part of that ecosystem. There'll be unforeseen things which will happen; some will be good, some will be bad. I appreciate what you were saying about other people are saying it won't be as bad as it sounds, that there are these impediments to the drastic consequences that I'm talking about. That may be and it will be the case in certain circumstances.

All I can do is say to you that as a publisher who's spent decades thinking and behaving internationally, signing contracts with international publishers and agents, I have no doubt that if Australia no longer has parallel import restrictions, pressure will build from year to year in every contract that's written for access to be granted to Australia as an open market. That will become an irresistible pressure because it will be the fact in law. We will resist it for as long as we can. Everybody will resist it. But the world is entrepreneurial. There will be third parties that will spring up of a kind we haven't even thought of. There might be somebody who will set up in Singapore, very close to Australia. Australia's an open market, get the rights, print the book, ship them in. India is full of entrepreneurs. It's a very low-cost country, very low-price country. Ship books from India. Do it from the moon. I don't know. They'll find ways of getting the books into here in ways that we don't expect.

I understand that there will be some drag; there will be some resistance. Of course bookshops will not want to take on the risk in a kind of automatic way of acquiring books from overseas if they have to pay full price for them if they can't return them. Of course, they'll have to think

carefully about it, but that's a pull factor. There are push factors from America, from England, from India, from wherever, and those are unquantifiable, I think.

Essentially, I really do think the predicament is the Commission is making a set of recommendations that would have been completely comprehensible 60 years ago when there was effectively no Australian publishing industry, when we were dominated by multinationals and Australia was a kind of post office or distribution centre. They were bastards. They were exploiting Australia. It served their ends. They decided when they would publish a book, what the price would be, what the terms would be. They controlled the retail price. Australia was just a very nice little earner, thank you very much. These kinds of recommendations, doing away with PIRs, would have made quite a lot of sense then.

Unfortunately, since then, under the protection or the umbrella of the rules which have been enacted, an indigenous industry has developed, indigenous publishes, real publishers, world-class publishers. They guy who spoke to you before, Michael Heyward, is one of the best publishers on the planet. He's got an international reputation. He's amazing. He's incredible. He's been able to build his business under the umbrella of the current situation. So have we and so have other Australian publishers.

We, in turn, have fed books into the Australian bookselling industry that would never come into Australia because we have insight into books that matter and books that work. That's what a publisher is. A publisher is essentially somebody who is prepared to take a risk on books they believe in. We do all those things. We bring authors into Australia for writers' festivals. We give the media an enormous amount of material that they can fill the air with, that they can fill print space with. All of these things publishers are responsible for and we do it because we have been able to develop under the rules that exist currently.

As I said before, we're not getting subsidies. We're not an industry which is a mendicant industry. In fact, the amount of money that goes to this industry from the government is derisory compared to many other industries in the country. There's no deals. There's no sort of amazing stuff that goes on which means that there are conspiracies against the consumer. It is what it is. You see what you get. It's in the bookshop. It's at a price. You buy it. You either like it or you don't buy it. We live on our nerves. We live on our judgment. All we ask is to be left alone. We're not doing anyone any harm. We're actually contributing something significant to the culture and all of us in the industry are doing it because

we care about it and believe in it. For that, every five or six years we're hit about the head and told to get out of the way.

MR COPPEL: You've made the point very clearly that in your view parallel import restrictions have been something that's contributed to the development of Australian literature, Australian publishing.

MR ROSENBLOOM: Absolutely.

MR COPPEL: We've heard over the last week of hearings that one of the advantages of this is that school-aged children are made more aware of Australian literature and people of my generation, your generation, growing up in Australia didn't have that opportunity. My parents I think had books that they bought for me and my brothers that came from everywhere else in the world but not Australia, so there was a lot of diversity. That was still a period where parallel import restrictions existed and yet we've seen this positive evolution in the Australian publishing industry. It seems to suggest that there's something more than just the PIR that's been driving this and it may well even be despite the PIR.

MR ROSENBLOOM: I mean I can't argue against it; I can't argue for it. This is the problem with any point to find a cause and an effect and a mechanism. I would say that the evidence is persuasive it may not be foolproof but given that you've had the development of notable Australian publishing houses in this environment, to me it's highly likely that it's linked to the fundamental architecture of the environment.

MR COPPEL: Thank you very much for your participation. I'm cutting it a bit short here but we have two further participants and I know we I think have to leave the room at about six o'clock. Thank you again, Henry, and thank you for your post-draft submission as well. Our next participant is Nick Rennie from Happy Finish Design. Welcome, Nick. Make yourself comfortable and when you're ready if you could for the transcript give your name and who you represent and then a brief opening statement. Thank you.

MR RENNIE: Yes. My name's Nick Rennie. I'm a designer based in Melbourne. I work with a selection of the world's top furniture manufacturers and have worked incredibly hard to do so and pretty much have the most amount of products in production with these manufacturers than anybody else in Australia except for one other person. I apologise for not being as eloquently spoken as the previous speakers, however it is quite ironic speaking directly after them because, unfortunately, me as a product designer, I actually don't have the same rights as these writers do or as these publishers do.

Unless I pay a fee in Australia for my work to be registered for a small amount of time, legally anybody can copy it. Anybody can produce it. I don't get a cent for it, and even worse, they can use my name and my image to promote that copy work. I guess for me the question that I've got here isn't so much about big business and millions of dollars. I know in the previous few days in other talks around the country other people have spoken about this, but for me it's quite the opposite.

My points are about creativity and who has the right to own it, especially in design. Why don't I, as a designer, have the same rights in creative protection as an artist, an architect, a musician, a writer? Why is it that my work is perceived to be of a lesser value that I do not have the same kind of protection. How is it that it's illegal to download music, movies, a book, yet it is legal to copy a design? How is it legal that someone can use my name to promote themselves with their copied product without my knowledge or agreeance, many times in slave-labour factories with unsafe work practice and hazardous material such as lead paint?

I guess the main thing I'm here for is to try and talk about the design laws and the fact they need to protect everybody, students, self-employed, small business. Without this protection there will be no innovation. As a separate issue, being that why don't we have any reciprocal rights between Australia IP laws and other regions? For example, Australia not having reciprocal rights or design law agreements with the UK for unregistered designs, for example, which oddly enough New Zealand does have in place and other countries very, very small in their turnover.

It's quite strange. Even though I live and work in Australia, I'm not protected here unless I pay a fee. Yet if I launch my work somewhere in Europe, I am protected there, however still not here. Does this encourage me to work in Australia? No. Understanding I am a designer, my designs are my intellectual property. This is where I feel the argument is getting lost. If, for example, I was to register all my designs each year, I would be up for tens of thousands of dollars. However, the registration may end before the product even makes it to market and also allow those trawling IP Australia website to see any innovation and rework it.

I might work on a project for a few years spending thousands of dollars prototyping and developing the design, however, it might still take years for it to be picked up for manufacture. For example, a lamp that I designed in 2002 and showed when I finished university was first put into production in 2014. That's 12 years of wasted design, 12 years before I

earnt any income for my work. If I had have paid for a registration, essentially that would have passed before I got a cent.

This discussion to me should also be about the value we as a nation put on creativity. Unfortunately, right now we're the laughing stock of the design world. To think that we have no protection for designing objects means that innovation here will end. Design courses will soon have to teach how copying another's work is actually legal and encouraged, rather than reasons for dismissal or plagiarism. How can a student be kicked out or punished when by law it states that it's legal to copy an unregistered design in Australia. This discussion needs to understand that the ones hurting the most here in Australia are the actual creatives. Please don't let this be the last generation of designers striving for innovation and creative integrity. Don't reward those that exploit laws that allow this to happen.

MR COPPEL: Thank you, Nick. Can I just ask a point of clarification and I think you may have given the answer at the end of your statement. You said at the beginning that anyone can copy your work.

MR RENNIE: Absolutely.

MR COPPEL: This is after the term of protection has expired?

MR RENNIE: No, this is if I don't pay a fee in Australia, anybody can copy my work. In the UK, in Europe, essentially - I mean the UK has recently changed their design laws for the life of a designer, which would be the same as an artist, same as a writer. So unless I actually pay a fee here in Australia and let's say it's around $350 which doesn't seem that much but if you're coming up with 50 or 60 concepts a year and you fill in those forms yourself, that's a lot of money. That protection for me in Europe - I don't live in Europe. I don't do it but because the companies I work for are there, there is a period of unregistered protection. In mainland Europe it's not actually as high as the UK's just changed to but Sweden and the Scandi countries are different. With a registered design, yes, once that period has expired, then it's open season.

So essentially let's say any student, for example, that produces a piece, shows it at their university exhibition, legally anybody in Australia can then produce that work and actually write it down the designer's name. To me that's abhorrent. It goes against every single idea of artistic integrity to think that somebody that does not have one cent of effort or time or attachment to an object can profit off it from the designer, from the manufacturer.

Again, listening to the writers earlier, it was quite interesting hearing the fact that if they then sell their rights externally and if a book was produced in Australia I think it was $1 or 25 cents for an external one. I don't get a cent. The manufacturer does not get a cent. The copy he produces, they take it all.

MR COPPEL: Do you register your work in Australia?

MR RENNIE: I have and have some but I can't afford it. Australia is a very, very small market in the world of design and, as I said, I'd probably be up for about $15,000 a year to register my work and the majority of those may never make it to market. As I said on one, I would have only had three years left on the registration within Australia if it had have been registered here. It's been registered overseas and it's fine overseas but locally, no. So yes, I have registered certain products because I know of people visiting factories where they were prototyped and they started shopping them around as their own designs, even though I hadn't shown it to anybody. I hadn't made it to anybody. To me, I think the industry as a whole does not register the products because they don't respect the registration. It's an unreasonable amount. There has to be some form of unregistered protection here, similar to that for artists, writers and musicians.

MR COPPEL: You mentioned that you have many concepts that you develop in a year and some of them you bring to market.

MR RENNIE: Yes.

MR COPPEL: Among those that you bring to market, how long are they on the market for?

MR RENNIE: Some might be on the market for two years. If they don't sell, they're out. Others may be on forever. I think this is the argument that those copy design people put into perspective is, "Well these big businesses have made all this money out of all these amazing companies from back in the 50s and 60s and they're rich and rich and rich". As I stated, other than Marc Newson, I have the most amount of products in production with the main manufacturers internationally. I barely make minimum wage. I cannot survive on royalties alone. One of the reasons being is that the industry here in Australia, whilst it's taken huge leaps in the last 10 years, it still is very rare for companies to invest in production and generally they're owner operated manufacturers.

The majority of my work is protected in Europe and, depending on what the protection is, so it could be anywhere between let's say five to 25

years, depending on how they've done it. The UK for example, because I'm not a resident of the UK I don't have lifetime protection there. However, if my work was launched in Europe, it is protected. Recently I had a legal issue that I was looking to resolve but because I was a resident of Australia, there was no reciprocal rights with the UK. If I had have been from New Zealand, there would have been. I don't understand this. I'm not well versed in the points of law. It just comes down to common decency and the reality is the Australian government's losing out because they're not getting tax from me because of these sales. They're not going to get tax from me or future generations of designers because there just won't be any opportunity for people to do that.

MR COPPEL: You mentioned when there are copies of your work that they're even sometimes sold with a photo of yourself.

MR RENNIE: Yes.

MR COPPEL: Which would suggest that there are other laws that could be used, passing off laws, to prevent that sort of activity.

MR RENNIE: I would have to register my name as a trademark in Australia and that way they couldn't use my name to promote the work, the same with certain images and things. I mean the irony of it is that I think a photograph taken by somebody should theoretically fall under copyright laws, however these companies still use - they just take the photographs off the international websites and use them as their own products. Again, it all comes down to more money, more money, more money from the creative having to pay, whereas an artist gets it free. A writer gets it free. A musician gets it free. I understand manufactured product is a separate entity, however, there still has to form some kind of protection for those that strive for creative integrity and strive for pushing the boundaries of creativity and design.

MR COPPEL: The instrument of registering a design in Australia is predominantly used for furniture but it covers a whole bundle of other types of designs in the shape of bottles, clothing, packaging for food.

MR RENNIE: Yes.

MR COPPEL: Are you suggesting that all of these items be treated in the same way as copyright?

MR RENNIE: I think to a certain extent, yes, because one company's developed the design. They've spent the time. They've spent the effort, whether it's a company or a designer. They've got all of their intellectual

property into that specific object. Why then can anybody come and free ride off of that? In the case of furniture, I think it's definitely something that potentially needs to be addressed, that it maybe falls into a different category. However, then that's unfair if I was to design a pen or a Walkman or something. Then I could get patents on certain things. So I think there are different ways of protecting different components from a patent and other aspects. But from furniture it's very, very hard to get a patent on an actual chair or something like that.

The other issue being that the majority of these manufacturers, if they are based internationally, the product will be shown internationally before registration occurs in Australia, and so then they don't actually register it in Australia because we are such a small market. Again, that's great for the people that sell these rip offs but it's not very good for those that are actually trying to be a part of that market. It has adversely affected me. I've had companies say, "No, you're from Australia. We're not interested in working with you because of your laws". That's an awful thing to be told, that it's got nothing to do with you but because of the reputation that we as a country have internationally, especially in the furniture and lighting markets, that people have a perception of negativity towards the designer manufacturing sector here.

MR COPPEL: Can I just sort of come back to the whole group of registered designs?

MR RENNIE: Yes.

MR COPPEL: All of the intellectual property rights are based on the notion that a period of exclusivity is given to reward the initial effort in expression of the idea in terms of research and development to bring an idea to market. That is balanced against the intellectual property then being made known to the broader community and after that period of exclusivity, there's an ability for anyone to produce that particular good or draw on that idea. So there's an incentive also for what's called follow-on innovation or innovation based on others.

MR RENNIE: Yes.

MR COPPEL: It's an area where we've often be told that innovation is incremental and it sort of draws on the past. If you had a period of protection of terms such as copyright, what do you think would be the consequences of that for such follow-on innovation?

MR RENNIE: Two points to that; one would be that that's all well and good but why is it that Australia doesn't match the leading nations around

the world in that protection section. Directly answering the question that you had, to me it allows more risk because all of a sudden, if you know that you have protection for an item and, as I'm saying, free protection for an item or a longer period of time, that then allows you to invest your own time and money, knowing that it might be purely speculative, knowing that it might take 10, 15, 20 years for a manufacturer to pick it up.

We only have probably six or seven Australian designers working with the top manufacturers in Europe. That's laughable. We have some of the best designers on the planet here in Australia. However, because of these risks, people just don't take them. People aren't necessarily willing to take a punt and propose a concept, knowing that once it's been proposed or once that it has been put public, then it's gone and then you go on to the next one and the next one and the next one. So I guess, for me, it's why would I invest my own time and money knowing that I then have to convince a manufacturer to put a concept into production, as opposed to a manufacturer coming and engaging me and paying me a fee to design something for them. So that's why I think it is incredibly hard to protect the entire system.

If you look at what the UK's done in the last few years and they readdressed it early this year, because they were in the same boat as us. It was a free for all, but they've been able to amend that to allow some sort of protection for creatives. I think as a result you're getting more people from around the world moving back to the UK to be creatives which will then earn more income and make more business for the UK.

MR COPPEL: I've just got one final question. In the area of furniture you've mentioned, and we've had other participants mention, that there are many prototypes and one of those prototypes is the one that usually goes to market. It's very expensive to register each of those, since only a small number would end up being actually developed. In Canada they have an arrangement for registered designs where it's possible to register a range, so one registration for a range could relate maybe to a series of prototypes. Do you have any views as to whether such an arrangement would be of value to protect your intellectual property from the sorts of situations that you've found yourself in?

MR RENNIE: I think where we're at the moment, absolutely. In the whole scheme of things, absolutely not. It's the same thing. I mean, as I said, if I'm doing 50 designs a year, those are 50 different designs, so I would then need to register each one of those and that's just for Australia, knowing that the majority of my work is sold internationally. So to think that it would be upon the progression of a design as it goes, yes, that would be fantastic, but it still doesn't answer the main problem.

To me, a better possibility might be that a designer pays a registration fee, just the one-off fee, and that then, if they would like to proceed to process legal proceedings against somebody, that then allows them some form of protection. You would have to spend more money, I guess similar to a patent search or whatever, to prove that your design was original and that it actually had merit. But there is some kind of form of protection from the beginning, rather than knowing that every single time I have to come up with something. It's like, "Well, that's more money, so do I do it?" Probably not, but that one might be the breakthrough piece for a student coming out there.

As a teacher at university, all I do is encourage people to "just work, work, work". If they know that every single idea they have, they technically have to pay a registration fee here in Australia, otherwise they lose that, there is no incentive for them to come up with that next idea, that next idea.

It is, it's a very, very hard thing because I know the copy design people are mounting a massive argument. They're Robin Hood, "We're good. You're bad" thing. Trust me, they make more money off my work than I do and there's a big irony in that is that they have not one cent invested in it but they make money off it but I make minimum wage. I think if there was a way of somehow organising some kind of registration per designer or something like that which would be a databank and maybe Nick Rennie, he pays his fee and then I send all my designs to be put on record and they just get held away in a vault or however it is. Then if a situation arises, we access that vault and we see what's there.

MR COPPEL: Thank you, Nick, and thank you for participating in today's hearing.

MR RENNIE: Thank you.

MR COPPEL: Our final scheduled participate for today is Nick Gruen. If you'd care to come to the table, Nick, and when you're ready if you could give your name and who you represent for the transcript and a brief opening statement. Thank you.

MR GRUEN: Thank you, Jonathan. My name's Nicholas Gruen and I don't really represent anyone other than myself. You'll be aware of a submission that I made on the draft.

MR COPPEL: Yes.

MR GRUEN: I thought I'd come along and have a bit of conversation with you about that draft and focusing on international negotiation. So you have been good enough to quote liberally from a review of pharmaceutical patent arrangements that I was on in 2013. I might say that when we spoke to the Department of Foreign Affairs and Trade as part of the process, I think it's a bit of a pity in some ways we were not taking a transcript as you are here, but I asked the representatives of the department who came to speak to us, and it was sort of an open session in some sense, I asked them quite open-ended questions along the lines of what were their objectives when negotiating international agreements where intellectual property rights were under negotiation.

The representatives of the department were completely unable to say anything coherent, other than that they listen to everybody's representations. The broad modus operandi that one can deduce from what they have said publicly on this is that the sort of default position we go into trade negotiations on intellectual property is that we don't want to change anything, whether it suits us or not, whether it's particularly well-crafted or not. Then we start from that position.

I'm sure that if everybody in Australia said the same thing to DFAT they'd be happy to represent that in their negotiations but the thing that perplexes them is that different people say different things, and that really stumps them. So what has always struck me as remarkable is that there is no underlying strategic understanding of our interests. Again, this is in an area in which, unlike trade negotiation where reducing a trade barrier is presumptively a good thing, with intellectual property there is no such presumption. An intellectual property right may be too strong, too weak, in the right way or the wrong way and so on.

I think your report reflects that but it really doesn't make it clear enough that we are suffering from a very grave and very long standing lack of leadership from DFAT on this question, coupled with a defensiveness about the very sensible suggestions that the Commission has made consistently on this matter. So the Commission has argued how remarkable that we should do cost benefit analysis before, during and after negotiation to see what is in our interests, and that has been parried at every possible opportunity. I've made a few notes. I thought I might go through some of these thoughts but I'm inviting you to jump in if you would like.

MR COPPEL: Thank you, Nick. You've contributed through the various stages of this inquiry process from the outset, in one of the initial roundtables in a post-draft roundtable and also in a post-draft submission. We thank you very much for your contributions. Let me pick up on these

governance arrangements as they relate to the negotiation of IP chapters in trade agreements. We did identify a lack of transparency and poor consultation processes as one specific area that may be one of the sources of dissatisfaction with some of the earlier preferential trade agreements that have been negotiated. I think the one that often comes to the fore as an example is the Australia, US Free Trade Agreement. The points you are making are more systemic than that. That's just an example of an outcome.

MR GRUEN: Much more general. Absolutely, it's completely systematic.

MR COPPEL: One of the specific areas that we suggested could be an instrument to improve the transparency of the way in which these agreements are negotiated, without revealing the hand of the negotiations, is through the use of a model agreement, the model IP Chapter Agreements. We've had different views on that in our consultations and we've put that in as an information request in the draft report to get a sense of whether that is something that would help or whether there are problems associated with such an instrument. I'd be interested in getting your views on that specific example.

MR GRUEN: Yes, okay. Well look, I'm actually not entirely sure what you mean by "model agreement". In box 16.10 you give examples I think. Are those examples the kind of thing you mean by a model agreement or are you talking about something different, because you talk about Congress constraining the President or imagining that it's constraining the President or the executive.

MR COPPEL: No, by a model agreement it would be basically a draft of what would be considered a good IP chapter of a preferential trade agreement. There are often examples of this with respect to foreign investment laws. They have certain provisions which are quite standard and bilateral investment treaties. A number of NGOs have put out what they consider to be a model investment law.

MR GRUEN: Yes.

MR COPPEL: Something similar for intellectual property.

MR GRUEN: Well, if it could be agreed, then I guess that sounds like a reasonable idea. I can't imagine it would be and I can't imagine that - I mean, again with investment agreements, there are presumptions that greater freedom is - a model agreement can set out a sort of "in principle" logic and I don't know whether that's the case here. I mean my sort of

feeling for this is that this is something which initially was the product of American interests saying "Here's a way we can promote our interests" and they have pursued that, and we are where we are as a result of that. There are lots of pretty unprincipled ambit claims and there's a sort of a chaos, a long period of chaos and fear, uncertainty and doubt, while it goes on. Then we have the big reveal. So if you can get some sort of model agreement, I suppose it could be a useful thing to do.

The direction that my thinking has gone has been to say - well, a few things. Firstly, just before I say that, I might just say that I think possibly a better course of action for you might be to actually address the DFAT arguments on their merits. Because if their argument is that it would ruin their negotiation to have some transparency about it, despite the fact that they boast about the transparency with which they negotiate, then you could, I would have thought, have every bit as much impact as you want by saying that all of that analysis should be present for the negotiators and published after the event. So that can all be taken in-camera during discussions and it can be published after the event.

The point is that people who are making stuff up as they're going along don't want that. They don't want that transparency. They don't want that discipline. You can, I would have thought, inject precisely what you're wanting to inject within the terms that they say is necessary, which is in some sort of confidential way during the negotiations.

Let me try and go through some sort of more general things. Well, unless you want to - I will say one other thing there which is that the Productivity Commission has typically supported the idea of cost benefit analysis. I think it rather overdoes that, because I think that these things are immensely complex and one can only model certain aspects of a cost benefit. What you need is some sort of strategic understanding of simple things and that is why my submission presents to you a set of principles, a set of negotiating principles, rather than the statement that you do a cost benefit analysis.

A cost benefit analysis doesn't give you a very good lie of the land when you're negotiating. You can spend a huge amount of time negotiating one little thing and then you want to know should we agree to this little change that Canada wants, or some country wants, and you don't know from your cost benefit. You've got to go away for another few months. I think that you should strengthen that approach with insisting that someone with an economic framework in mind is present and publicly accountable to inform that process if necessary confidentially and then after the event.

I will also just comment on one sentence from DFAT and this is quoted on page 453 of your report. "The government already has robust arrangements in place to ensure appropriate levels of transparency of our negotiating mandate, while protecting Australia's negotiating position". I was involved in endless DFAT consultations about the TPP and various other agreements and it's a very Kafkaesque experience, very Kafkaesque. You're invited into a room a bit like this and they say, "What are your thoughts?" and you say, "Well, what have you been negotiating?" and they say, "We can't tell you". You say, "Well, we came and saw you six months ago. These are our concerns. These are the things that we think matter and that hasn't changed, so what are we talking about here?" It's a very, very strange process.

On the report, and it's all about this sort of stuff or most of it is, I think the PC makes a bit of a mistake that I made for quite a long time which is to make this idea of net importers and net exporters a fairly pivotal part of the analysis. I mean it's quite obvious that we should be thinking of ourselves as a net importer of IP and there is really only one sure-fire exporter of IP. The reason why I think that is very inadequate is that the net exporter, the clear net exporter of IP, the United States, is not pursuing its own interest in any coherent transparent sense. It is pursuing the interests of certain rights holders and it is entirely happy to pursue the interests of those rights holders at the expense of the country itself, quite apart from the expense of us.

When Disney wants to keep Mickey Mouse safe from the prying hands of an end of copyright, the United States passes the Sonny Bono Act, keeps Mickey safe in the hands of Disney Corporation and then goes out to successfully try to negotiate to keep Mickey safe in Disney's hands in Australia and everywhere else. That is certainly at the cost, not just of Australia, but of the economy of the United States. In an economy-wide sense, that's obviously at a cost to the United States. Similarly, a range of other types of rights.

I think it's important to try and present the picture of how this is happening, which is that certain rights holders see it as in their interest to pursue these things and we are not disciplining that process by saying, "Well, here is a set of principles against which we think it's worth negotiating". That is a point that I wanted to make.

You also talk about international agreements as lowering transactions costs. You say this is sort of an important motive. Now I think that's an obvious motive for something like the PCT and there's a whole lot of activity that seeks to lower transactions costs and does so in a pretty commonsensical way. I think it's pushing the envelope a bit to say that

the terms in AUSFTA or the TPP have got anything to do with lowering transactions costs. They're argy-bargy about how much rent we can - they're about rent creating. I think it's important to try and make those distinctions.

MR COPPEL: I think we were making a distinction between some of the bilateral trade agreements and some of these IP-specific multilateral agreements.

MR GRUEN: Yes, but there's something like that Anti-Counterfeiting Treaty, or whatever it was called, and that's IP-specific and it's a rent grab.

MR COPPEL: This is another point and it comes up in the area of design. So there is a sort of draft treaty called The Hague Agreement and they often conflate arrangements which would facilitate the registration. So The Hague Agreement you can register a design in one country and it would be registered in all of the signatories to that agreement, but it also has provisions that relate to length of term. It's the combination of the two.

MR GRUEN: Sure, you can get them mixed up, yes. I think it would be useful for you to distinguish between those two things a bit more clearly than you do in the draft.

I don't know whether you comment on this but we talk about expertise and the need for expertise in chapters 16 and 17. I think it's quite important to say that if we are trying to exercise policy expertise, expertise about what policy should be, that the expertise in some sense needs to be essentially from an economic perspective. Now that doesn't mean that lawyers can't be expert at trying to get economically beneficial law. So people like Kim Weatherall, Rebecca Giblin and so on are doing that very effectively.

There are also lawyers for whom it doesn't really occur to them. They are sort of locked into a legal analysis and they would be good in a Court of law for a client and they would be good in making a judgment in a case as a Judge. But they're not people who seem to understand that if you're trying to think about what policy should be, there isn't much to be said for a legal analysis, except insofar as it might be an analysis about what would make for efficient law and what would make for inefficient law. I think it is quite important to bring that out.

Another thing that I think is really critical and one of the things that's really struck me about this area is that there are areas in which there are

substantial gains to be made with virtually no losers at all. I think the classic example of that is manufacturing for export. But it is remarkable how - I mean we've lost something like two billion dollars' worth of pharmaceutical exports from the failure to allow one plant to go ahead. I mean nobody prevented it from going ahead; they just told them that wouldn't have the right to export the material. Nobody benefited from that. India benefited from it because that's where the facility was built and it has weaker intellectual property laws.

Another similar area is fair use. Again, there were comments made earlier that I saw where the author who appeared before you said that in Canada this would lose substantial revenue. If an important part of the test of fair use is is this undermining somebody's ability to exploit their intellectual property and if it does that, it isn't fair use, that's the test that enables you to try to focus on gains where the losses are minimal. So that seems to me to be an important thing too, to try and emphasise the opportunity to generate large gains without any costs.

Just one other thing I should have mentioned with costs, where costs and benefits I think are very out of whack, is that it's very hard to see benefits from software patents and it's very easy to see benefits from not allowing software patents, which effectively was the law until about 1980. We see software just all around us, built by people who wouldn't know where the software patents are and can't possibly know because there's half a million of them.

MR COPPEL: Can I just briefly ask you a question about the domestic governance and institutional arrangements? We make the point in the report that policy for intellectual property is a bit fragmented, part of it, and the Department of Communications part of it in industry and for all intents and purposes, IP Australia has an administrative role but also a policy role. We're seeking further information on how those arrangements could be made in a way that would improve an evidence-based approach to intellectual property policy. I'd be interested if you've got any views on those sorts of arguments.

MR GRUEN: Yes, I do. I believe we should do with them what you might be intimating in one of the boxes where you talk about what happened with competition policy. So competition policy is now right in the right place. It's an economy-wide instrument for trying to improve the efficiency of our economy and the productivity of our economy, and that's exactly where IP should be in my opinion.

MR COPPEL: Treasury?

MR GRUEN: Treasury, yes.

MR COPPEL: For the purposes, given it's close to 6 o'clock and I think it might relate to one of the points you were making and it's an area that's come up frequently in the hearings of this week relating to parallel import restrictions, in your post-draft submission you say, "Prohibiting parallel import restrictions is contrary to the global public interest in economic efficiency"; can you elaborate a bit on that what you mean?

MR GRUEN: Well you left out one word which was "presumptively" contrary. I said, "Encourage countries to prohibit parallel imports is presumptively contrary to their own interests and to the global public interest and economic efficiency".

MR COPPEL: Okay.

MR GRUEN: As we know, and as Henry appearing before you previously commented, I mean he didn't quite put it in these terms, but 60 years ago we kind of served ourselves up for the benefit of foreign publishers to maximise their profits by allowing them to monopolise our market. It's hard to think of a sillier arrangement. Now there are some domestic publishers working in that area and they enjoy the advantages that they tell you that they enjoy. It seemed to me that Henry reasonably accepted that prices were a bit high but not as high as they used to be but that the big advantage - which is an interesting thing that he raises, the big advantage is the advantage on risk. So if that was the only thing to think about - sorry, I'll back up a bit.

I don't think that when it comes to culture that economic efficiency is the highest priority. I don't have a problem with subsidising culture. I don't even have a problem with subsidising culture somewhat inefficiently. However, if you look at parallel imports in Australia, the form of subsidy will be far more valuable to J K Rowling and her publisher than just about anyone else. So a large amount of the money that is generated is generated for overseas publishers, for overseas writers.

I, at one stage, was preparing to do a media interview on this a few weeks ago and I wanted to just grab a few basic facts and I couldn't find them in here. They're in the 2009 report, no doubt, and they're a bit out of date and I didn't have time to go through it all. A very simple table that says, "Here is the likely advantage of parallel imports. This is how much clearly goes to foreign publishers of foreign people. And then this is how much Australian publishers might be able to make from some importing of foreign writers and this is how much would go to Australian authors

and Australian publishers of Australian authors, given a range of different assumptions". I think that would be a useful thing to do.

The thing that disturbs me about these mechanisms and the politics behind them is that they're so poorly targeted to the thing that I'm completely convinced someone like Henry is absolutely passionate about, which is Australian culture, and not just Australian writers but publishing of taking risks to publish Australian authors, which is a much larger part of the market than just funding people to write. I'm very happy to take that very seriously and I'd love to have a chunk of money from the government and have people like Henry with their passion support them, and support them better than they're supported now. But I don't want to do it for Jamie Oliver's cookbooks. J K Rowling's wonderful but she doesn't need any help from us. So that's my view of that.

MR COPPEL: I'm going to wrap it up here. Once again, thank you for your contribution today and your earlier contributions.

MR GRUEN: Good. Thank you.

MR COPPEL: Ladies and gentlemen, that concludes today's scheduled proceedings. Is there, for the record, anyone else who would like to appear before the Commission?

UNIDENTIFIED SPEAKER: If I could say something. I know it's extremely late.

MR COPPEL: Yes, so if you could come to the floor.

MR GRUEN: Sorry to keep you waiting so long then.

MR COPPEL: We still have a transcript, so for the purpose of the transcript, if you could give your name and who you represent and these will be very brief interventions that follow the scheduled participants.

MR DAY: Yes. I'm David Day. I'm chair of the Australian Society of Authors but I'm just here to speak as an author who's celebrating the 30th anniversary of his first book. The ASA will be talking to you on Monday.

MR COPPEL: Yes.

MR DAY: We put in a submission and we'll be talking to that, but I thought it would be more useful if I just talked about my experience as an author and address those three things that particularly worry us. One is the copyright period which I know is a smoke screen or flying a kite and

has no real force. But you know that book that I brought out 30 years ago in '86, it was republished in the 90s and republished again in 2001, I think, and then made into a dramatized documentary in about 2007, I think. So a 15-year copyright period would have killed that. It wouldn't have had that third publication or probably the dramatized documentary either or it certainly wouldn't have accrued any benefit to me. It mightn't have happened because I wouldn't have been there pushing for it because it wouldn't have been a benefit.

The big thing, of course, or one of the two big things - just going back a bit, I've published nearly 20 books over the last 30 years, so been very prolific in terms of the non-fiction author. I've published with a range of publishers, including Henry, but Random House, Harper Collins, Oxford University Press, Melbourne University Press, and both self-initiated projects, but also commissioned works for the government doing the Customs Department. So I know a little bit about dumping and how hard it is to actually enforce dumping provisions. Also a book on the Bureau of Meteorology. Five of my books have been published overseas.

It's really essential in my view to retain territorial copyright to allow that to happen. One of my most recent books is this history of Antarctica for which I had great trouble getting funding, research funding to do it. Random House Australia generously came up with quite a generous advance and that allowed me to do all the international research, going to Norway and England and New Zealand and America, all the international research that was essential for getting that done. They were only confident enough to do it because they had the Australian rights.

They knew when I went off and sold the American rights to Oxford University Press and then the British rights to Oxford University Press that those books wouldn't be dumped into the Australian market if there were excess copies. Otherwise they wouldn't have given me such a generous advance and the book simply wouldn't have been written. So this book is a physical representation of the advantages of parallel importation restrictions or territorial copyright.

You've talked here about dumping and I know this is going to try and get through and we've come in here as a matter of form really because we don't figure that anything we say will affect the recommendations. We'll take our arguments up elsewhere. But you talked about dumping and, as I said, books aren't cans of tomatoes. The cans of tomato case took years before it was finally resolved. A book has a relatively shorter life than a can of tomatoes. It would need people on the wharves checking pallets for books that were being dumped into Australia. That's not going to happen

as publishers have said they can't chase around bookshops looking for dumped copies of their books and then trying to stop them.

The third thing I wanted to raise was the fair use recommendation that's been made. This is of incredible concern to us because we've seen what's happened in Canada where a similar sort of exemption for educational institutions was allowed and I think it was 40 to 50 million was ripped out of the publishing industry and spelt practically the end of educational publishing in Canada. In Australia, we'd rip probably 70 to 80 million out of publishing, the money that goes through the copyright agency to publishers and to authors.

As you know, and as we've said in our submission, the average author from their work gets less than 13 grand a year from literary activity. Myself, if you don't know, I'm a prolific author, I did a little calculation a few years ago looking at how much I've earnt in royalties over the previous 10 years and it was an average of 20 grand a year. So one can't live on royalties. I've had books on the bestseller list in Australia and had books published overseas. This will be coming out in China in a month. Nevertheless, I couldn't make a living from writing alone. I've had to do teaching in Tokyo and Dublin and take on commissioned work as well to make a living. What the Commission is suggesting will undercut that and I'm glad I'm sort of coming hopefully not to the end yet, but to the tail end of a career, rather than at a start of a career, because I would hate as a writer to try and start out now, if these proposals get implemented.

MR COPPEL: Thank you, David, and thank you for your patience in waiting until the end.

MR DAY: And it's my birthday.

MR COPPEL: And it's your birthday. Well, I wish you a happy birthday.

MR DAY: Thanks.

MR COPPEL: I thank you for putting those views to the Commission. We've had many authors participating in the hearings so far. We will be reconvening in Sydney and there are a number of other authors and I think you're picking up several of the points that are particularly close to the minds and hearts of authors.

MR DAY: I mean it's more important than authors; it's about readers.

MR COPPEL: And publishers.

MR DAY: Readers wouldn't have this book, readers in China or America or Britain or Australia simply wouldn't have had this book without parallel importation restrictions, had I not been able to sell the Australian rights. It's a big issue and it'll be argued about for some time, I imagine.

MR COPPEL: I agree with that. Thank you very much, David, and happy birthday.

MR DAY: Thanks.

MR COPPEL: Is there anyone else who would like to appear before the Commission. There's only one person left.

MR DAY: I'll give you a copy.

MR COPPEL: Really.

MR DAY: And you can hopefully keep it in mind when you're writing your final report.

MR COPPEL: Do you want to inscribe something?

MR DAY: Look I will, yes.

MR COPPEL: Okay, thank you.

MR DAY: I hope I don't see it down in the second-hand shop.

MR COPPEL: I can guarantee you won't. Thank you very much. I now adjourn the proceedings and this concludes the Commission's public hearing for the IP arrangements inquiry here today in Melbourne. The Commission will reconvene in Sydney next Monday. Thank you all.

MATTER ADJOURNED AT 6.13 PM UNTIL
MONDAY, 27 JUNE 2016

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 SMC CONFERENCE & FUNCTION CENTRE, SYDNEY
ON MONDAY, 27 JUNE 2016 AT 8.44 AM

INDEX

RESUMED **[8.44 am]**

MS CHESTER: Good morning, ladies and gentlemen, and welcome to the public hearings for the Productivity Commission's Inquiry into Australia's Intellectual Property arrangements. My name is Karen Chester, I'm one of the Commissioner's on this inquiry and I'm joined by my Commissioner colleague Jonathan Coppel. Just by way of background, our inquiry started with the reference from the Australian government in August 2015 and that reference 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 we've talked to a large and diverse range of organisations and individuals with an interest in these issues. We've held a number of round tables with groups of interested parties to inform the inquiry and we received around 150 submissions before we released our draft report in late April this year. Our draft report did include some draft recommendations, some draft findings and a number of information requests.

Since our draft report, and unsurprisingly to this group I'm sure, we've received a large number of submissions in response, with the total number of submissions now well over 500. We are very grateful to all the organisations and individuals that have taken the time to prepare submissions, to meet with us, to participate in our round tables and, indeed, to appear at these hearings. The purpose of today's hearing is to really provide us an opportunity for interested parties to provide comments and feedback on the draft report. I think most people are very happy to tell us what we got right, what we got wrong and what we missed out altogether.

Now, today is our final day of public hearings and this follows five very full days of hearings in Brisbane, Melbourne, Canberra and Sydney where we've heard from innovators, authors, designers, academics, legal experts, legal practitioners, publishers, businesses and consumer groups. We will then be working towards completing a final report, having considered all the evidence presented at the hearings and in submissions, as well as other informal discussions. Our final report will be handed to the Australian government later this year.

Now, we like to conduct all our hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken and

for this reason comments cannot be taken from the floor. But at the end of today's proceedings, time allowing, we will allow anybody to make a brief presentation, if they would like to.

Now, participants are not required to take an oath but are required, under our Act, just to be truthful in their remarks. The transcript 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. For any media reps who join us today there are some general rules of the game and my colleague, Dominique Lowe, has those for you.

To comply with the requirements of the Commonwealth Occupational Health and Safety legislation, or just good old common sense, you are advised that in the likely event of an emergency, requiring the evacuation of this building, that the exists are located in the stairwell just outside left and left and the emergency assembly point is in Hyde Park, a couple of blocks that way. If you do require assistance please speak to one of our inquiry team members here today. Participants are invited to make some opening remarks, but if you could limit those to five minutes that would be appreciated. This allows us an opportunity to really get in and discuss matters with you. You are more than welcome, also, to comment on the issues raised in other submissions to our inquiry.

I would now like to welcome to the first of our participants here this morning, from the Australian Society of Authors, Juliet Rogers, Garth Nix and Olivia Lanchester. If you could each just state your name and who you represent, just for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks.

MS ROGERS: Thank you. I'm Juliet Rogers, from the ASA.

MR NIX: I'm Garth Nix, an author and member of the ASA.

MS LANCHESTER: I'm Olivia Lanchester, from the ASA.

MS ROGERS: Good morning everyone. We're here today on behalf of our more than 3000 author and illustrator members from across Australia who each represents a small business, a livelihood under threat from the recommendations of this Productivity Commission report. These creators make a rich contribution to the culture of our community and copyright is the mechanism by which they make a living. As such, it's not an impediment to the consumer but rather the means by which consumers can enjoy a range of locally produced books that reflect their family's lives and those of their communities.

This review is grappling with the challenge of how copyright legislation can be flexible, robust and relevant, in the face of a rapidly changing market. We understand that dilemma and appreciate that there is room for improvement and simplification within copyright legislation. But to quote writer, as I would, of course, Ellen Glasgow, "All change is not growth as all movement is not forward." This report is written under a predetermined position that considers change to be positive and necessary, simply because it is change not because it means progress. What problems are your recommendations solving? We struggled with the tone and the rather provocative content, such as the 15 to 25 year term of copyright, but it's the lack of evidence and failure to quantify the benefits of the proposed changes that are most disturbing to us.

If parallel importation rules were removed the proposition appears to be that the consumer would benefit through better prices, availability and range. While these are fair and reasonable benefits, they are all available, at the moment, under the current arrangements. As an individual consumer of books I can buy any book from anywhere in the world, find the best price on any number of comparative pricing sites as well as having access to some of the best book shops on earth. As a bookseller I can buy my major international titles and all my Australia books through my local publishers at a good discount with the protection of full sale return and localised promotional support. I can buy any other title in bulk from anywhere in the world, unless my local supplier has made it available within Australia, within a very short window from this first international publication.

Most authors collect of their income by licencing their rights in markets around the world, just as their colleagues in the US and UK are able to do, without risking their local sales being devastated by the importation of overseas remainders. Publishers can manage the considerable risk and investment of their Australian lists by licencing international titles which they can actively promote, on an exclusive basis, within Australia, in the same way that their colleagues are able to do throughout the world.

These activities all underpin a vibrant and successful creative industry that stands on its own two feet, without relying on government subsidy. So I ask, again, therefore, what problems are your recommendations solving? Prices of major new titles are driven by competitive market forces and are comparable with international pricing, once the complexities of exchange rate, local taxes, different formats and supply chain dynamics are taken into account. Books, in the very long tale, are largely not subject to exclusive licences, but the intricacies of exchange rates, international shipping, less advantageous discounts and firm side

purchasing all stand in the way of booksellers purchasing direct from overseas.

So our concern is if the recommendations made any difference to price it would be in the importation of low value, poorly made, mass produced fodder, which would most likely be in the areas of early learning children's books or non-fiction titles as, with a little help from Wikipedia, such books can be assembled without proper authorship and at low cost, or any of the books that have failed to sell to their expectation in the original market.

Where is your evidence that this is what the current consumer wants? Because our evidence strongly suggests that parents do not want their children to start calling them Mom. They want Australian books that embody our humour, values and idioms. Why place the publication of our stories at risk in exchange for piles of failed books that no one has actually asked for or actually want? Why change a system that 15,000 people have signed a petition to support?

Finally, the great misnomer, fair use. Fair does not equal free and while consumer interests are important, so are the interests of our creators. The Commission clearly considers that the current fair dealing provisions are insufficient in terms of the consumer, but haven't you taken a sledge hammer to crack a nut by proposing a change that almost ignores the creator all together? Why does the Commission consider the writer's ownership of and recompense for their creative work is so much less important that the consumer's right to unfettered access? How does the Commission propose that the average author develops the skills, contacts and financial resources to act as the sole gatekeeper to their own rights in an environment that will be close to a free for all?

Everyone has their favourite book, that book that takes them back to a time and place that's special to them. From Possum Magic to The Power of One these books help to define who we are, both individually and as a nation. No system is perfect and our authors are more than willing to work with all sectors of our industry to continue to improve the way in which we work together and deliver the best value and service to the consumer.

Indeed, there would be no better time to do so, given the unprecedented unity across the industry that your report has ironically elicited. But there's no escaping the fact that these recommendations place a system that delivers high quality, locally made, relevant and accessible books at considerable risk, without producing evidence of

harm, in the present system, or quantifying the benefits of the new. This is unjustifiable, illogical and downright wrong. Thank you.

MS CHESTER: Thanks very much, Julie for those opening remarks. I might just begin with just a couple of points of clarification and I think there's been some interesting media reporting of what people think might have been in our draft report. I think the first point that might be helpful is we don't make any draft recommendation with respect to the term of the copyright. Indeed, there's many pages of our report that explain why we would not recommend that, given the obligations we have and given, indeed, our terms of reference asked us to be mindful of those obligations.

MR NIX: May I just say, there is a draft finding in a box, on the page which many people saw as a recommendation.

MS CHESTER: I was just about to get to that, Garth.

MR NIX: If you didn't intend for that to be anything of a recommendation, why is there a box draft finding?

MS CHESTER: I was just about to get to that, Garth, thank you. So what we did, in our draft report, was our terms of reference asked us to say are we getting the balancing act right at the moment. In doing that, we did some analysis, based on ABS statistical evidence, where the ABS had done quite a lot of work about the commercial life of creative works in Australia and it was based on that evidence that it suggested that the commercial life of most creative works are about 15 to 25 years, so we were contrasting that to the term of copyright at the moment, which is life plus 70 years. Don't worry, we realise that that's caused a great deal of consternation and concern with people.

MR NIX: It's an extraordinarily flawed way to - books are not average products, every book is a unique product. Trying to find the average life of a book is very dubious statistically. I haven't actually seen the methodology of that ABS study, but how do you account for a book that has a life of - take one of my books, for example, has a life of three years and disappears for two years, comes back in a second edition, it has a life of five years, it sells a certain number of copies, goes away again. Books come in and out of print, new books bring older books back into print again. How do you arrive at 15 to 25 years for an average book when there is no such thing as an average book?

MS CHESTER: I think we appreciate that - a couple of things. Firstly, the ABS statistical base hasn't been challenged by anyone, nor their methodology, based on any evidence that we've received. One of the

challenges we've got is under our obligations and the way that copyright term is framed, it's kind of like a one size fits all and we know very well that it's not one size fits all. You can have book that might have a life of a year, you might have a book that has a life of life plus 70. So we were looking at the evidence base, in terms of what it told us the averages were and the spread of 15 to 25 years. Anyway, it's not relevant, in terms of the draft recommendations, we're bound by those international obligations.

The other point of clarification that I thought might be helpful is around parallel import restrictions. A first blush reading of our terms of reference might suggest that we've been asked to do a holistic review of whether or not to repeal parallel import restrictions and, indeed, that's how some people have misinterpreted our terms of reference. It did require us to take into account the government's response to the Harper Competition Policy Review so we have to look through to that response to interpret our terms of reference and in that response the government has accepted and said that they'll proceed to remove parallel import restrictions and they were asking us to look at transitional issues. So that was what very much was the focus of our report in looking at parallel import restrictions.

So that kind of takes me, maybe, to the first question that I thought would be good to begin with. In our report we identified a couple of the transitional issues, as we saw them, and, indeed, a lot has happened since we did our earlier report on books, in 2009. Prices have come down but we're still trying to get a handle on what the real number is there. Secondly, the Australian dollar is in a very different position, in terms of managing the transitional issues that would come from removing parallel import restrictions. We also know that some of the concerns that have been raised previously and now about the potential to dump books of whatever quality, or remainders, on the Australian market, the government's introduced some more changes to Australia's dumping arrangements, which apply to all other sectors of the economy. So they were a handful of the transitional issues that we identified. Are there other transitional issues, in your thinking, from the perspective of your members, that we need to be mindful of, as we finalise our report?

MR NIX: Can I just say I think your leaping ahead that parallel importation restrictions should be abolished, based upon the Harper Review. Looking at your report here, I mean this draft sentence here, which is on page 129, "By raising book prices PIRs adversely affect Australian consumers, with little or no change in the incentives for producing works by authors, notwithstanding claims to the contrary." There's absolutely nothing to support that sentence. If that was in a Year

7 essay it would fail. There is nothing in there. Is there going to be something more in your later report that actually says, "Notwithstanding claims to the contrary" six words. Now you've received hundreds of things saying, "Yes, there are actually many things to the contrary." I also wanted to ask, "Little or no change - - -

MS CHESTER: Sorry, we're trying to ask some questions of you, so the question I asked, and I'm not sure I've had a response to, is are the changes - - -

MR NIX: Because you've leaped ahead. You've leaped ahead to transitional issues after PIRs are revoked, but we need to say that PIRs should not be revoked. So why are we leaping ahead to transitional issues?

MS CHESTER: So two quick thoughts there so that we can get on and try and speed up and answer some of the questions we've got for you.

MR NIX: So we're not meant to ask you questions?

MS CHESTER: So the public hearings can be a discussion but we've got a number of questions that we need to get in evidence based from yourselves and that's the purpose of today's hearing.

MR NIX: So the purpose of this is to actually not hear from - - -

MR COPPEL: We've heard many people say that the work that we did in the 2009 report on parallel import restrictions is now out of date. We'll be updating some of that analysis for the final report. We judge that for the draft report, given that the terms of reference asked us to look at transitional arrangements, that updating of that work was of lower priority than other areas of the report, which are quite expansive. But we will be doing some further work to look at some of the evidence that was presented in 2009 and what it looks like today.

MS CHESTER: So that way when the government gets our final report, albeit we've had to work within the terms of reference we've got, they'll have that updated information on pricing. We've had some evidence provided by some publishers who've tried to be helpful and looked at some excerpts of price lists, but unfortunately to do it full justice we're going to do the comprehensive pricing update.

MR NIX: All on pricing, not looking at any other issues? Not looking at any of the other issues that have been raised in many, many of the submissions? Because it's not all just about pricing, of course. You

brought up dumping provisions, which is very interesting because, of course, if we do remove our parallel importation restrictions, which is really just surrendering our Australian territorial copyright, many of the books that come in will not be officially dumping. It won't be a situation where they could even be described as dumping, under various international arrangements, they'll just be a by-product of the international scheme of how books are sold because the Australian market is not a separate entity, it's part of an international copyright market, which is one of the things that most disturbs me about this is that we're suggesting change to our Copyright Act and our market as if we are somehow separate from the world.

MS CHESTER: So, Garth, one of the things we have been doing, over the last six days of hearings, is asking for some further evidence from the industry, from publishers, particularly the multinational publishers, around practices and the extent of remainders, particularly in the US market, given that that's the primary area of concern.

But given that you sell and licence internationally, it would be good to get your sense, or from any of you, about is there any difference in the US model? We've heard a lot about the risk sharing in Australia, across authors, booksellers and publishers, with respect to royalties, with respect to taking back unsold books from the booksellers and with respect to remainders. Is that disparate from your experience in the US?

MR NIX: There's lots of commonalities between all three markets. The one that particularly disturbed me, of course, and I've just come back from the UK where I discussed these proposed changes with my British publishers who were - I actually had a conversation where they could not actually believe what I was telling them. They could not believe that our government would be stupid enough to remove our territorial copyright. So I had this almost Cathegeresk conversation, which I've had before, but this was with somebody new, where she found it hard to believe what I was telling her and I had to keep repeating, "Yes, it would be an open market that their editions of my books could also come here."

What greatly disturbs me is not dumping of remainders, which would certainly be a possibility it would be actually giving them our market. My British publishers, my American publishers have both said, openly, that if this becomes an open market they will compete here and they will print for it.

One of the things that disturbs me about this report is the lack of understanding on a very basic level of publishing business. Everything is based upon reports and studies of very big scale stuff, without any

evidence of understanding of how publishing actually works on the ground level. So, for example, the very basic thing of economy of scale, in print books, and print books are still between 50 and 60 per cent of the market, sometimes more. In America it's about 50/50 with eBooks, here it's probably 60/40 the UK is probably 80/20. So print books work on an economy of scale where the more you print the cheaper they are. For both the Americans and the British, having Australia as a market where you could print an extra 5000 or 10,000, on top of your normal print run, makes all of your books cheaper, greatly improves your bottom line in your home market, the US or the UK. You could print an extra 5000 specifically just to sell them in Australia.

Say, with my books, for example. I'm an Australian author, I'm here, my books are published by Allen & Unwin, an Australian publisher, Australian owned, independent publisher, but if they have to compete with Bonnier(?) in the UK or HarperCollins in the UK or Scholastic and HarperCollins, in the US, who publish my books, who simply decide to make their bottom line better by publishing more and sending the books here. Due to the intricacies of publishing agreements, it's quite likely they could also distribute their books here at a much lower royalty.

So I would have books coming here which have been specifically printed to improve the bottom line of American and British publishers, in my own country driving out books published by my Australian publisher, under these proposed arrangements. This could not happen to an American author or to a British author, you can't go the other way. This is one of the things that gravely disturbs me is that we're just giving them an opportunity and, in fact, in a way we're going back to 40 or 50 years ago where this happened all the time, there were not separate Australian editions.

MS CHESTER: So just two comments that would be good to get your sense of. Firstly, we've heard from the industry that publishers locally have been quite lean and mean since 2009 and the price differential doesn't really exist between books published here in Australia and offshore, and we're still waiting to get an evidence base around that. So if that's the case, and you still have the advantage of no transportation costs, the point that, Juliet, that you made in your opening remarks, why is it that there would be a flood of books into the Australian market, remainders set aside, Garth. I'm just trying to understand.

MR NIX: It's a good question. Because there would be an opportunity for the American and British publishers to force out local players. As I'm saying, they can print the extra books to improve their bottom line. Those books are essentially free for them. They are something they can then use

as a lever. So they can use it as a lever to get into our market, they can price them at a loss, as a loss leader, and sell them here, simply to then kill our local publishing. If they could, over time, put Allen & Unwin out of business, for example, then there is no competition, they can put the prices back up again. It just creates an opportunity for them which doesn't exist if we maintain our copyright territory. So they could do very predatory pricing and there's nothing anyone can do to stop them, that's the nature of it.

MR COPPEL: This scenario is a scenario that could play out in any other sector, which do not have parallel import restrictions, what makes the book sector so different from those other sectors to have these restrictions?

MR NIX: Well, what other sectors would you have absolutely identical products?

MR COPPEL: I don't know if you have to be absolutely identical, but can you - - -

MR NIX: No, but that's what I'm saying, the books are identical products.

MR COPPEL: Can you explain then, is it just because books are different from every other sector that parallel import restrictions are justified? What rationalises the prevalence of parallel import restrictions in the book sector and not in any other sector? I put the question back to you, in a sense?

MR NIX: Yes. I think you'd have to look at history. Regardless of why they are there, they do exist, they exist worldwide. There is a worldwide system of copyright. This is how the international system works. Why it is there, why are other forms of international arrangements, why do they exist?

MS LANCHESTER: Book are different because they're not substitutable, like an appliance might be, for example. So there is something about a creative work which is inherently not substitutable. So the restrictions might not exist in other sectors because the nature of the product is different in other sectors, whereas there is an added interest in a creative field to have uniquely Australian content.

MS CHESTER: But the music industry doesn't have parallel import restrictions and they would see themselves very akin to books. Anyway, just coming back - because I want to get onto fair use, and I'm very

conscious of time. Just coming back to the point about these arrangements exist everywhere else, I think it's important that until Friday's Brexit decision it was quite different for the UK, compared to Australia, because territorial copyright applied to the entire EU.

MR NIX: That's not actually true. In practice it's not true. I mean in practice Europe - Brexit will change how English language books are sold in Europe, it won't change how English language books are sold in the UK and Northern Ireland. I think it's important to differentiate that from looking it as a whole, particularly in terms of Australian books, of British, Australian, American books.

MS CHESTER: Publishers and legal academics might choose to disagree with you because that's an area where we're getting conflicting evidence. I think the other thing, though, is that the US, which has a slightly - originally arrangements for parallel import restrictions with first right of sale, that's now being unbundled by some court decisions where - - -

MR NIX: It's been temporarily unbundled by Cassai(?) but that's very temporary. Again, when I was in the US, in February, talking to a publisher about this, there's already a bill before Congress or was about to go before Congress which will close that first sale loophole. So once again they will have complete territorial copyright. In practice it will be very - apart from Cassai importing those John Wiley text books, I don't know of any example of a non-US publisher successfully importing books into the United States. I'd be curious if you can tell me if there is one.

MS CHESTER: Well, we have received submissions, in evidence, to suggest that's the case.

MR NIX: The American publishers I asked actually could not name any successful examples of that. Certainly I'd be very interested in an example of an Australian publisher being successfully able to export copies of books to America, where there is already a US edition of that book.

MS CHESTER: I'm conscious we need to touch on fair use as well this morning, given the concerns that you've raised there. It's interesting, one of the participants last week suggested to us that fair use wasn't getting a fair deal, and I think what they were suggesting there was that a lot of folk have described fair use as free use. It would be good if you could just talk us through your understanding of what it is about the four fairness factors and the illustrative examples that would result in fair use being free use,

because that's not what we understand, based on the previous work of the ALRC, the view of legal academics and practitioners in the field.

MS LANCHESTER: Because fair use would operate as an exception to copyright infringement. So, therefore, if it's an exception to infringement there is no requirement for pay for information.

MS CHESTER: Maybe if you give us some tangible examples of what you think is remunerated today, under fair dealing, which is kind of fair use but through a prescriptive exclusions list, what would be remunerated today, under fair dealing, that wouldn't be remunerated under a system of the four fairness principles, and the illustrative examples?

MS LANCHESTER: When you say the four fairness principles, are you referring to the principles the Australian Law Reform Commission recommended or the principles that you have recommended, or the US principles?

MS CHESTER: Let's start with the ALRC, because I think they've, rightly, pointed out to us our attempt to stray a little bit from their principles would potentially raise some issues about importing some jurisprudence experience from the US. So just looking at the ALRC fairness factors and illustrative examples, can you give us some tangible examples of what's remunerated today, under fair dealing, that wouldn't be remunerated under fair use? Mindful, as well, that we have made no recommendations to change licencing and statutory licencing for education.

MS LANCHESTER: But education, I guess, is an obvious one, because the Australian Law Reform Commission recommended that education be an illustrative purpose. So that would be an area where we would say remuneration would slow or stop.

MS CHESTER: Of what? Because when you look at the fairness factors, if something's commercially available and it would impact that market for it to be made available without remuneration of copyright then that wouldn't get through the fairness factors. So we're really struggling to understand why people construe it as free use.

MS LANCHESTER: But the very purpose of bringing in a fair use exception is to allow free use.

MR COPPEL: But fair dealing is an exception as well, it's just one that's prescribed fair use as more driven by principles that a user needs to

be comfortable that are consistent with those principles, in order to be able to avail itself of that exception.

MS ROGERS: I guess the worry is that where there is fair use in America is that there are many, many cases where the person who used the material felt it was fair but the copyright holder very definitely did not. So that amount of litigation that surrounds this area is due to that lack of clarity and our concern is putting that onus back on authors, who are not well-resourced, on the whole, to prove their case will make it extremely onerous on them and there are many large organisations who may well, in their own minds, be able to justify that use, under one of the principles, have resources to defend their use and the author is there trying to say, "No, I didn't give permission and I do require payment."

MS CHESTER: I think, Juliet, this comes to the issue that's been raised about which of the systems, fair use or fair dealing, is more certain, no legislation is certain, but we've actually received a lot of evidence from users, libraries, archivists, educational institutions that fair dealing, because it's set in time and it's not technologically neutral, actually gives rise to greater uncertainty about what's fair or what's not, because there's a certain list of what's prescribed is in or out. Whereas fair use, because it's principles based, similar to what we've done with our Australian consumer laws, for example, we've moved away from detailed, prescriptive legislation to principles based legislation because business models and technology and things adapt. So they're saying that fair use provides them with greater certainty because it does adapt, over time, to different forms of technology, in terms of how copyright material is made available.

MS LANCHESTER: But at any certain time the assistance or guidance from the courts, which would require extensive litigation to get there, and we're saying, on behalf of writers, they are not well placed, as a group, to run litigation to the order to get guidance. We would question that even in jurisdictions where fair use has been around for a long time, like the US, that there is settled understanding even there. It seems to me confusing to propose that fair dealing, with a list of prescribed purposes, is less certain than fair use, with an open, non-exhaustive, ever evolving inflexibility. That just does not make sense.

MS CHESTER: So there's a couple of ways in which the uncertainty of the principles based legislation can be addressed. We've identified those in our draft report and, indeed, we can look to international jurisdictions, like Israel, that has transplanted the US fair use system into their economy and publishers and creative industries are thriving there under it.

So, firstly, if we don't stray from the ALRC wording we can actually leverage the US jurisprudence. The industry and the users in the US have effectively issued a whole bunch of guidelines in different codes, in terms of providing useful guidance to users on how they should interpret the fair use principles. So there are a whole range of ways in which that uncertainty factor is being addressed, without requiring local authors or local publishers to have to go through the courts. We can draw on leverage off that, those uses.

MS LANCHESTER: I think when you hear another commentary on fair use its appeal seems to lie in the fact it's deceptively simple. We've got this one, broad category of exception and we can apply that and we've dealt with all of the challenges to copyright and it's flexible and every evolving. Great. But we say that it's danger is in its very breadth and it's as though fair use is identifying a netball court sized challenge and throwing a blanket, the size of a football field, over that challenge and ignoring the fact that all the extra space you've covered represents lost remuneration for our writers.

MS CHESTER: That's where it would be good to get some evidence from people about what they think won't be remunerated, under fair use, that's remunerated today, under fair dealing.

MS LANCHESTER: Off the top of my head, what about if you had a situation where a writer has written a book and the book is out of print, or a poem, and that poem is used as the basis for a song. Under fair use there could be an argument that, "Well, there was no commercial availability of that work at the time and there's been transformative use because it's been made into something new and different," and there might be, on behalf of the author of the book, a real uncertainty about whether or not they can litigate, particularly if you are not well placed to run litigation anyway, due to cost.

MS CHESTER: One of the other issues that you raised in your post draft report submission seemed to be some concern that we'd recommended changes to the educational and statutory licencing arrangements. Our draft report doesn't make any such recommendations so I'm just trying to understand where those concerns were coming from.

MS LANCHESTER: Sorry, can you point to me where? I don't think we raised that concern. Could you repeat that?

MS CHESTER: When you were talking about your concerns around fair use, I think it was in your post draft report submission, you had some concerns around educational use of fair use material, which seemed to

suggest that there wouldn't be the continuation of educational statutory licencing. We didn't make any recommendations in our report to make any changes. We actually see the licencing arrangements providing quite a valuable role, in terms of, one, reducing uncertainty for the myriad of education institutions, but also reducing transaction costs with dealing with the collection agencies directly.

MS LANCHESTER: I think you might be referring to where we quote an author, who is an educational writer, who is explaining a concern he has, "Why would I continue in educational writing if I can't expect remuneration?" So how do you propose that fair use, if it includes, in an illustrative purpose, education, how do you propose that that sits alongside the educational licencing scheme?

MS CHESTER: So the same as it sits alongside fair dealing at the moment. We've received evidence, including in submissions that you can have a look at, from the educational institutions and those that are currently in charge of doing those licencing arrangements, that they will continue. Because it's a way for them to manage the transaction costs, it's a way for them to manage uncertainty across the schools and universities.

MS LANCHESTER: Of course I know you've already been made aware of the concerns in Canada, when their fair dealing provisions wouldn't include education. But perhaps we'll leave that to the publishers to speak to you about because in Canada when fair dealing covered education there was a massive reduction of licence fees back to authors.

MS CHESTER: I think there's a lot been said about the Canadian example and whether or not it's relevant to Australia. In our draft report we spend quite a bit of time unbundling what really happened in Canada and how it's not a parallel to what's happening in Australia, given that it is fair dealing and given there was a change to the licencing arrangements, which we're not recommending any change to.

MR COPPEL: In your submission to advocate for improvements to the licencing arrangements, can you elaborate on what you see could be improved in that area?

MS LANCHESTER: Well, for example, we agree with the Commission's observations on licencing solutions, such as a copyright hub. So rather than introduce a vague exception to copyright infringement, in fair use, we would advocate for more work to be done on driving efficiency on licencing. I don't think it's something that the ASA has expertise in offering how those licencing solutions might be rolled

out, but that is where we see true value in going down that path, rather than a broad - - -

MR COPPEL: I guess a starting point would be identifying where there are problems, under the current licencing arrangements. Do you see any problems with the existing licencing arrangements?

MS LANCHESTER: No, we see problems with introducing a fair use exception. So we don't see problems with the current licencing arrangements, in fact we think that they that is the way to go, to ensure remuneration for creators by licencing.

MR COPPEL: I'm not quite sure I get the full logic, because you're saying that there are issues in where the licencing arrangements can be improved, but you're saying that they're all working fine.

MS LANCHESTER: The online environment might be an area where licencing is difficult so we see technology driven licencing solutions as having a very valuable role to play there.

MS CHESTER: I think we're probably going to hear about that shortly, we've got the Australian Institute of Professional Photographers coming up and they really struggle with those issues as well. Thank you very much, they're all the questions that we wanted to work through with you this morning, but we appreciate your submissions and we appreciate your attending our hearings today. I'd like to invite our next participant to join us, Chris Shain, from the Australian Institute of Professional Photography.

Good morning, Chris, and welcome and thank you very much for joining us this morning but also for your submission, following the release of our draft report. If you wouldn't mind just stating your name and the organisation you represent, for the purposes of the transcript, and then if you'd like to make some brief opening remarks, but just imagine I've got a debating bell here that I'm going to ring in five minutes. Thank you.

MR SHAIN: That's fine. I understand. My name is Chris Shain, I'm a working, commercial photographer. I'm here, in a voluntary capacity, representing the Australian Institute of Professional Photography, that has over 3000 members in Australia. I will make a reasonably brief opening statement.

Firstly, thank you for the opportunity to speak directly to you about the Productivity Commission's draft recommendations on intellectual property arrangements which are, from what we see, appear to be

ideologically driven and if implemented in any way would be very detrimental to the livelihood of our members.

I'm very happy to answer questions about our submission, obviously, and any general questions that you may have, but I'm here as a creative content producer and I represent 3000 others, who have to deal with the day-to-day reality of trying to make a living out of copyright. I'm not a lawyer, I have no legal, political or legislative background and if you do need to have academic and legal discussions, I'd be happy to forgo some of my time to allow my colleagues, at the Australian Copyright Council, to have more floor time, if needed, and we support their position wholeheartedly.

The Copyright Act works pretty well right now. Copyright is an important and economic imperative to creators. Consumers can make copies of their DVDs. School kids have pretty fair, and some would say it's too lenient, access to copyright material. What is the problem you are trying to solve? I'm a working professional photographer and a long term member of the AIPP and very involved with copyright and licencing issues since the early 90s, when I was involved in negotiating changes to section 35 of the Copyright Act.

Now, if there's one issue about copyright that fires up photographers today it's the very wide, broad proposals from all sorts of people, all over the place, about fair use and different fair use regimes and how good it will be. It's probably the one thing out of this, aside from the term issue that you've tried to explain to my colleagues here that it's a non-issue, but you've certainly flagged it as one, about the term of copyright is an issue, the other one is fair use, obviously.

Photography is a very widely used creative medium. There is an insatiable appetite for good quality visual material in the online world, the world, not just Australia, the online world that we all encounter. There are many, many, many examples of significant moments in history that are marked very strongly and effectively by a photograph that often carries with it massive emotion. I'm certain that everybody in this room, and you two I'm sure, could reel immediately, off the top of your tongue, a number of photographs that define a historic world event, way above anything else. Our society would be a much poorer place without them. It's not created, used or published with geographic boundaries that stop at the heads of Sydney. That content, the ownership of that content, the copyright on that content doesn't stop at our borders. Our members work, once online, is in a worldwide market instantly. Like instantly.

I'm sure now that everyone has iPhones, crowd sourcing of news imagery is a whole new source of images. But if our society, and I mean the whole range of society, wants to record something properly and effectively, everything from a shiny new billion dollar bridge for the Queensland government, this building, for example, that had a whole new top put on it some decade ago, if that wants to be recorded for the posterity of the community and the society and the Australian society, everything from that through to a still birth at the Whyalla Hospital, more and more now people are coming to a professional to get that done properly.

Sure, there are millions of pictures, you only have to go to Google, you will find images of this building that we're sitting in right now, there will be tens and tens of thousands of them. There will only be a handful that are published with kudos and with respect. Our member's work is what is making these images. From my personal experience, that is happening more and more and more. That, despite the fact of this insatiable appetite for imagery, there is a great demand for professional imagery. The only way the professionals have a way of controlling that is through copyright.

I'm a working professional photographer, I've been freelancing for 40 years and the basis of my income is the control of copyright by licencing my work, in one way or another, not always successfully, but that is the basis of I work. The ability, as a visual artistic creator, to be able to exploit that copyright is often, not always, but often the only way I can make money from my work.

The other thing that I'd really like to impart here is the distinction that we, as working photographers, often get bundled up with copyright owners and this sort of - I don't know if that terminology is used a lot through your report, but there is this sort of assumption that the copyright owner is this massive corporation who is trying to shut up the public. I am a copyright owner. I'm no massive corporation, I'm a single individual person working out of the boot of my car. Yes, I own some copyright, but I struggle like hell to control the copyright, as a content creator.

There is a big difference between copyright owners and copyright creators. Photographers and writers and publishers, we're sometimes strange bedfellows but we all - Rupert Murdoch and I get bundled into exactly the same category and I would urge the Commission, strongly, to have a really serious look at that, because we are miles away from the same category, miles and miles and miles away.

It would appear to us that many of your recommendations are trying to give a consumer free and uncomplicated access to content on their TV screens. That seems to be, sometimes, the base point of the conditions of what I would see as pretty simplistic recommendations. As a small time, individual creative content creator I'm also affected by this. I just don't see any consideration, by the Productivity Commission, of the vast range of visual content, monetised by existing copyright law, that's created by a single, lone photographer, a writer, a painter, a musician and I'm sure I'm just - you must have heard this before, I hope you have, this is day five, or six, I'm hoping I'm not the first person to point this out but it is such an important point about how the small time, lone creative content producer is just being left out of a lot of these discussions, as we shouldn't be. So the two biggies for us really are fair use and the term of copyright. The fair use, I notice a couple of other submissions referred to Richard Prince, are you aware of those examples?

MS CHESTER: Yes.

MR SHAIN: One of our members particularly, I mean the Richard Prince v Patrick Cariou example of the Rastafarians is talked about most generally. A more recent example of that is the Instagram use that Richard Prince made of repurposed Instagram photos and they were professional photos. One of our members in Australia here was the subject - one of his photos was used in that exhibition. That is a really scary prospect for a small time individual creative photographer to try and deal with that, on a worldwide basis. It is very, very, very difficult. I'll conclude my remarks there.

MS CHESTER: Thanks very much, Chris, for those opening remarks and I hope the earlier comments that you were here to listen to around the term address that issue, at least in terms of what was in our thinking in our draft report.

MR SHAIN: You mean about the term?

MS CHESTER: Yes. So no recommendation.

MR SHAIN: Sorry, do we not have any recommendation on that?

MS CHESTER: No, sorry, we did not have any recommendation.

MR SHAIN: It would be really good to clarify that, I think, because that's big time out there in the public sphere. If you are not recommending that, please withdraw the comment about 15 to 20 years. Seriously, because the public, and this is the trouble where we're going to

get to in talking about fair use, the public are the one that read this on the front page of the Telegraph and that's the simplistic thing that I was referring to there in my opening remarks, there are these simplistic things put forward, "Let's just reduce the copyright term to 15 or 20 years, that will solve a few problems." It's just complete rubbish.

MS CHESTER: Well, it's not something that we said and agree it's complete rubbish.

MR SHAIN: Sorry, you do agree it's complete rubbish.

MS CHESTER: Sorry, we don't have control over what media print. So just you mentioned, Chris, that you think everything is working very well. I guess we did identify what we thought was a problem for your industry, and that is with the online world there is a huge amount of unauthorised use of professional photographer's images. Indeed, metadata being stripped out and folk using it in an unauthorised capacity. So one of the areas that we did spend a little bit of time on was trying to work out what other solutions there might be to this problem. Indeed, Jonathan and I were lucky enough to have several meetings, including a face-to-face, with the folk from the UK Copyright Hub, which has tried to, following the Hargreaves Report into the UK copyright arrangements and intellectual property. That was an initiative of industry and government in the UK. It would be good to get your thoughts on the merits - - -

MR SHAIN: I'm not sure that the industry was completely supportive of Hargreaves, but anyway, yes, in the photography industry.

MS CHESTER: Of the UK Copyright Hub.

MR SHAIN: Of the Hargreaves, sorry, did you say - I misunderstood. You mean there's industry support for the hub or for Hargreaves?

MS CHESTER: I wasn't asking for the views on Hargreaves, but on one thing that did come out of the Hargreaves Report that I think industry has been supportive of was the Copyright Hub. We had quite a bit of commentary about that, in our draft report, in terms of the potential for that to be rolled out in Australia, with the support of industry. So it would be good to get your thoughts on the merit of that extending down under and is that something that the institute is supportive of and what role would you see that playing, in addressing some of the online unauthorised use?

MR SHAIN: I think anything that would enable a photographer to be able to pursue, effectively, an infringement we would support

wholeheartedly and be very interested in having discussions about that. I think we mentioned, in our response, a little bit about perhaps a Small Claims Court and those sorts of issues, we'd love to see something like that. Because that is one of the biggest impediments or the biggest impediment, to be honest with you, is the cost of defending an infringement. Forget about if the law changes, right now I personally know in Australia I think of one or maybe two cases that have actually ever gone to the Federal Court and been prosecuted at all about photography, pure photography. So the cost is just absolutely prohibitive. It is absolutely prohibitive and we are dealing, again, I just need to keep reminding you, you are dealing with small time, local, Australian micro micro businesses that are struggling to make a living, in a way, and the basis of that living is copyright. So pursuing that against an infringer of that right is extraordinarily difficult.

MR COPPEL: On that point, because you've made several points about the ease of someone illegally using a photograph, and that's under current arrangements so many of your points relate to enforcement or ability to enforce copyright. Can you give us a sense as to whether the proposed changes - is there any conflation of the proposed changes in the draft report to copyright scope, through things like fair use, with the challenge associated with enforcement under the current arrangements?

MR SHAIN: You mean things that will help?

MR COPPEL: I'm wondering whether a lot of the concerns you have with the proposed recommendation for fair use, for example, which is the statutory exemption, are being conflated with existing problems associated with the enforcement of copyright, whether that be under fair dealing or simply pirating.

MR SHAIN: I would agree precisely with what the authors just said about fair dealing. Here is a prescribed manner where everybody knows exactly what the deal is. Maybe that needs some tinkering and adjusting and all those sorts of things, but the fair dealing provisions are prescribed, everybody knows what they are, the school kids can photocopy their books, we all get a little slice of it, from time to time, if we're lucky, so be it.

Under fair use that just gets completely blown apart and we come back to the front page of the Telegraph. I believe is the biggest problem is that the public, the user, just starts to - it sort of just keeps knocking another brick off the parapet, is how I personally see it. And from watching this happen over time, has the public think, "Here's a photograph, it's on the internet, I just right click and use it." I don't know

if you've done it, but I've probably done it, where you right click on a picture on the screen and save it to your desktop, you've breached the Copyright Act.

MS CHESTER: Which is, I guess, why we were looking at it from the perspective of a lot of consumer groups, like *Choice*, have done some surveys about piracy and unauthorised use. Part of the issue seems to be a lot of people actually want to do the right thing and to remunerate copyright holders, but difficult to identify who the copyright holder of the image is. That's why we're looking at things like the UK Copyright Hub.

On the issue of enforcement, that's another area, so we tried to look at things holistically, do the rights set the right balance? Can people enforce their rights and are we keeping transaction costs down for both consumer and creator so there's less likely to be unauthorised use and breaches of copyright. We identified, in our report, an example in the UK where they have the IP Enterprise Court, which is a low cost stream of litigation around intellectual property arrangements. So in Australia we've got the Federal Court, which is quite an expensive option for pursuing litigation, you then also have the Australian Copyright Tribunal, but there's kind of nothing in between.

MR SHAIN: I can assure you, both of those options are completely economically miles and miles away from anything that I would get engaged. I've been involved with a couple of cases, so I'm acutely aware of how that system works, it is incredibly expensive. Forget about going to court.

MS CHESTER: Is that the Copyright Tribunal or is that the Federal Court?

MR SHAIN: Trying to pursue a copyright infringement in Australia, for a lone individual creator, is almost impossible.

MS CHESTER: We've received evidence on what the average cost can be of pursuing a matter through the Federal Court, but through the tribunal itself, do you have a sense of what the cost is?

MR SHAIN: No. I'm a photographer.

MS CHESTER: So with the IP Enterprise Court in the UK, it's a specialist stream with a judge dedicated to listening to those matters, and it doesn't have the open discovery and it's capped to two days of representation of hearing, so the legal costs are down. It'd be good to get

your sense of whether there might be some merit in pursuing something like that in Australia.

MR SHAIN: Definitely. A Small Claims Court would be a fabulous thing to see in Australia. I think there'd be lots of creators who would be very interested in having that option available. Because what happens at the moment, from my personal experience, is that if there is an infringement, if it's some small organisation or an individual or a school, and I'm aware of my personal work being infringed constantly. It is a constant, constant problem, and there's only so many - well, there's hardly any that you pursue, but there will be one where you go, "Actually, that's XYZ large corporation, I really think they shouldn't be doing that and I'm going to pursue it." The smaller things, at the moment, there's no financial incentive for you to do it, so it doesn't happen.

MR COPPEL: Do you know why photographs, metadata, are stripped out when they are loaded in the internet?

MR SHAIN: How long have you got?

MR COPPEL: Unlike music - - -

MR SHAIN: There's metadata in music, there's metadata in words.

MR COPPEL: Why are photos different?

MR SHAIN: Well, it's changing, but one of the great things that you will probably start to see, I think in our lifetime, is there will be technology developing around image recognition. So rather than the metadata of a picture that's online being the way to find out about what that is, what you will see is there will be technology that will look at if this is a picture of me, or here is a picture I came to talk about 10 to 15 years, but it doesn't seem to be relevant any more. So this picture ends up on the internet, instead of the metadata being attached to that, it will look at that, maybe, and will recognise all these things and that will be the defining mechanism to read that picture.

Now, that technology is still being developed. Getty and the large image libraries are very, very keen to develop that and the Germans, particularly, have a couple of mechanisms that are, or they almost have this right, then metadata just won't even be an issue. But at the moment, image recognition and I think the authors and writers have had some hope with this. We hear stories about university plagiarism comes up from that, rather than from the metadata, it's actually from the words themselves.

MR COPPEL: So when you hear "stripped out" it suggests that it's there and it's been taken away, is that how it works?

MR SHAIN: Yes, absolutely. Sometimes it's done completely inadvertently. For a while Adobe, in their Dreamweaver and their web based products, it was just automatically stripped out. So if you put a photograph through some of their software that you wanted to repurpose it to put it on a website, it automatically stripped it out, for a whole lot of technical reasons. That's changing now. One of the things that we are definitely encouraging, we've had campaigns about this with our members, is to make sure that you to attract metadata and attach metadata to your photographs. It's a very important issue. Education is one of the massive keys about copyright that is such a boring, dull issue in the society that has a hip pocket nerve every now and then, but education is probably the key, education on all sides.

MS CHESTER: That's something that you've raised in your submission to us and, indeed, we've looked at international jurisdictions where the Intellectual Property Office in the UK actually plays a far more stronger role, in terms of educating consumers, around copyright and copywrong and breaching and online piracy. What sort of model do you see might be helpful in the Australian context?

MR SHAIN: I think perhaps right now, through the collecting societies, or some of that might be a way to do it. I don't know, I don't know that I could offer a particular model, but we would be very interested in working with, and we've said this, we've made submissions to ALRC and now yourselves and other departments, as these sorts of things come up. We think that's one of the keys, actually, is to educate probably the consumer, actually, about copyright and the importance of it. Going to the primary school system and having a module about respecting creators rights and artists rights, as a part of your education, and why it's important for the society. I believe that the image making that Australian photographers do, it's important to the build-up of Australian society. Forget about anything else, it goes to make the fabric of society work and how we record it is vitally important. So it's vitally important that we encourage people to do it and to do it properly.

MS CHESTER: Chris, that's all the questions we were hoping to work through with you this morning, so thank you very much for joining us.

MR SHAIN: Thank you for your time.

MS CHESTER: I'd like to call our next participant to join us. It's John Lee from Aristocrat Leisure. Good morning, John, thanks for joining us

this morning. Also, thanks to Aristocrat for a pre-draft report submission, a post draft report submission and also allowing us to have a look at your operations here in Sydney to get an understanding of the business and how the different parts of the products use different streams of the intellectual property arrangements. That was kind of helpful for us early on. If you could just state your name and who you're representing, for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks.

MR LEE: Sure. Thank you. So, firstly, my name is John Lee, I'm a partner of the law firm, Gilbert & Tobin. I practice almost exclusively in patent litigation, across a range of industries, mining and resources, digital technologies, information technology, life sciences. I act for both patentees, plaintiffs and defendants. I'm here today to represent Aristocrat Technologies Australia. Firstly, thanks to the Commission for the opportunity to appear. I wanted to talk a little bit about Aristocrat and it's background and just to give some flavour for why Aristocrat is qualified and should have a voice during this inquiry.

Aristocrat is, essentially, a very successful start-up. It started some 50 years ago and it's grown into a global entity, ASX listed, employs a very large number of people in Australia and exports its products to many jurisdictions around the world. Technology and intellectual property is a critical aspect of the company's success. Innovation is the lifeblood of Aristocrat. We hear a lot of talk about innovation, it's a very overused word, I think, these days, but as we will see it is completely apt in relation to Aristocrat.

Aristocrat is a very significant Australian employer in the technology space, I suspect one of the largest. It has over 150 employees solely in its creative team. That includes mathematicians, software engineers and artists. It's one of the largest employers of artists in Australia. It expends a very significant amount on R&D and that's a growing figure. I think, in the private sector, again it would have one of the largest R&D budgets.

A significant part of Aristocrat's success and growth to date has been its reliance and its strategic use of the intellectual property system. That has helped Aristocrat to grow from a small start up to a global entity. Intellectual property underlines much of what it does. Aristocrat has a very substantial patent portfolio, I think it's the largest of any Australian entity. It has some 500 granted patents and about 1500 pending patent applications.

Aristocrat also is regularly involved in patent litigation. Again, it sees patent litigation at the coalface and is qualified to comment on a number

of the things that are the subject of the Commission's report. Importantly, it's involved in litigation as both the plaintiff and a defendant. This isn't a particularly pro-patent approach, it sees both sides of the fence.

The important things for Aristocrat, in terms of intellectual property, are having a robust IP framework and a robust judicial regime. It would like to see certainty, that's important, when it's making significant investments in R&D and technology. Consistency, again, is critical. As you know, we've had a lot of changes to our intellectual property regimes, and I'm only focusing on patents, in the last 10 years or so. Consistency and certainty in any business is important. One of the things we've heard a little bit about this morning, you talked about the specialist courts in the UK and, as you've seen from Aristocrat's submissions, that's something that it's certainly interested in being investigated further in Australia. It sees the existing regime as sound and robust, but not perfect.

The Commission has made a number of recommendations in the patent space and there are just two today that Aristocrat would like to focus on. The first is the innovation patent system. As we all know the innovation patent system was introduced to provide access to the patent regime for small to medium entities, developing small, incremental advances over existing technology, which may not be patentable as standard patents. This system has been in place for about 15 years and the two main criticisms seem to be that that intention of enabling a second tier patent system for Australian SMEs to exploit has not been achieved and also there seems to be some concern about strategic misuse, shall we say, of the system.

It seems, to Aristocrat, that both of those concerns are misplaced. On the Commission's own statistics something like 66 per cent of innovation patents are filed by Australian entities. Of standard patents, that number is about 7 per cent, and I think the Commission picks that up as a concern, that a lot of the patent applications applied for and granted in Australia, over 90 per cent are to overseas entities. That's not the case with innovation patents. Now, it seems to me that if you abolish innovation patents, that's going to make that issue worse.

The second concern seems to be this potential for strategic misuse of innovation patents. Again, I think the numbers in the report suggest that's not a concern. Firstly, you note there's a very small percentage of patents are innovation patents, about 5 per cent. Of those, only a very small per cent are every certified, so they're not enforced until they are certified.

I don't think innovation patents will ever be a significant concern in the life science sector, they only have an eight year term, it's not long

enough for a lot of those inventions, in relation to pharmaceuticals, medical devices and, to date, I'm not aware of an innovation patent being enforced in that sector. We don't have the same issue that exists elsewhere in relation to patent trolls. For a number of reasons, we have our loser pays system in relation to costs. We don't have the very significant damages awards that are obtained in other jurisdictions. So I don't think there's a current issue with patent trolling in Australia.

In Aristocrat's industry small incremental advances are very important. A lot of time and effort and R&D goes into developing small advances over existing technologies. Often these have a short lifespan. So an innovation patent with an eight-year term is perfect. Aristocrats' primary submission is that rather than abolish the system, which doesn't seem to be creating any significant concerns, two options: (1) to look at greater education and promotion of the system. And we've heard a little bit about that in relation to copyright. That the people the system is targeted at don't really know it exists and not in a position to use it. The second is if there is a perception of potential misuse, to look at reforms in relation to enforcement of innovation patents. There's been some submissions and commentary about remedies, injunctions requiring innovation patents to be certified earlier.

The second topic that Aristocrat wishes to address is the exclusion of business methods and software. The first point to make is that Aristocrats' concern – and we've seen this, I think, in a lot of the responses and the report itself – that it's perhaps an oversimplification to conflate the two. The Commission's definition of "business methods" that you've used in the report is incredibly broad, I think, and covers a vast array of technologies that go well beyond the scope of software.

MS CHESTER: John, it might be helpful – I'm just conscious of time. Is there anything else in your opening remarks that is in addition to the submissions that Aristocrat have made, because we have read those submissions?

MR LEE: Yes. So, essentially, the key factor in relation to business methods and software is the definitional issue, that if the Commission were to proceed with its recommendation, that would be enacted, that's going to create a lot of uncertainty. What is a business method? That's a very broad concept. The other thing is Aristocrat, as we've said, is interested in certainty, as all business is. In the current framework we think that degree of certainty is certainly being achieved. We have a number of recent decisions that the Commission is aware of, Research Affiliates, RPL Central, Myriad, all on patentable subject matter.

The courts and the Australian Patent Office are grappling well now with those decisions and implementing them. The High Court at the time you issued your report, the High Court hadn't ruled on RPL Central. It dismissed that application for special leave in two lines. That sounds like complete certainty to me. So Aristocrat's position – and I think this is widely held – is that there have been these changes in technology, the law has caught up, the judiciary, the patent office are far more technologically savvy than they were perhaps 20 years ago. There is certainty. There is. To introduce a broad exclusion of business methods, we think, would be a significant step back in terms of certainty. Again, the only other thing I would emphasise is the point you picked up this morning, that Aristocrat embraces to investigate the possibility of specialist courts to deal with these issues. I think that's really the summary of the position on those two significant issues.

MS CHESTER: That's great. Thanks very much, John. Maybe I'll begin with a better understanding of how Aristocrat does use the patent system today. You mentioned that there's currently 500 patents. What's the split between standard and innovation patents for Aristocrat?

MR LEE: I would be estimating but I would say it's probably 90 per cent standard patents.

MS CHESTER: When you're advising Aristocrat on which of the patents to pursue, the standard versus the innovative patent, what are some of the factors that would influence that decision tree?

MR LEE: Term, the extent to which there's an inventive step in the subject matter of the patent. In other words, it's not obvious. And the general enforceability. So on each occasion it's a case-by-case decision. But often infringements arise late in the term of patent, in which case innovation patents have expired.

MS CHESTER: Of the intellectual property that's protected through patents alone for Aristocrat – and we were quite mindful when we did get presented on the products and the patent activity – and I think you touched on it in your opening remarks – that there is a lot of incremental innovation that occurs in that product range. Is there anything that really has a commercial life beyond the eight years of the innovative patent?

MR LEE: Anything within Aristocrat's portfolio, absolutely, yes. So there are patents being used and licensed and enforced in years '15 onwards.

MS CHESTER: What products would they relate to? In terms of the

products that Aristocrat offers today commercially, what products would they link back to, at what percentage of the product range?

MR LEE: It's gaming technology, broadly, but implementations of different gaming systems, the hyperlink system, which is referred to in the submission is a significant one. But, broadly, it's different aspects of the overall system. That ranges through from player interface right through to the backend hardware. There are a whole range of technologies.

MS CHESTER: You rightly mentioned that things have changed, especially in light of some of the recent court decisions around Research Affiliates and RPL Central. What sort of flow through implications for a company like Aristocrat in terms of what had previously been patentable under a standard patent and what would be patentable going forward?

MR LEE: I think we're obviously all still grappling with that at the moment. But certainly the patent office has implemented some policy changes based on those decisions and the way it sees those as impacting on decisions they make about patentability. We're still in the early phases, but certainly we have a lot more certainty about what is and isn't going to fall on either side of the line. So Aristocrat will, over time, implement that into its own internal research development and patent filing processes. Certain things that may or may not have been patentable in the past now fall on one side of the fence or the other.

MS CHESTER: Are there any initial thoughts, have you got any advice that you've given to Aristocrat in terms of what might fall on the other side of the fence going forward?

MR LEE: Only on a case-by-case basis. I don't think there's been a broad review of the portfolio to date to assess where things might fall. But as things arise on a case-by-case basis and certainly I think Aristocrat's patent attorneys who are dealing with the patent office on a daily basis will be considering those issues and applying general rules and learning.

MS CHESTER: Would one possible strategy be for a future piece of IP that, in your legal view, is no longer patentable under a standard patent that, given those court decisions and the way the examiners are now interpreting and applying those, administering them, that Aristocrat would then look to using the innovation patents more often?

MR LEE: No, should not, because the decisions are about patentable subject matter and applies equally to standard and innovation patents. So that should not be a factor in terms of which path or route Aristocrat goes

down.

MS CHESTER: Your comments around the innovation patents, the government policy objective with the innovation patents was very much targeted at SMEs and providing a low-cost form of patent protection for them. Given your opening remarks, Aristocrat is kind of not in the SME category and IP Australia certainly did quite a comprehensive review of the innovation patent system against those policy objectives, and I'm sure you're familiar with the findings of that report. And we were able to leverage and benefit from that earlier work by IP Australia. Are there any aspects of that report that Aristocrat would disagree with that we should get some evidence on from you today?

MR LEE: The first thing is Aristocrat is not an SME anymore but it was, and it grew from a start-up through the SME phase to the entity it is now off the back of leveraging its intellectual property. There are many, many entities out there who are at early stage of their lifecycle, investing in technology, who would like to have access and use the patent system to springboard off that. We deal with them on a regular basis. The benefit of the innovation patent is that it's a shorter term, it doesn't require the same investment upfront in terms of expense that a standard patent does because you don't have to apply for examination and certification and go through that additional cost.

Then you have to get a patent attorney to draft five claims, whereas in a standard patent you may have 20 or more. So, yes, Aristocrat has moved through that phase, but it still sees and we still see the benefit of the innovation patent system to entities to whom it was targeted and based on the evidence who seem to be using it. The concern I have, and I suppose the response to the report, is what is the issue, where is the problem with the innovation patent system? I don't believe – and I deal with people on a day-to-day basis who are on this side of the fence seeking to assert IP rights or the other side seeking to defend their position.

I've never seen an entity in Australia of any size enter into patent litigation lightly. I don't think there's the degree of strategic misuse or enforcement that there seems to be the concern about. So the fundamental position from Aristocrat is that it has successfully used the innovation patent system, it will continue to do so and there just doesn't seem to be the clear evidence that there's some issue with it.

MS CHESTER: I think the key issue and the key concern was that the low threshold was just resulting in a large rump of low-quality patents and those low-quality patents were largely being taken out by large companies

as opposed to SMEs. I couldn't tell from the post-draft report submission or your comments then concerns that Aristocrat might have had about the work that was done by IP Australia when they sort of reviewed the innovation patent system on which we've drawn heavily.

MR LEE: Yes, look, nothing beyond what's set out in the submission. But the point I'd make in relation to low-quality patents, those patents have been filed, they're sitting there. We have evidence they're not being certified. Who's suffering? I mean, I just don't see the downside. If someone wants to go through the exercise of drafting some patent specifications and filing those, they're not ever enforced, what is the problem with it? In fact, there's a significant benefit of that for all of us because if they keep that as a trade secret, that remains secret for perpetuity, potentially. If you file an innovation patent, that is published.

Now, it will lapse definitely after eight years but often sooner because people don't pay their renewal fees. Anybody can then go and find, read that specification and implement that technology, whereas previously it would remain a trade secret. So, again, just coming back to this theme of why are we looking to make a significant change in terms of abolition of a whole class of patents when many other jurisdictions have a second tier patent system? We have since the petty patent system. We just don't see convincing evidence that there's a problem.

MR COPPEL: But the issue there is that the low inventive or innovative step for an innovation patent creates many more low-quality patents and that can have an impact on follow-on innovation through notions or patent thickets is the concern. Can I just ask one question and it relates to enforcement or litigation in the patent area. You mentioned in your opening remarks you represented both sides more broadly than Aristocrat. Can you talk us through some of the problems that are faced when pursuing litigation in intellectual property?

MR LEE: The problems that are faced, I think the key issues are lack of certainty. It's often hard to predict the outcome of a patent case at the outset because there are so many variables. You're often dealing with quite complex technologies. The judiciary – and we do have a number of judges in the Federal Court who are very experienced patent judges. But, generally, judges aren't technically qualified and they may be dealing with quite complex chemistry. Some of the digital technologies, the telecommunications technologies, are very complicated. I think that does lead to uncertainty.

When I'm sitting down advising a client on their prospects of success, whether they're patentee or defendant, we have to factor in all of those

elements. That's why, again, coming back to this prospect of thinking about a specialist court with specialist judges operating with a particular framework, not just the Federal Court framework, may enhance and add to that certainty.

MR COPPEL: In this regard, our examination of the UK IP Enterprise Court, the novelty there is that IP is a dedicated list, and in the draft report we have an information request that tries to determine where would such an equivalent in Australia best fit. Is it under the Federal Court, which has a very high-cost structure, or would it be the Federal Circuit Court? Do you have any views on that?

MR LEE: Obviously you would need some consultation and think about where it would best fit and how it would best operate. But I think there's generally a will to try and establish such an entity and there are a variety of possibilities. I think the fundamental thing is to try and streamline the procedure, as has happened in the UK, so that we have shorter, more certain hearings, try and cut back on some of the extraneous issues such as discovery, which we're already seeing in the Federal Court. But, as you say, the Federal Court structure doesn't necessarily lend itself to fast and efficient resolution of IP litigation. I think while there are some issues with patent litigation in particular in Australia, we do have a robust regime. We have certainty. We have clarity of precedent. A lot of multinationals – and we know from our experience – choose to litigate in Australia for those reasons. So I think in terms of jurisdictions I have experience of, Australia is travelling very well. Cost and (inaudible) may be an issue.

MS CHESTER: John, thanks very much. We didn't have any other questions for you this morning but thank you for appearing on behalf of Aristocrat.

MR LEE: Thank you.

MS CHESTER: I'd like to invite our next participant to join us, Peter Treloar. Good morning, Peter, thanks for joining us this morning and thanks also for your post-draft report submission to us. If you'd just like to state your name and the organisation that you represent for the purposes of the transcript and then if you'd like to make some brief opening remarks.

MR TRELOAR: Thank you for letting me appear today. My name is Peter Treloar. I am a patent attorney with about 30 years' experience. I have been involved in a personal submission and a submission on behalf of my firm, Shelston IP. I've also been involved with the AIPPI

submission where I'm an Australian committee member on AIPPI. However, I'm not really authorised to speak on behalf of AIPPI. I think someone appeared in Melbourne on their behalf. I can probably speak on behalf of my firm. But the primary submission I'd like to speak on behalf of is my own personal one. You'd probably reflect on a bit of commonality of language in the three submissions because I drafted a substantial portion of each.

I am here today because of a general concern about the extensive report of the Productivity Commission. I sort of have had, as I said, 30 years' experience, primarily acting for what by any measure would be the leading edge Australian research companies seeking protection in the IP field that would be dominated by seeking protection perhaps overseas. I'm also responsible for a group of attorneys and internally within my firm, and obviously the Commission is aware that the Australian IP system is perhaps dominated by foreign filers into Australia. So that's a reality.

My concern with the report is a number of initial premises that I think have clouded some of the Commission's judgment. The objective of maximising the wellbeing of Australians and providing incentive for innovation that would not have otherwise occurred, in my experience, most Australian corporations are looking to an international global system and, in particular, looking for US protection is their first and most important patent. Australia is 1 or 2 per cent of their market, in some industries it's larger than that. I work primarily in the computer science software, hardware and optics and physics field. So a lot of the report is very relevant to those fields.

My concern is that if perhaps if the Commission's – if we take the (indistinct) Commission's objective, whether we would have a patent system in Australia because, as you can see, it's dominated by multinationals seeking patents in Australia and most of my clients want patents in the United States. They're not too concerned about – some of them file in Australia but not as their first port of call. So there is a number of the submissions, in particular, the Law Council have made the point that we're part of a comity of nations and if we didn't have a patent system, then – it has been tried in other nations, in particular the Soviet Union and I think Canada tried for a long time to – they had no – the live sciences were sort of banned for many years. The result is the whole industry has sort of disappeared.

But there are notions that we are part of a system, a global system, and if we choose to go a different path, then that's obviously going to have some international concerns. There are a few specifics which I'm

concerned about in the report. The objects clause doesn't seem to really fit what an Australian patent system should be about. The obviousness an inventive step as a practitioner on the day-to-day, the Commission seems to have sought the most difficult obviousness test that a practitioner experiences, which is the European obviousness test. Now, the Europeans do the best job of searching for their patents and I have the whole – without going at length into the jurisprudential nature of the obviousness test, it is disappointing that the Commission has chosen obviously the most difficult obviousness test that I experience as a day-to-day practitioner.

It's sort of a flavour of not allowing companies to have Australian patents rather than embracing what the patent system is all about, which is this come forth with your disclosure and the society will give you a reward. That's the initial premise of the patent system. Again, the renewal fees – discussion seemed to be targeted again at reducing the incentive to patent. Unlike many speakers, I'm not – an innovation patent, without an obviousness test, is a very dangerous thing to me. When it was introduced I was very concerned that it didn't have an obviousness test because it allows utilisation, as we saw in the Apple v Samsung case, of increasing the COT(?).

This is where my views differ from other members of my firm and other members of AIPPI. I am perhaps in disagreement with the Commission about the innovation patent or at least introducing an obviousness test and raising the threshold, which I think is what the patent office is seeking to do. One of the main concerns for me is the business method and software patents area, which, again, the Commission has devoted an extensive chapter to. I take somewhat heretical views that the RPL court sort of has looked to the US. The US system – we have a Supreme Court in the US which has adopted a certain test of abstract. The lower courts have very increased levels of difficulty trying to implement that test.

I personally disagree with the US Supreme Court. I'm sure the US Supreme Court is not worried about my views on the matter. But having abstract ill-defined tests brings the system into disrepute. If you go back to fundamentals, I am quite the other extreme, that we should have software patents, and I've made the point that being a computer scientist drafter of patents I now have to draft a patent that looks like a hardware patent just so it's (indistinct) test down at the office. I'm not too concerned about the Australian patent office because they are obviously taking the lead from overseas. I'm more concerned about the US patent office and the issues that are going on there and US jurisprudential cases

that are coming out as a result of the Alice decision, which I have to deal with on a day-to-day basis on behalf of my clients.

But they naturally have flown through to Australia. I realise time will be on my side is what I suspect and eventually these areas will open up being of extreme value and fundamentally patentable. It also goes for business methods. I mean, the courts can introduce various tests but as practitioners you have to adapt to those tests and if your client still wants protections of fundamental patents for their innovation, whether someone can put a business method label on it, it's up to me to make sure that is more difficult for them to put a business method label on it. So we're dealing with ill-defined tests that somewhat bring the system into disrepute as a general rule. I suppose my concern about the report and a lot of the issues is it's not really taking account of a global context of how the system operates. That's probably the gist of my submission.

MS CHESTER: Thanks, Peter, and I did resist the temptation to ring the debating bell because some of your opening remarks were answering some of the – partially answering some of the questions that we had for you. Maybe if we turn first to the global world and the global thresholds that exist in different jurisdictions for patentability for a standard patent, which we were very mindful of in our draft report. Indeed, we've had meetings with folk in Europe and we've spoken to folk in the US as well as two of the largest jurisdictions that we really needed to try to get a better evidence base on. What was really underpinning our draft recommendation around the patentability threshold was some analysis that we did around the quality of Australian patents to date.

We're yet to get sort of any evidence from folk about their views on the methodology and the data upon which we drew from IP Australia in doing that analysis. That analysis isn't too dissimilar to results from the work of academics in Europe, as we now understand it, albeit there seems to be a slightly larger rump in Australia of low-quality patents, albeit measured using some proxy measures in our methodology. So a couple of issues there. Firstly, you've obviously had a close read of those areas of our report. Did you have any views on the attempt to assess the quality of patents? If not, that's fine. Secondly, the changes that we've recommended are very mindful of what's happening in other jurisdictions and, indeed, trying to bring Australia into line with the patentability threshold in Europe. I'm a little unclear why you think our draft report isn't mindful of the global stage when it's, indeed, the global stage that kind of informed our thinking there.

MR TRELOAR: On the particular area you're talking about introducing a – sorry, the threshold test for obviousness is what you're discussing.

The European test for obviousness, the average person in the field sort of thinks, what is obvious, has a notion of what is obvious. It's very difficult to define. It does have some subjectivity nature to it. If you look at the old Australian cases and the US jurisprudential cases, they define obviousness and having difficulty grappling with it; there's no doubt. The European test for obviousness involves an unrealistic expectation of what the average person in the field would notionally define what is obvious. In Europe you're entitled to take any document that may exist anywhere in the world in any language and present it to the inventor and then sort of say, "Would you as the inventor be led from that document to your invention or solved your problems, problem-solution approach, as a matter of course?"

Now, that is a totally artificial construct. Sure, it raises a higher standard and more difficult standard to obtain protection. The Commission and the Australian Patent Office has chosen to adopt that test. And it is a test for major trading partner. But it doesn't really – it's devoid of any – what I perceive of is it's devoid of any notion of what should be considered to be obvious. If something is in Japanese and I'm an inventor, should I really be held to that standard of obviousness?

Now, if you look at the US test, it is somewhat more lenient but somewhat more subjective. So the Europeans have the advantage that it's all a mechanical test and the European Patent Office applies a somewhat mechanical test. But whether that should be considered as the obviousness test – and there's a famous sort of quote, just because you can find something on a shelf in a library, does that mean that it should be utilised against you in obviousness? That was the old Australian position in 3M. But the courts and the patent offices have moved it as – or are moving it in accordance with the European test.

My notion is well, should we not consider the US test, which dominates the world of the patent system? It's a more lenient test than what exists in Europe. So that's sort of the point I'm trying to make is that the European test is a tough test and if you want – the general notion that we don't like patents and we want to introduce the most difficult test, well, introduce the European test. If you're saying, "Look, we like the patent system because it encourages people to bring forth innovations that are beneficial to society. We are going to choose a more reasonable test," reasonable in the eye of the holder, of course, let's look to the US which has perhaps a more lenient test than Europe. I should also say these tests are all subjective as well when you're dealing with examiners on a day-to-day basis. In relation to your point about the Australian office, it's often the standard of examiners and the standard of funding those examiners have that influences the standard of the prosecution of the patents.

MS CHESTER: We're mindful of that as well. I guess our motivation is based on our analysis around the quality of Australian patents, that the rest is large percentage that appear to be low quality and thus, we looked to the threshold as the way of addressing that. Your earlier comments, Peter, around innovation patent, if we can just revisit those for a moment because it's not too often that we have a patent attorney share those sorts of views on the innovation patent.

MR TRELOAR: Yes, I think some of my colleagues – I don't speak for the firm, I suspect, the whole firm.

MS CHESTER: Given it is a substantively lesser threshold for the – you still get an eight-year patent term through the innovation patent. Are there examples of patents that you've seen go through the innovation patent system which you would sort of consider to be sort of strategic misuse, for want of a better description?

MR TRELOAR: I would refrain from using the word "strategic misuse", but I think if you look at the Apple and Samsung cases and Apple's utilisation of the innovation patent system – I'm refraining to use the word "misuse". They're entitled to. When the system was introduced I remembered within the firm I was then at saying, "Why wouldn't everyone apply for one of these innovation patents if you're going to go to litigation?" It makes it more difficult for the other side and if you look at the innovation patent cases, the Dura-Post case and there's one to do with fishing processing equipment – the standard put to the defendant is a lot more difficult, the hurdle that they have to get through is a lot more difficult. In my own instance, if a client wants to apply for an innovation patent, look, most of my clients are looking to an international global system.

MR COPPEL: On that point, in your submission you say that innovation will occur without a patent system in Australia.

MR TRELOAR: Without an Australian patent system, yes.

MR COPPEL: Can you elaborate on what you mean by that?

MR TRELOAR: Well, I think some of the notions – I, unfortunately, looked at the Productivity Commission's report as quite negative towards patents. The rest of the world is not too concerned about the Australian patent system. When I say that, if you look at the Indian compulsory licences or the Canadian experience with banning foodstuffs and chemicals, eventually they come back into line. So any of the

fundamental research around globally, it's not determinative of that research – I can get myself in a lot of trouble – whether Australia has a patent system or not. But if Australia didn't have a patent system it would be like the old Soviet Union Inventor Certificates. Well, the rest of the world will have to put up with it and lobby internationally and eventually the inventor certificates will go – it's like China has only had a patent system for 30 years, but China is now dominating the patent system of the world. Historically, if Australia was to do away with its patent system, I believe that in 50 years the patent system would be back in Australia, or 20 years or 10 years.

MR COPPEL: What about the commercialisation of an innovation in the United States, are you talking about – in that comment, are you saying that it would have no impact on the commercialisation of an innovative product or process in the Australian market?

MR TRELOAR: Look, Australia, GDP wise, is about – I haven't looked lately, but it's about 2 per cent of the world. If I'm Google in Silicon Valley patenting things around the world, I file a thousand patents in the US and I file a hundred or 50 in Australia. Australia is probably in the top 10 of Google's intent but Google's research and patenting will go on whether Australia had a system or not. It would just be that they would be mighty upset and the US Government would probably be mighty upset if we did away with our patent system. Then it's a comity of nations. If everyone does away with their patent system, let's all go back to trade secrets and keep everything secret for a thousand years. There's a great alternative. We have a patent system for a reason.

MR COPPEL: I guess my question is, would the commercialisation of international patents – of products protected by patents in other jurisdictions still occur in the Australian market or would they simply not bring that product to the Australian market?

MR TRELOAR: I don't think you can give a definitive answer to that. You look at the banning of chemical patents in Canada. The commercialisation of drugs still extended to Canada and then we still have this problem of the Canadian border being quite porous to US citizens because of – the whole Canadian patent system experience in relation to chemical patents – people are still going to buy drugs in Canada, whether or not they have a patent on those drugs and the commercialisation of those drugs – so there's the whole issue of the generic originator in Canada and there is volumes of material that you can find about the whole genesis of the exemption and then for the disbanding of the whole exemption in Canada for those issues. So in answer to your question, of course commercialisation is going to go on in Australia to a degree. We

have a system for a reason and the reason is that it's the best system there is. If Australia wants to walk away from it, then there'll be consequences. I believe those consequences will be severe and long term but Australia will come back into line, just like Canada has, just like the Soviet Union or Russia has, just like China has.

MS CHESTER: Thanks, Peter. We don't have any other questions for you this morning but thanks for appearing and thanks for your submission. Folks, we're going to take a little break to stretch legs and have some morning tea next door. Can I just get a sense, is anybody else cold in this room?

MR COPPEL: Yes.

MS CHESTER: Okay, good. We'll try to see if we can address that. I just wasn't sure if it was me not feeling the love. If we could resume our hearings at – we'll take 10 minutes. So if we can come back at 10 to 11, that would be great. Thank you.

ADJOURNED **[10.42 am]**

RESUMED **[10.53 am]**

MS CHESTER: We will resume our public hearing and I'd like to welcome to the table representatives from the Association of Australian Musicians, John Prior and Tim Williams. If you could both just say your name and the organisation you're representing, just for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks, but we've got a bunch of people to get through, so if you could keep it to under five minutes, that would much appreciated. John?

MR PRIOR: My name is John Prior. I am the Secretary of the Association of Australian Musicians. My associate is Tim Williams. He's also a musician, a lawyer and a teacher, who is also on our Executive Committee.

MS CHESTER: Sorry, Tim, are you planning on speaking this morning?

MR WILLIAMS: Possibly, yes.

MS CHESTER: If you could just state your name. They need the voice match, thanks.

MR WILLIAMS: My name is Tim Williams. I'm a musician and lawyer and I am a board member of the Association of Australian Musicians.

MS CHESTER: Thank you. Sorry, John, over to you.

MR PRIOR: Thank you. I'd like to thank you for the opportunity to address the Commission and then answer any questions you may have. I've been a professional musician for more than 40 years. I co-founded a band, Matt Finish, in 1979 and we've sold a quarter of a million records and performed thousands of shows to over a million people.

Every time we tour and release new products there's a bounce in our back catalogue sales and royalties from live performances and media plays and our songs are still being added to new films and compilation albums. So it would be wrong to think that music has a short life span. It sustains us and presents new opportunities throughout our careers. We generally earn very small amounts of royalties lots of times, if we're lucky. I might have a piece of music used in Europe and I might earn half a cent from it. I might do an ad that's played all around Australia for one year. I might earn $300 in royalties, in addition to my commissioned fee. So royalties are not a lot but they really do add up and end up being probably a quarter to a third of composing musicians' income. Of course, they vary. Some people compose all the time and don't perform live. I'm a bit of an all-rounder, so it's a substantial part of my income and all of my live work, all of my recording and production work flows on from - well, in my case it flows on from the success I had as a young musician and Matt Finish.

I've produced thousands of soundtracks and commercial works now. I produced over 150 albums for local Australian artists. Our association is an industry trade group with a seven-member executive committee and a 20-member advisory committee. Our purpose is to represent the interests of all Australian musicians in all genres. Our members include some of Australia's most respected and accomplished musicians, including virtuoso violinist, concertmaster and composer, Adrian Keating, who is best known as the principal violinist at the Australian Opera and Ballet Orchestra. I use him in sessions with rock bands and jingles and soundtracks. He's a very active member of our music community.

Also on one of our committees we have guitarist, Bob Spencer, from the Angels and Skyhooks. We have jazz composer and band leader, Sean Whelan, acclaimed singer, Grace Knight from the Eurogliders. Over the past four years, we've operated an online musicians' forum called AIMA, which is the Australian Independent Music Association, which has a

membership of 7000 Australian independent musicians who are mostly sole traders and small businesses. Debate in the forum is focused on developing industry reforms because our industry is in turmoil and musicians are very concerned about the future.

There's a number of factors that always affected the music industry. There are factors that are new; for example, the old digital landscape. It's still a big challenge for big record labels right down to individual musicians. Copyright infringement is a major issue. I don't think the solution is to get rid of copyright because we all rely on it for our income. The mainstream media and major international recording labels support very little Australian music, usually less than a dozen local singers at a time are being promoted in the public view.

If you look at the record companies' rosters, you'll see dozens, sometimes hundreds of local artists' side. But how many are current, how many are being supported financially? Not very many. When you look at AirCheck, which is an Australian company that researches radio airplay, and they have a chart which shows the 40 most played songs on all radio in Australia last week every week. Consistently, that chart shows that almost no Australian distributed artists are ever on commercial radio, which means that the lion's share of the income is in one part of the industry which is the major labels and the commercial media.

Australian musicians are actually in a different industry. Our industry is musicians, instruments, teaching, performing local shows, working with local labels and distributors, and generally working with community media and only a very tiny little bit ever gets into the commercial mainstream. The commercial mainstream in the music industry is basically an American industry. They're international companies, I should say, that are based in America and based around American culture.

It's difficult to know how many professional musicians there are in Australia. The Australia Council and ATO - well, Australia Council has collected data from Deloitte, Ernst & Young, ATO and in 2011, they estimated 12,500 professional musicians, up from an estimated 7000 in only a few years earlier. We believe these numbers fluctuate a lot. We guess more like 25,000 professional musicians. But as I say, the industry is in turmoil. Are there any professional musicians left would be the real question.

APRA is the Australian Performing Rights Association. They collect and distribute about a quarter of a million dollars a year in publishing royalties and distribute it to music publishers and 90,000 Australian writer members. They only become a full member when they earn royalties. So

these are royalty-earning Australian composers; there's 90,000. APRA say that 88 per cent of APRA writers are independent of the major international recording and publishing labels.

The live music industry generates about 2.2 billion dollars a year, according to Live Performance Australia. About half of that is more their area which is music theatre. The other half is more our area, which is pubs and clubs and festivals and other live music venues. The whole industry - again, it's very hard to know the exact figures, but we would estimate between five and 10 billion dollars annually. We believe that could be double if we could fix our industry with a few minor regulatory and legislative changes.

We have recently prepared a policy statement that is a comprehensive plan to revitalise the Australian music industry, considering viability, sustainability and long-term strategic growth. We want to make the pie bigger and distribute it more efficiently. Our plan will create possibly 100,000 new jobs and billions in additional revenue and we welcome the opportunity to explain the details of our plan with you further. I'm not sure how much you'd like to discuss with it now but we'd like to give you a copy and hopefully we can discuss it in more depth in the future. We've actually worked towards this point for four years, since the bottom fell out of our industry.

MR COPPEL: Is it outlined in your submission to the draft report?

MR PRIOR: Some of this is, yes.

MR WILLIAMS: We've made reference to it. We'd be happy to hand up a copy of the statement. We would place on the record though that this document is written as a political campaign document and its original audience was not intended to be the Commission, or not intended to be this inquiry. We just want to make that caveat to it, that it is written in the context of the current election campaign and that is the intended audience.

MR COPPEL: Okay.

MS CHESTER: But the strands of it that are relevant to intellectual property arrangements are what you've touched on in your post-draft report submission?

MR WILLIAMS: Yes.

MR PRIOR: Yes, absolutely. You inspired us to add a few sections.

MS CHESTER: You're the first to say that, John, so thank you.

MR PRIOR: Yes. It inspired us to protect our industry. Humour. If I can just speak from my heart a little bit more, rather than reading all of these notes that are compiled. As I say, over a four-year process we've been running this online forum. It really does operate 24/7. We have 7000 members. Musicians are very intense and passionate people. It is furious debate and the whole purpose is to find the forms that will make the industry better for Australian musicians.

We say there's 10 to 15,000. I struggled over those figures a minute ago. We estimate there's 25,000. Australia Council says there's actually 220,000 semi-professional and aspiring hobbyist musicians. Where are the jobs going to come from in the future? This is a huge potential area of employment. Entertainment is one of America's biggest industries, biggest export industries. Australia's proven that there's great interest for our music all around the world.

The previous Labor government funded two organisations to address this problem; one is Sounds Australia. They are, I believe, primarily focused on creating events overseas to promote Australian artists, like Big Backyard. They work in association with the Trade Department, I believe, to also just create a great vibe for Australia around the world. It's not just selling the music; it's actually selling our culture and investment in all industries in Australia. The other organisation funded by the recent Labor government is called the National Live Music Office. John Wardle is the brainchild behind that. He's a very passionate and dedicated musician who's looked at all the problems musicians face with live venues. Councils inadvertently over decades have favoured newer developments that have impinged upon the live music scene. In a wonderful way he has solved a lot of those problems, got councils on side, realising that cultural events are one of the big reasons people move into an area but often might complain about the sound once they get there.

We fully support these two organisations; we think they're great. They both, I believe, get not only Federal funding but also funding from APRA AMCOS and PPCA and a number of other industry organisations. We believe they do a great job but they don't have the overview we do. John Wardle hasn't had 40 hit songs on radio like I've produced. John Wardle hasn't been in the biggest touring live band in Australia for a number of years in the 80s like I have. Matt Finish played to more people than anyone in the 80s in Australia. I don't think the people at Sounds Australia or the National Live Music Office have dealt with earning royalties internationally and the issues that are raised there. So we, in our view, have an enormous amount of experience in a number of genres:

rock, pop, jazz, classical, electronic music, soundtracks, children's music, teaching.

That's basically it from me. We offer this plan. The current Federal government has cancelled Sounds Australia and Live Music Office funding. As we know, they've reduced Australia Council arts budgets and we're concerned about the ongoing stability of the industry in that regard but we're not actually after grant funding. We just want a fairer, more level playing field for tens of thousands of Australian musicians, with the potential to make it hundreds of thousands.

The suggested copyright changes you have made, or suggested, sorry, would unfairly disadvantage Australian musicians on the world stage, which would reduce the value of music copyright in Australia and reduce investment in our music industry. It would reduce local innovation and drive a lot of creative people offshore, therefore reducing life of copyright and controvert the first objectives listed in page 2 of the draft report. Whereas increasing the life of copyright would result in increased innovation, increased investment and more productivity.

We recently ran an online straw poll with three choices for musicians. One was to stay with the existing arrangements of life of the composer plus 70 years. The second choice was to reduce copyrights 25 years after creation, as proposed in the draft report of the Productivity Commission. The third option was to extend the life of copyright in perpetuity, same as if I bought a house, same as if I made the bricks and built my own house, like I do with my music. Ninety-two per cent of respondents or all musicians chose to extend life of copyright in perpetuity and we believe this would be a huge bonus to Australia. We believe that rather than a brain drain it would be the opposite. We would have people from around the world coming to Australia with fantastic skills.

MR WILLIAMS: To work and to create here in an environment where their work is protected in perpetuity.

MS CHESTER: This might be a good juncture maybe if we jump into some questions.

MR PRIOR: Yes, please.

MS CHESTER: Otherwise we might run out of time.

MR PRIOR: Thank you.

MS CHESTER: We did know the results of that survey because it was in your submission to us, John, so thank you.

MR PRIOR: Thank you. I'd just like to make one other point, a very short point.

MS CHESTER: Sure.

MR PRIOR: We feel the same way about fair use provisions. There's already existing provisions for reasonable uses of copyright material and if they don't, people can always go and ask the composer or the creator of the work if they could use it for charity or education, which happens all the time. We believe fair use is just an invitation for people to breach our copyright quite simply.

MR WILLIAMS: As an association, we see no need to disturb the current arrangements.

MR PRIOR: I'd just like to point out that music is infinite. It's fully, fully infinite. There's a lot of elements of music that are accepted universally as public domain already. Led Zeppelin just won a case last week - Stairway to Heaven, one of the most successful songs ever in the history of the world. There's a descending minor chord sequence in the introduction that sounds very similar to a band that people said that they performed with very earlier on in their career. That band had harboured this desire to sue Led Zeppelin all their lives and the singer died and handed over property to his wife. His wife has got a new publisher who sued Led Zeppelin finally. This has been a massive effort for them. This chord sequence is patently obvious in compositions from the 16th century. I've used it in several pieces. Music is infinite. There is no fear that protecting copyright would stop other people from making music.

MS CHESTER: Thanks, John, for those opening remarks and the passion behind them.

MR PRIOR: Thank you.

MS CHESTER: Also, you've very importantly done what some other participants haven't done and that's really put your industry in the context of the broader ecosystem within which you operate. It's not just intellectual property arrangements that impact the health and robustness of industry; there's a whole bundle of factors and that's probably what the broader plan is about. That said, intellectual property arrangements are kind of core and fundamental as you would be the first to say.

MR PRIOR: Yes.

MS CHESTER: Let me just begin maybe with one point of clarification. I don't think you were here earlier this morning where I did clarify that despite some media reports to the contrary, we do not have any recommendation, draft or otherwise, to change the term of copyright. Indeed our draft report has many pages dedicated to why that's not feasible or possible because of the international treaties and multilateral, plurilateral and bilateral agreements that we're in.

MR PRIOR: Okay. We agree with that, of course. It's very complex.

MS CHESTER: There's no recommendation to do that and indeed our terms of reference required us to be cognisant of those trade obligations.

MR PRIOR: So why was it such a big issue in your report, when we know that the Greens in England proposed this only a few years ago and it was shot down in flames immediately by millions of artists. Why was it proposed? It undermines - - -

MS CHESTER: It wasn't proposed. It was what's called a finding or an observation. The government asked us to have a look at do we think the balance is about right. One way of viewing the term of copyright, and there's many ways of viewing the term of copyright, but one way would be what term of copyright would make sense if you looked across all the artists creative endeavours in Australia and what's the commercial life of those works. We make an observation that if "term" was linked to "commercial life", based on evidence from the Australian Bureau of Statistics where they've done this analysis across all of the rights holders in Australia and commercial times of life would be around 15 to 25 years. So it was an observation but not a recommendation, if that's helpful.

MR PRIOR: Fair enough and sorry if we weren't clear in responding to that. Just on that point, we formed Matt Finish in 1979 when I was 19. Musicians, basically if you don't get a break when you're young, it's very unlikely in the commercial pop world or rock artists, as opposed to a backroom guy running orchestral arrangements or whatever, it's very unlikely to have any success at all if you don't have that early success. I was lucky and I had that success and I've been able to expand upon it my whole life. But without that success, that's the bedrock of my whole career. I can walk into an advertising agency and go, "Hi, I'm John from Matt Finish" and they'll go, "Oh", you know, anyone over 40, I should say. We wrote those first songs for our first album in 1979, so they're 37 or 38 years old now and we just got a song on film. We just a song on an international compilation album by Warners. Wendy Matthews covered

one of our songs recently which created a boost in sales. Many musical artists will remaster, repackage and re-release their work later in their career. The Church have just done it. Midnight Oil have done it. All the bands do. So that is another argument for extending life of copyright and not shortening.

MS CHESTER: I think we all sort of recognise that the world of averages is very difficult when you've got copyright term which is an umbrella across all of the creative endeavour and it's difficult to cater for outliers, inliers and the middle that kind of matters.

John, just coming back to your concerns around moving from fair dealing to fair use and I guess we've had evidence from some of the copyright users suggesting that the fair dealing arrangements kind of haven't kept up with technology. A good example they've given is by the time the fair dealing arrangements which are sort of like a prescriptive list of what's allowable, as opposed to fair use which is applying fairness principles which you can adapt to technology over time, by the time the fair dealing caught up with the VCR they were all mothballed and in the attic. So we're sort of grappling with this issue of how can we make the system more amenable to ongoing use by consumers and libraries and educators if we remain with sort of the prescriptive fair dealing list versus the fair use principles. It would be good to better understand your concerns in terms of what would happen to your membership if we moved from fair dealing to fair use. What is it that you think would be non-remunerated today under fair use that would have been remunerated under fair dealing?

MR WILLIAMS: Any rapper who samples a riff, quite simply. If Kanye takes 10 seconds of something that John's composed and puts it in something else and makes a bucket of money out of it in America, where's his return on that creativity that was the original element for that work.

MR PRIOR: It's just a business. We make stuff and sell it, but because it's music, because it's in the air somewhere, a little bit harder to explain, why would you change property laws just for our stuff. Like why does everyone want our stuff for free and think that it's possible to do just by changing laws, when we know we can't just walk into Woollies and take whatever we want. People have to pay for it. People have to work for it. That's the basic gist of our argument, is it's just simply a product we make and it's a little bit more personal to us. I imagine farmers would care perhaps a bit more about their product than someone who just works in a sandshoe factory. Musicians are about as passionate as we can be about the music we make. If we don't convince people that we're honest and passionate about the music we make, people don't even listen to it. So to

somehow try and disconnect artists from their work, it's a head spin; it really is, and counterproductive. I mean just to talk about it for six months would harm investment in our industry.

MR COPPEL: Just getting back, you make the analogy with a product in a supermarket and no one expects people to come and steal that product and they have to pay for it. But if you pay for a product in a supermarket, it's gone. The ownership has shifted to the person that buys it. Whereas in the area of copyright, it's more or less inexhaustible. You can sell it to one person; you can sell it to another, and you can sell it ongoing.

MR WILLIAMS: You can also do that with a car and refrigerator and house.

MR COPPEL: But to multiple - - -

MR WILLIAMS: In the design of a house. You can assign and reassign and assign continually repeatedly.

MR COPPEL: I'm not talking about licensing to someone else who would then take ownership of that copyright. I'm talking about multiple use - - -

MR PRIOR: No, rather you're talking about the copyright issue of those products in Woolworths in the same way as music should protect - - -

MR COPPEL: No, I'm talking about potentially everyone in this room could consume your work and there would be a payment for each person consuming your work. That is one of the big differences between physical property and something like music.

MR PRIOR: It's easier to steal. Digital products are certainly easier to steal and that is - - -

MR COPPEL: That's true as well but that's not the point that I'm making.

MR PRIOR: Sorry.

MR COPPEL: The point that I'm making is that in essence it's inexhaustible. You're able to exclude someone else on the same music. So you can sell that music to each and every one of us. Whereas if you have a tin of tomatoes in a supermarket, you sell that tin of tomatoes, no one else can buy that tin of tomatoes. I don't think there's any other type

of asset where someone would propose an ownership in perpetuity like you're suggesting.

I also think if you were in a regime like that, particularly with our formalities, it could be extremely difficult. It's already very difficult with life plus 70 years identifying who the owner is. That may be one of the reasons why infringement is so high.

MR PRIOR: No, it's not. I've registered all my works with APRA. If someone else wrote music and didn't register it, well that's their problem. I register my works. That's not hard. It's easy to find my work, so that's not true at all.

MS CHESTER: But a lot of copyright's not registered and that's part of the difficulty.

MR PRIOR: Well, if after a certain period perhaps there should be considerations of that work to be in the public domain. If no one can find the owner, then that's a separate category to my work that I've put all my effort through my life into that.

MR WILLIAMS: That being said, of those works that are registered with APRA or any future collecting society that may enter the market, it's our view as an association that some copyright is vested beneficially in say, for example, APRA, who are friends of ours I might add, it should revert automatically, probably through some statutory mechanism, into the estate of the deceased artist. That way it's very easily found because, as a matter of law, it automatically reverts to its natural home. That is one of the positions that we advocate.

MS CHESTER: How do we deal with the issue of orphan works, where someone's tried to find the owner of the copyright and they can't?

MR WILLIAMS: That depends on how much weight you want to put on it and how much expectation you have about how people are going to try.

MR PRIOR: I don't think it's a major issue. I mean it would be for some people but it's not a prevalent issue that's a problem.

MS CHESTER: We've had a lot of evidence from even writers, musicians, librarians, educators, that orphan works is quite a material issue and indeed it's one of the issues that's sort of contributing then to potential infringement.

MR WILLIAMS: We don't have a formal position on that although I would suggest, speaking on the fly, that like any other orphaned item, it might become the property of the Public Trustee in the State in which it lives until it can be identified and sent home.

MS CHESTER: Coming back to the collection agencies, APRA is the key one for your industry. One of the issues that's sort of come up during the post-draft report submissions and in the public hearings, John and Tim, has been the issue of the governance around the collection agencies and kind of knowing that what they're collecting on your behalf is what comes through to, whether it's the musician or the composer or whoever, that they can sort of follow the money and know how it's all being sort of divided up and allocated.

MR WILLIAMS: We are indeed in favour of increased transparency with collecting societies. We don't have a particular beef with APRA I can say for the record. John's on a number of APRA committees. A number of our members are APRA members who receive the benefit of APRA services.

MR PRIOR: Yes, to answer what you said, APRA basically inform us what country it was earned in and how much it is.

MR WILLIAMS: Should there be a royalty return.

MR PRIOR: That doesn't help us in our future business. If I knew that a particular station in France was using my music for a kids' cartoon, that would inspire me to write more music and target towards their business. But, in effect, APRA, and it's not just APRA, it's the nature of international publishing, traced right back to 1926 when the publishing companies fought for copyright laws to protect their industry with the onset of radio. You know, that they were more concerned about perhaps losing some of their publishing business to performers, now that performers would be heard on radio, because before then it was just pieces of paper shipped across the world. Dad would buy a piece of sheet music on Friday and then spend the weekend with the family playing it around the piano. That is still the power base in our industry. It's very antiquated and those companies obviously have a desire not to share the information of where my music's played with me.

MS CHESTER: Maybe coming back to the point, Tim, that you made.

MR PRIOR: Was that your point? Did I answer your point?

MS CHESTER: No, no, you did, but coming back to the point that I think you're both making around sort of the transparency and accountability, there is currently a voluntary code of conduct that applies to collection agencies in Australia. Our terms of reference also asked us to have a look at what might be international best practice in other jurisdictions and indeed we met with folk from the music industry in London. They pointed to - there's an EU determination that we've learned of and we've had a look at that's around the governance collection agencies in the EU, although I'm not sure whether that's going to apply to Britain going forward. It would be good if we could get your feedback in the not too distant future as to whether or not if you have issues around transparency and accountability, whether that EU determination is kind of a model that would address those issues and concerns.

MR WILLIAMS: I would like to learn more about that. I can assure you we'll be happy to provide comment on that and so forth.

MS CHESTER: Did you have any other questions, Jonathan?

MR COPPEL: No.

MS CHESTER: We didn't have any other questions for you. I think we've covered all the bases we were hoping to this morning. Thank you both for appearing and thank you very much for your submission as well to our inquiry.

MR PRIOR: Thank you. Can I just say that everything we've presented is in the context of responding to your draft report, but please have a look at our policy statement which, as Tim said, was geared towards the Federal election. You guys are the Productivity Commission and this is how we make the music industry productive and more profitable for Australians. Thank you and if you have the opportunity to have a look at that, we'd love to come back in and explain it, because it's in very brief form. There's just so much information condensed into a small area, so thank you.

MS CHESTER: Okay. Thank you, John. Thanks, Tim. I'd like to welcome our next participants from the Australian Copyright Council, Fiona Phillips and Kate Haddock. Good morning. Should I say welcome back; we've met with both of you previously. Firstly, let me just say thank you for the Council's input and help with our inquiry. We've met with you and one of you has been involved in roundtable as well and we do appreciate that and appreciate you coming along to our public hearings today. Maybe just for the purposes of the transcript, if you could each just say your name and the organisation that you're representing in the public

hearings today, and then if you wanted to make some brief opening remarks, but debating bell in five minutes. Thank you.

MS HADDOCK: Thank you. My name's Kate Haddock. I'm the chair of the Australian Copyright Council.

MS PHILLIPS: I'm Fiona Phillips. I'm the Executive Director of the Australian Copyright Council.

MS HADDOCK: I'm got a little five-minute timer here.

MS CHESTER: Excellent.

MS HADDOCK: Commissioners, thank you for the opportunity to address you this morning. As you know, the Australian Copyright Council represents the peak bodies for professional creators and the copyright collective societies in Australia and we've made two submissions to this inquiry and Fiona's participated in your roundtable discussions and we don't propose to go over the matters raised in detail in those submissions here.

The first thing I'd like to say is in response to your press release and also in response to some of the matters that you've raised this morning. I know that there has been a very public response to the draft report, particularly from Australian authors, publishers, and booksellers. We represent the first two categories of those stakeholders. In a number of the pre-draft report discussions, including the one that we had, Commissioners, we discussed the fact that an inquiry such as this had the potential to be extremely divisive and that what we felt was needed was an approach of intellectual neutrality, particularly in the context of a number of reports and the inquiries that have been conducted in this field in recent years.

Instead, with respect, what we've got, at least with regard to copyright, is a document that seems calculated to offend and I'm sure that can't be the case. It is extremely disappointing that a government body would choose to issue a draft report with "Copied not right" as a sub-heading for an area of industry that generates nine billion dollars a year to the Australian economy. Of course we understand that the Commission has not made a recommendation for a reduced term of copyright. Of course we know that the Commission understands Australia's treaty obligations and is required to take those into account.

There is a finding in this draft report that the optimal term for copyright protection is probably 15 to 25 years. That seems to act as a

signpost for the assumptions that then inform the recommendations made in the draft report, particularly with regard to fair use. So, from my perspective, it's hardly surprising that the country's most articulate and talented wordsmiths have felt driven to express themselves so compellingly in the press.

I would also like to comment on the Commission's acceptance of anecdotal and hypothetical suppositions in place of evidence from people working in the industry. It must not be forgotten that academics have a vested interest in reducing the amount of money paid under statutory licence fees. They have much to contribute to society but I think in a lot of cases, what has been put forward by academics in response to this inquiry is basically hypothetical. Rights holders have in good faith provided what evidence is available.

Any lawyer in the room will know that it is much easier to attack evidence that has been presented by the other side, than it is to actually present your own evidence. So what has happened is, rights holders have done their best to give you evidence of what is happening in the industry and to commission, at great expense, evidence of the economic impact of various proposals. What happens is that that evidence has been torn apart. We feel we might have been better off arguing on a philosophical level, rather than putting forward the evidence.

I would just like to quickly address three matters. Parallel importation restriction on books, the fair use proposal and enforcement and geo-blocking, which I have put into one little thing. The Commission has recommended that the limited parallel importation restriction on books be removed. It said that parallel importation restrictions have a tendency to increase the price of books available. I'm not going to talk about the comparative prices of books, but it should be noted of course that any individual is able to purchase physical and digital copies of books any time at whatever price they can get on the internet. That's not illegal. It's not a confusing aspect of the parallel importation provisions. It's a completely legitimate area of commerce. So even if there is a price difference, which I doubt, consumers aren't actually disadvantaged by that price difference.

The protection of borders is commonplace throughout the world. Parallel importation of books is restricted in America and it's restricted in Europe. Obviously between the member states of Europe there's a required freedom of trade but as the border of Europe, there is parallel importation restriction on books. In the Council's view, it's vital that Australian publishers and booksellers be encouraged to support local

writers. They can't do that if there's going to be dumping of products from those vastly larger territories.

In relation to fair use and fair dealing, you've said this morning that there is an issue about technological neutrality and fair dealing. In my experience, the fair dealing provisions under the Act have got nothing to do with technology. There's no technological references. They are completely technologically neutral. I'm not entirely sure what the Commission's concern is with that regard. If what the Commission is talking about is the Optus TV Now case which is not a fair deal and it wasn't accepted to be on a fair dealing exception but on a personal free use exception, I think that's a different issue. But it's unrelated to fair dealing which those exceptions don't refer to technology or restrict use in a technological sense in any way.

We have serious concerns that specifically what's been proposed doesn't comply with our treaty obligations for reasons that we've set out in our submissions. We also think that to introduce the fair use exception would create enormous uncertainty in the law and in the industry and it would interfere with existing licence arrangements. We think it's extremely problematic to import one isolated part of US copyright law without all the additional parts of that law. We don't have free speech in Australia. We don't have statutory damages in Australia. I think if you look at table 5.2 in the draft report, that is a very good encapsulation of all of the problems that would arise if we did introduce fair use because most of those things in the left-hand column are things that are currently remunerated under licences.

Finally in relation to enforcement and geo-blocking, speaking personally I've got 27 years of experience as an IP solicitor in private practice in Sydney. I've got extensive experience in the Federal Court and in the Copyright Tribunal and more recently in the Federal Circuit Court, so I'm very happy to answer questions about that. In relation to the safe harbour provisions, we've consistently rejected the idea that multinational corporations such as Google should get the benefit of the safe harbour provisions. They generate billions of dollars in profit off the back of some of the valuable content in the world. There's no justification for firms like Google to not have to do their due diligence and not put proper licensing arrangements in place and not be liable for infringements. I just don't understand why that would be seen to be a valuable addition to our law.

I also don't understand why the Commission would recommend that people be expressly allowed to circumvent geo-blocking technology. Circumventing geo-blocking either is or isn't an infringement of copyright, depending on how you do it. If a firm in the United States

can't prevent its offerings being accessed by consumers in Australia, there will be no incentive for any of those firms to set up local operations. They won't employ Australians. There won't be an Australian Netflix. There won't be an Australian Spotify, which will mean that Australian consumers will have less access to Australian content, but it will also mean that all Australians spending on that content will go straight overseas and won't be returned here, not to mention the people employed in those businesses here won't be part of that economy. Sorry, I did go over time.

MS CHESTER: No, that's okay, and you've probably answered partially some of our questions that we had for you, Kate, in your opening remarks and some of the evidence, so thank you for that. I might just turn first to one of the issues that you've raised with respect to the evidence base and a couple of points of clarification and maybe one question there. So you're right in saying that some of the evidence that we received from parties pointed to cost benefit analyses and the like that were undertaken by consulting firms. We did critique the methodology and the assumptions. We were mindful at the time that Department of Communications, which now has responsibility for copyright, had actually commissioned independently a cost benefit analysis to be done by another consulting firm and we're hoping that we will have the benefit of that independently commissioned analysis to inform our final report. So we were very keen to try to garner the evidence bases as much as possible.

The other part of the evidence base that I think you might have had some issue with was with respect to commercial life of copyright materials, which was what underpinned our finding that's caused great consternation amongst the industry, we understand. We were sort of stepping back from the economic framework that we were asked by the government to bring to this in looking at the criteria against which we sort of assess is the balance right or wrong, looking at it from the perspective of what's effective and efficient and adaptable over time. To inform that, we viewed that commercial life was relevant to copyright terms, so we went to the only evidence base that we thought was robust and relevant to Australia and that was the ABS analysis. We've asked people if they've got some concerns with the ABS statistics and methodology, which we thought were relatively robust, to give us that sort of feedback.

MS HADDOCK: We have done that in our second submission, but I guess further to that, I sort of think one can't have it both ways. If it is the case that a copyright has a limited commercial applicability, then it doesn't matter if it's tied up in perpetuity as Mr Prior would have it because nobody's going to want to use it after the first five years. It's only because people want to use it and don't want to pay for it that they

want the term, either the exceptions to be broadened or the term to be shortened. So if all these works are suddenly released on to the market after 15 to 25 years, but they have no commercial applicability or interest, then what difference does that make.

MS CHESTER: Well under current copyright arrangements people wouldn't know if they could use it on issues like orphan works when you have life plus 70 years. There's a much larger window that people have to work with.

MS HADDOCK: I guess I don't understand the conflation of the orphan works issue, the term "issue". As I understand it, in my practice orphan works issues come up mostly with people who want to use photographs and they can't identify them. So it happens a lot with book publishers and I know it happens a lot in the museum and gallery area and sometimes with old letters as well. It's not really an issue for works that have been commercially available. I don't see that the longer term really makes any difference to that. In any event, what you're talking about is a work that people want to commercialise and then they can't find the owner. So if they want to commercialise at 70 years after the death of the author, then it does still have a commercial use. I guess I might be missing the point of the orphan works and term issue.

MR COPPEL: Can I take you up on copyright term, even though we don't have a recommendation in the draft report. All the forms of intellectual property are based on the idea that there's a need for a period of exclusivity to provide an incentive either for the innovator or for the creator, and in exchange for that period of exclusivity, after a period of time, it's a patent. The explanation of what is innovative is revealed and it can be then used in the public domain. It could support follow-on innovators. A similar thing with respect to copyright. Copyright has a much longer term than other forms of intellectual property. It sounds from what you are saying that either you're arguing that the current term for copyright is the appropriate term or something else. Can you elaborate?

MS HADDOCK: Yes, thank you. I think I've got two things to say in response to that. The first one is I don't see myself as an advocate for the current term. I think what happened, as we all know, is that copyright got traded for (indistinct) and we had a life, plus 50 term as part of the Free Trade Agreement. More powerful voices than ours were listened to to advocate for a longer term, but it is what it is, so I think that's a pretty academic area of discourse.

I do think that the answer to a longer term is not to increase the exceptions and to introduce a de facto shorter term. I think that would be an error, with respect. As I understand it, the justification for an argument that a shorter term is optimal is that the commercial life of a copyright work is relatively short. Therefore, the owner of that copyright only needs to be rewarded during that commercial life. I'm saying if the commercial life is short, it doesn't matter that the term is 70 years because if no one wants to use it after 25 years - I'm probably expressing myself badly but I think that's a bit of having your cake and eating it too. It is only being released into the public domain so that people can use it. If people want to use it, that means it has a commercial life. That's what I'm saying, but I'm not an advocate for the term. I don't think that's a large issue, the term.

MR COPPEL: I raise it because it seemed as though you were suggesting that the term should be something longer than life plus 70 years.

MS HADDOCK: I am certainly not suggesting that.

MS PHILLIPS: In fairness, Jonathan, I think what we said in both our first submission - in our initial submission we said term is a relatively academic issue because of the international treaties. Given everything else you have to cover in this inquiry, we recommend that you don't focus on it. We then spent quite a lot of the draft report focusing on it and then were surprised when people responded. For us, term is not the main issue. Our concern was that to the extent that your views on term had informed some of the other areas where you did make recommendations; for example, in relation to fair use.

MS CHESTER: I think our terms of reference obliged us to look at the arrangements holistically and to see whether there was a balance, and so it wouldn't have been appropriate if we hadn't looked at term as well. Just coming back to your point around geo-blocking and circumvention of geo-blocking, we've sort of had conflicting evidence as to whether or not there is uncertainty in Australian law as to whether or not Australian law would make circumventing a geo-block illegal which was the aspect that we were looking at and I'll elaborate why in a moment. We've got a lawyer here; what's your read of it?

MS HADDOCK: I'm not a circumventer of technology so I'm probably the wrong person to ask. The Council has an information sheet on VPNs and Fiona might be better placed to address the issue. My understanding is that if you hack into somebody's system, that might be illegal. It can be completely legal to use a VPN, except for the fact that there are

contractual terms of the service that you're reaching. So if I have my contract with iTunes says that I can only use the Australian site and if I use a VPN or an American gift card or whatever to get to buy music or movies from the American iTunes store, I am lying to Apple when I tell them that my address is Cupertino. I think that is not something that's socially acceptable to encourage.

MS CHESTER: The issue we were focusing on was was there any uncertainty in Australian law about circumventing geo-blocking.

MS PHILLIPS: Kate is completely correct. There's a copyright issue and then there's a contractual issue but the contractual issue leads itself into the copyright issue. The issue under copyright law is whether the geo-block is a technological protection measure under copyright and arguably if it's just simply a block to the IP address, that is not a technological protection measure because it's not attached to the copyright material per se. So that's not a copyright material. Then there's the contractual issue that Kate has explained. The terms of service say I'm in America and I'm in fact in Australia, so I'm breaching the contract in order to gain access to the content. Then you have to look at if the contract is actually giving me a licence to perform a copyright act in the US and I am in fact exercising one of the exclusive rights of the copyright owner in Australia, then I am using that copyright material without the permission of the copyright owner, and when I last looked that was infringement of copyrights. Do you understand how the contractual - - -

MS CHESTER: Absolutely. I was just pointing it to circumvention.

MS HADDOCK: My concern is actually a practical concern because outside Council I do act for people who license entities that sell content in Australia and a lot of those entities are American organisations, primarily American, but English as well that have set up entities here, that employ people here, and they do provide access to a greater range of Australian content than they do in their American services. If it is completely legal for Australian consumers to go to Netflix or Spotify, just to use the two most obvious ones, in America by VPN or whatever, then I can't see any incentive whatsoever for those firms to set up business here.

MS CHESTER: I guess one of the things we were trying to address is that we know that online piracy is highly problematic. We know that copyright's being breached left, right and centre. We're trying to unbundle what are the drivers of that infringement. When you look at the surveys that are done of consumers and Choice have done some surveys in the area. Kate's smiling, so there's going to be something on the surveys that you're not going to like I'm sure. It does suggest that the majority of

folk would be prepared to pay and not breach copyright if they had timely access.

MS PHILLIPS: With respect, look at the music industry for example where in Australia you have pretty much access to what you want, when you want it at a reasonable price or even for no price at all if you're going to be a member of a subscription service with a deal with the advertising. Still in the music industry, infringement is a significant issue. I think as we've said consistently in our submissions and as others have said too, availability and price are not the sole determinants of infringing behaviour. They're a big factor, but education and appropriate legislation has to go with that. As we've said in our submissions, I think this issue in relation to geo-blocking is in fact a distraction. Already in the time between the IT pricing inquiry and your inquiry, business models and the availability of services in Australia has changed markedly. I think as business models mature, these issues will just be seen as issues particular to a point in time and they're a distraction in a sense. I would agree with you that in a sense what we're dealing with now is perhaps the fallout for industry not being quicker to get on board 10, 15, 20 years ago and to come up with innovative business models. I don't think that the same accusation can be made now. I'm not saying that we're completely there but the industry definitely is - - -

MS CHESTER: No, I do appreciate that.

MS HADDOCK: Also, I mean there are lots and lots of studies that show that - I mean everyone talks about Game of Thrones, that even though Game of Thrones and Dr Who, which is more my area, are available in Australia at the exact time that they are available in their country of origin. People will still pirate that material. I don't know if it's for the joy of piracy or because there is a resistance to any price at all.

MS CHESTER: The surveys do show that there is a minority that will still continue to infringe.

MS HADDOCK: Yes, sure.

MS CHESTER: I'm conscious of timing. We don't want to spend the whole time on geo-blocking.

MS HADDOCK: Or Game of Thrones.

MS CHESTER: No. I'm with you, it's Dr Who genre. You also had some comments around our recommendations on fair use running into

problems with Berne. Is that because we strayed from the ALRC wording, which I'd understood - was "Berne" okay?

MS PHILLIPS: Yes. There's two things principally. There's two main things in raw formulation of fair use that I think are problematic. One is that you don't include a consideration of the nature of the work and I think that's problematic. The second thing is that you include a temporal restriction on the fairness of the use at the time of the infringement or the time of the use. That's where I say I think it's a little bit informed by your view of the term of copyright, because under "Berne" it's the interests of the right holder, the legitimate interests of the right holder, and that would not be limited to the particular time of the use. So where when you're looking at what things would not be remunerated, just pre-empting another one of your questions, if I am a novelist and my book's out there but it hasn't been made into a film. Your formulation risks any kind of adaptation, something that's not currently in the market, then perhaps having a leg up via fair use.

MS CHESTER: If we were revert to the ALRC wording, that addresses both your concern around the "Berne" and it also addresses that one example, Fiona, that you've given of something that was previously remunerated that would not be remunerated.

MS PHILLIPS: Yes, I think that's right. However, I would say and I have said at the Fordham conference in New York earlier this year that the fair use factors as they operate in the US set up the framework. But there are instances, for example, where I say that decisions of the US Courts actually are outside the three-step test. So it's not the fair use factors themselves but the particular application in a particular judicial decision. It has sometimes strayed. It's not a fool-safe way of saying that decisions made applying these factors are always going to be consistent with international law, but the factors themselves are less of a concern, whereas I immediately see difficulty with the factors that you've proposed in the draft report.

MS CHESTER: Thank you. That's helpful. Governance and collection agencies. I don't think this is an issue that you've touched on in your submissions. Is that something that you would have a view on and are you familiar with the EU determination?

MS HADDOCK: Broadly, but also extremely familiar with the code of conduct which in my experience has been an incredibly effective regulator of conduct, even though it's voluntary code, that change in the way that societies react to complaints in particular has been remarkable in the last 10 years or so. I think that a lot of people, particularly a lot of licensees - I

know that what Mr Prior said about transparency. In my experience of the collecting societies that I work with, the concern about transparency comes less from members of the society and more from licensees, particularly licensees under statutory licence models.

I don't think that a code or a directive or whatever vehicle you use that says, for example, that you have to publish distribution information is going to be particularly helpful in circumstances where some licensees simply cannot report on a transactional basis. So what you have is with some lines of business, licensees are reporting on a line-by-line - you know, use Spotify and Apple and so on, can say this song was listened to this many times. That information is all available to members of collecting societies and it's the licensee that's giving the collecting society the information. So the last thing it wants is yet another 200 million line report coming back in its direction.

Where the educational institutions say they want to see where the distributions have gone, the distributions are necessarily informed by imperfect surveys, because the educational institutions are incapable, not through any unwillingness on their part but just because the technology does exist to report on a line-by-line basis of what they've been using. The less good the reporting, the less transparent the distribution is going to be able to be, or less accurate distribution is going to be.

MS CHESTER: We've put it to people that have had concerns, and we've heard from quite a few and not just from licensees, to have a look at the EU determination and say does that address your concerns. We'd want to be even handed so we'd appreciate if you were able to do the same.

MS HADDOCK: We could, yes, sure.

MS CHESTER: Let us know if there's any issues or parts of it that would not translate to the Australian situation, because I know part of it's also about what's happening within the EU as opposed to we'd just be doing it as a standalone jurisdiction.

MS PHILLIPS: I think Screenrights undertook to do that piece of work. Obviously the collecting societies are our member organisations so they were going to consult us in that process. There were a couple of questions you asked earlier this morning. Can I just quickly - you asked a question about - - -

MS CHESTER: Unless Jonathan's got any other questions.

MR COPPEL: No, I don't.

MS CHESTER: I'd covered everything I wanted to and we're now running sort of 15 minutes behind because we've had the pleasure of your company for longer than we should have. We will wrap it up there, if that's okay. Thank you both for appearing and for your active involvement in the inquiry. It's much appreciated.

MS HADDOCK: Thank you.

MS CHESTER: And for your frank feedback. I'd like to call our next participant, Fraser Old, to join us. Good morning, Fraser. Thank you for joining us.

MR OLD: Thank you. Good morning.

MS CHESTER: Thank you for your submission to our inquiry; that's much appreciated. Maybe if you could just firstly state your name and who you're representing for the purposes of the transcript and then if you'd like to make some brief opening remarks.

MR OLD: My name is Fraser Old, spelt F-r-a-s-e-r O-l-d. I've been a registered patent attorney for about four decades. I've spent 20 years at Spruson & Ferguson. I ended up there as Senior Partner. For what it's worth, I'm a former president of the Institute of Patent Attorneys. My particular concern is the question of patenting what might be termed computer-implemented inventions.

When I was at Spruson & Ferguson I acted for the CSIRO and wrote the Wi-Fi patent and that's earnt Australia two or three hundred million dollars in royalties and it shows you what can be done. Also when I was there I acted for ResMed and that started what has now become a listed company and not just a single company but a whole industry dealing with sleep apnoea and that was all based on a single invention by a Sydney doctor.

I also acted for IBM in the IBM case and if you know about patent law, inventions and so on, there's a couple of cases, one of them was IBM. There's another case, CCOM, which is spelt C-C-O-M, and I acted there on a pro bono capacity for them and we won at least in the terms of the advance being patented. The problem is that if you look at the Patents Act, you'd see there's only one exception to the general principle of the amount of manufacture being patentable and that has to do with the creation of human beings.

In point of fact, there's a vast raft of case laws built up over the years saying what is and isn't patentable. After the IBM and CCOM decisions and at the time I was the convenor of the Institute Committee dealing with this problem, we managed to convince the patent office that these advances were patentable and for 20 years or so there was never any problem. In the last few years there's been quite a marked changed in the stance taken by the patent office, which has culminated in these two cases, RPL central and research affiliates. Both of those specifications were very badly drafted and in my view they should never have been taken off as test cases. They're terrible and the results are terrible because what's so important is that the Australian market is quite tiny. The big market is the American market. The Australian patents is the entrée for Australian companies into the American market.

I can give you as an example a patent specification, one of my clients which deals with an automated system for dealing with adverse reactions to drugs. The idea being that you can ring up and talk to the computer; the computer assesses the key words and what you've got to say, ask you questions, goes down through various paths and you get a benefit that someone in the middle of the night is able to get advice as to what to do and how to fix it. The published US specification number is 2014/0343958 and the client didn't bother patenting in Australia, simply because it wasn't patentable here. I give you a copy of that specification.

MS CHESTER: Thank you.

MR COPPEL: Yes.

MR OLD: In order to show you what's going on in the Australian Patent Office at the moment, I'll also give you a copy of an examiner's report. Ironically, it happens to be ResMed and the Australian and the Australian Patent Office has had various additions in its word processor for formulating these objections but they're spewing these things out and probably a third of all the electrical cases get one of these objections. Talk about a "how not to vote" card. I mean if you really want to impress people overseas and tell them to go away and don't patent anything here, this is the way to do it with the examiner's report. For the record, the number is 2009/296732.

Also in my submission I specify why I believe draft amendments should be made for the Australian Patents Act which would allow the patenting of presentational information. I've got with me a specification which I did some years ago which dealt with - if you consider a company like Avon, for example, where you've got a hierarchy of sellers. You can represent their sales in a hub and spoke arrangement and what I came up

with was the idea of making the width of the line connecting the hub to the subsidiary sellers proportional to the volume of sales, so that you could see at a glance on the screen that the fatter spokes represented better sellers than the thinner spokes.

Many people, myself included, are relatively sort of innumerate in the sense that if you have a list of numbers, it's very difficult to run your eye down and pick out which is the highest number, which is the second highest, which is the third highest. But when you look at that displayed graphically then it's easy and you can do it and it's advantageous. We launched a patent, a PCT application for it. There's a Regulation 39 in the PCT that says that the patent offices don't have to search if it's a presentational information, so the Australian Patent Office refused to search. I asked for a search fee back; they refused to refund it. I reckon that's official theft frankly.

MS CHESTER: We probably better not stray into individual cases, Fraser.

MR OLD: Okay. What I wanted to show you was an example of an invention that dealt with presentational information. This would undoubtedly have been patentable in the United States, assuming it was new. For the record, the published specification is WO02/05083. Also in my submission I included an extract from an interview given by Gustav Nossal to the IMSANZ organisation and in it he gives a very good exposition as to why it is that Australians should patent their inventions, in particular, in terms of getting the investment up to get the thing going. As he said, if you don't have a patent it might happen one day but if you do have a patent it's much more likely to happen. The reason is that investors want to see some sort of patent protection to provide a sort of safeguard.

I have often said to my clients that expenditure on patenting is like paying an insurance premium. You insure your R&D basically. One of the reasons you need to insure is because one of the groups of people who are likely to take you on are not only your existing competitors but also your employees. You can have a situation where someone comes into your firm, you spend a lot of money paying them a salary, but they are educating themselves as to what it is you are doing and how to go about doing whatever the business happens to be. There you can have a situation where someone says, "Right, well I'm going to set up in competition", and they take all that know-how with them and so on. One of the benefits of the patent system is that it stops that at least during the term of the patent.

Whilst mentioning the term of the patent, the average life of an Australian patent is only about seven years and that's because very often there's been a new development comes along and overtakes the old one and no one's interested in the old one any more. Like in the course of my working life, I've seen the rise and demise of the fax machine. Nobody bothers with faxes anymore because everybody sends emails with attachments. When people talk about patents and patent term, they tend to think about Viagra and all these drugs that actually run right to the very last day. Most inventions are overtaken by technology.

In the submission I point out that this enormous technical revolution that's occurred not only since the industrial revolution in England but since the Second World War, for example, has all taken place in the world of patents. Patents have existed. It's not possible to say that it wouldn't have happened without patents but it's certainly possible to say that patents didn't stop it happening.

MS CHESTER: Fraser, I'm just conscious of time. We might jump in there and ask you some questions, if that's okay.

MR OLD: Yes.

MS CHESTER: Particularly given your history as a patent attorney, this is a question I probably couldn't put to many folk but before computer software did become eligible for patent protection, computer software existed before then, how did people protect it?

MR OLD: You need to understand that if you go back to the 1950s, computer software was a list of instructions. It still is but it was a list of instructions that enabled the computer to operate. The patent offices took the view that you could have hardware on the one hand and you could have software on the other and the developments in hardware were patentable. Developments in software were subject to copyright and were not patentable. What happened was the technology changed and in particular with the PC and so on, you've now got the situation where by writing a program you can change what's happening within the hardware. Instead of just calculating a number or getting a result, you're actually getting a different machine out of it. The patent offices have never come to grips with that.

MR COPPEL: Can you give an example of that?

MR OLD: Well, for example, I've got one client who uses a Java virtual machine and Java language has gone through about seven different versions. There's an awful lot of programs out there written in old Java

language versions or editions which have pretty poor security. What they've been able to do is to use the Java virtual machine to run an early language version on the modern Java machine which then provides security against, for example, hacking and other interference. The outside world sees the modern program, but the actual work, for example for a bank, is being done by the program that's only second generation or something of that sort. So without having to have human intervention to rewrite the old program to get the new modern security, they have been able to, by programming, create a machine which is what the outside world sees that operates differently. That's going on all the time.

MS CHESTER: You mentioned before, from your own experience really, like the commercial term of life for computer software now is on average maybe around seven years or something. What role then do the other forms of IP protection in the forms of trade secret and first mover advantage, what role do they play in parallel or in substitute to patents?

MR OLD: The difficulty you've got is that with a lot of this stuff the advance is generally an idea where you say "Instead of doing this, let's do that". I gave some examples in my submission about lift technology because I thought they would be fairly easy to comprehend. Once someone has that idea and they put it into practice and it gets going, the word soon spreads around the industry as to what this thing is and does and how it works. So that people don't need to read the code to emulate it. They can go away. Once they've had that idea explained to them, they say, "I see what he's doing", and they can go off and they can write their own software which is an infringement that embodies copyright because it's an original work, but it does what this other fellow's come up with. If you want to stop that happening, you need a patent.

MS CHESTER: So trade secrets and first mover advantage don't play any role with short life.

MR OLD: Trade secrets, you go down to the pub and you buy a bloke a few beers and he starts explaining what he does at work and out the door goes the trade secret.

MS CHESTER: That leads me to my next question. You mentioned in your opening remarks some of the other commercial value that businesses that you deal with can get from patent protection, and you cited the example of the potential of an employee to take the IP when they leave and the patent protection provides additional protection beyond the employment contract, I imagine.

MR OLD: Yes.

MS CHESTER: Are there other sort of commercial values that your clients are getting from taking out patents in that sort of vein?

MR OLD: The patent's a little bit like a corner. On the one side you've got the ability to sue someone for infringement. On the other side that ability gives you the ability to licence their pitch and it's that that enables the patent to offer some protection to the licensee in return for the royalties. There's also sort of various other benefits in terms of having a published document that describes what's going on and there are plenty of examples. For example, in British code breaking in the Second World War where one of the things they did at Bletchley Park was go and get all the patent specifications dealing with commercial encoding machines to see what people were doing and how they were constructed and so on. In fact, the Enigma machine was a refinement of a much earlier machine which was patented. Gus Nossal makes exactly that point in his interview that the patent specification publishes what's going on and people can see it and you can trigger other ideas and create other inventions and so on. So in that sense there's a great openness about it because everything gets published in 18 months.

MS CHESTER: In your submission you made mention that there's a lot of innovations which are currently not patentable in Australia that are still patentable in the US.

MR OLD: Yes.

MS CHESTER: We've heard evidence from some other patent attorneys that the Ellis Corporation decision has had an impact on what's patentable in the US versus what's patentable here. Is that something that you're familiar with and have a view on?

MR OLD: There's a tendency for the Courts to move in the same general direction but in my view what's needed is not a sort of tweak of the case law but a rewriting of what's patentable. When the High Court brought down the NRDC decision in about 1960, I think it was, it was regarded as a breath of fresh air in the patent world and Australia led the world and the British Commonwealth followed suit. In those days particularly the precedent value of Commonwealth higher Courts was quite compelling. The situation in Europe, in particular, is just ridiculous and where's the European computer industry? Well it just doesn't exist.

The US has been in the forefront of allowing more and more liberal interpretations of things but recently the pendulum's swung back a bit with a case called Alice which ironically was an Australian invention.

What's needed is to permit the breath of fresh air that came with NRDC to be reinvigorated and to provide an amendment to the Act to allow all these things. There's no justification for preventing patenting for the display of information. Why? It's like saying you can allow a patent for inorganic chemistry but not for organic chemistry. Why prohibit something just because the person does it with using a computer, instead of using relays or instead of using an integrated circuit? There's no logic in any of that.

MS CHESTER: Fraser, I only have one more question and Jonathan might have some more. From your experience, have you also dealt with the flipside where you've had clients that find that a patent of another patent holder's in the way of them commercialising or innovating?

MR OLD: Yes, and I've done searches trying to invalidate someone's patent and been unable to find it and the client just had to wait until the patent expired and then that client and half a dozen others jumped in and started doing exactly what the patent was all about and the invention had to do with "for rest of life" clause. Sometimes you've just got to put up with it and let the term expire. This was a valuable patent and they were in it right up until the last - in those days it was 16 years and as soon as that 16 years was over everybody was into it.

MS CHESTER: But they weren't commercialising it during that period due to the patent protection?

MR OLD: No, they didn't infringe because they knew about the patent.

MS CHESTER: No, no, no, but the holder of the patent hadn't commercialised?

MR OLD: Yes, they were commercialising.

MR COPPEL: Just one question for you, Fraser. One of the issues that we've been asked to look at is a sense by some that our research institutions and universities have intellectual property but it's being locked up in the sense that licensing agreements are not coming to bear. I was wondering if you had any views as to whether such a diagnostic in your experience is one that you think suggests that there is such a problem with our research institutions and universities sitting on intellectual property?

MR OLD: I don't have any specific examples, save this one. There was a bit of a debate in the sort of the CSIRO research institute world as to whether or not if they issued a licence it should be an exclusive licence or a non-exclusive licence. There was a lot of sort of theoretical pie in the sky stuff about "It's a public board. It should be available for everybody".

It's far better commercially to make an exclusive licence and to enable the licensee to get going and not have any competitors for that little while because that first mover situation is very important.

I have a client in the conveyor belt monitoring field who took up such a licence from the CSIRO and, as it turned out, he was the only licensee. But he would have much preferred to be an exclusive licensee rather than just a non-exclusive licensee. He started a business and it's still running. The original patent has long since gone and he's now producing his own. The monitoring of the mineral-carrying conveyor belts is an enormous problem. Rio Tinto recently had a couple of belt failures where the belt ripped longitudinally and all the stuff that was carried by the belt fell down and so they had to dig all this out by hand, repair the belt, put it all back together. They lost a week or two's production, hundreds of millions of dollars. He has a device now that can detect these rip failures and stop the belt. You can do things before you've got to go and shovel everything away.

MS CHESTER: That covers all the questions that we were hoping to chat through with you today, Fraser. Thank you very much for - - -

MR OLD: Can I just raise two things. One is that you were discussing earlier on the question of inventive (indistinct). It doesn't matter what the test is, it's always going to be very patchy to apply. I've had one client who had the Australian Patent Office and the Federal Court say his invention was obvious and the corresponding patent application in the European Patent Office was issued without an examiner's report issuing. Well it was granted without an examiner's report issuing which is just unheard of. It's the only case I've ever had in 40 years where that's the case. So who cares what the tests are but you get this application and that's human nature.

The other thing is that there are lots and lots of cease and desist letters written and the cases that get to Court are the cases where the advisers on both sides agree as to what the predictable outcome is going to be. So although litigation is to some extent uncertain and a bit of toss up and so on, basically the body of the side of case law is there and it keeps being applied over and over again and people make commercial decisions based on that and keep out of Courts.

MS CHESTER: Thank you very much, Fraser, for your interest in our inquiry and for coming along this afternoon to have a chat.

MR OLD: Thank you.

MS CHESTER: Thank you. I'll call our next participant and apologies if I get the name incorrect, Chenoa Fawn.

MS FAWN: Perfect. Hello.

MS CHESTER: Hi, just come up and make yourself comfortable.

MS FAWN: Thank you.

MS CHESTER: Feel free to stamp your feet to keep yourself warm because it's freezing in here. Thanks for providing us with some comments post our draft report and for appearing at our public hearings. If you could just state your name and who you represent for the purposes of the transcript, albeit individual author, and if you wanted to make some opening remarks. Then we've got a few questions we'd like to run through with you.

MS FAWN: Thank you and I'll try and be brief because I know we're abutting lunchtime. My name is Chenoa Fawn. I am interested in the outcome of this from two points of view, as an academic and also as a writer of creative fiction. So just to give you some background about myself, I was in the corporate world and I was busily enjoying my gilded cage when I received a letter one day at home. The letter was asking to republish some of the work that I had published for free in a student journal during my university days. It came as a total surprise and also at one of those, what you realise later as a turning point in your creative life, because the letter represented someone valuing my creative writing and putting a commercial value on my writing.

The institution behind it wanted to use it for educational purposes and being someone who has benefited greatly from education, I didn't want to charge them for it. I wanted to just give it to them to donate my piece so that they could use it for their students. So I wrote back on their form, "Zero dollars. You don't need to pay me anything", and sent it off thinking that's the end of it, and feeling a little chuffed that my work which was created rather hastily back in those student days was something that someone later came to see value in.

That got me thinking about my old love for writing and for one day, as so many people do, harbouring a desire to be published to have a novel written. It was something that when it occurred to me when I was younger I put it aside. I put it into the category of something that I would do once I was already financially established in the world because I could already see how difficult it was for authors to make a living. So it was one of those dream items I would do once I had been settled in life. But

when this letter arrived asking to republish this work and offering to pay me for this work, it really made me thing about, "Well why aren't I exploring a creative life now. If people value this work, maybe they will value other work of mine".

I went back to school. I did my Masters at night while working long hours in the corporate world and I reacquainted myself with the canon of English literature and I started writing. Eventually I got to a point where I said to my partner, "I really want to pursue this. This is a serious desire for me to create a path which is more creative". So that has led me down quite a path and it was based on the fact that someone saw value in my work. The rest of that story is that while I was trying to give that work to them for free because they were using it in an educational setting and I don't mean to imply by that that authors should not profit by that. It's really important that they are paid. But in my circumstance, at that point in my life, I was earning a good income doing something else. I had the ability to be generous with my work because it wasn't what I was relying on to pay my power bills; I had another stream of income. Perhaps I would have looked at it differently if there was no other source of income for me.

The final part of that is that when I started investigating the world of writing and how does one make a living in this world, one of the things that came up in I think one of the courses that I took was that you should register with the copyright agency, and that they should know you as an author and that all the works that you put out there should be registered with them so that if people want to reproduce what you have created, that there will be some recompense for you. So I did that and I did that just as a sort of hygiene factor as setting myself up for the future.

What I didn't realise was that that piece of work that they had asked for to be used in the education system had been reproduced tens of thousands of times and that many, many students had read that as part of their formal exams and then they had to comment on my work, which I found quite entertaining. But there was a commercial benefit to me as a writer, because every time, even though I tried to give it to them for free, every time they reproduced it, that is registered with the copyright agency and that means that the author should then receive something in return for the fact that their work is of continued value.

While in the scheme of things I'm in the beginning of this potential career for myself, I've already experienced the power in terms of the real return in monetary terms, even though it's only small if you're only talking about a few thousand copies here and there. But more of what I wanted to say to you is that there's a motivational factor. In a creative

person's mind, often their work and the fact that they even undertake something creative has been undervalued or they undervalue it. So if you then remove some of the small ways in which they can make money from their work, you're devaluing it as an option for future creative people to come through. In this world we seem to value things according to what do we get financially in return and we need to work within the system as it is. There's no patron in the system any more. So it's not a case of a new painter or a new writer aligning themselves with someone who can then provide them some kind of existence going forward in return for their creative work, like we don't have that option any more.

The option that we do have is apart from book sales or selling a painting or selling a song, we have that recurring revenue stream of the copyright. In my brief submission, the only thing that I really wanted to target because it was of most concern to me personally, was the term of the copyright period which seems to be coming up for debate. From my point of view, I have a business mind and I'm trying to become someone who is making their life based on their IP. So whether I publish my PhD thesis eventually as a book, whether I go on to write other academic work and or whether I have novels published or other pieces, I still need to eat. I still need to provide for my family and there needs to be some kind of economic benefit for me giving up my time to do these creative works, which have been shown in that little example to be of benefit to other people. I just wanted to only speak for myself, of course, because I'm not in a position to speak for more than that, but to give an example of someone who is starting out and who is assessing, "Can I make a living of this? Is this worth my time and will my work be valued?"

MS CHESTER: Chenoa, thank you for those opening remarks and it is a unique insight that you're sharing with us. We haven't had any other authors that are sort of starting out come in and talk to us during our public hearings. Perhaps if I could just make one important point of clarification which I think you might find helpful and then one or two little questions, if I may.

You may not have been here earlier. There's been a lot of media reporting around our draft report and our draft report doesn't recommend any change to copyright term and nor would we because our terms of reference told us that we had to give regard to our international treaty and agreement obligations. It's not practicable or feasible to make that recommendation, so we haven't. I think there was a finding that we had around the commercial terms of creative works which is the 15 to 25 years.

MS FAWN: Yes.

MS CHESTER: If you were doing an optimal term of copyright from that perspective, that's what it would be and I think people have confused the two. I hope that helps in that regard.

MS FAWN: Yes, that does.

MS CHESTER: At the moment you're an academic?

MS FAWN: I am finishing my PhD and I have lectured at university, yes.

MS CHESTER: Have you published? What sort of genre of writing would you ideally like to be involved in if you become a full-time writer?

MS FAWN: Well there will be my academic work and my fiction work.

MS CHESTER: Do you have anything published at present or is finishing off the PhD number one priority?

MS FAWN: That's absolutely the number one priority because it takes all my mental energy but I have had some poetry and some short prose fiction.

MS CHESTER: Is the PhD an English Lit?

MS FAWN: It is, yes.

MS CHESTER: Here in Sydney?

MS FAWN: Yes.

MS CHESTER: Great. You also mentioned what sort of instigated that turning point moment. I think we all remember what - I've had career path changes as well and there always is a bit of a turning point moment. It was where you got that letter asking for your authorisation or licensing of that previous work you'd done when you were at uni.

MS FAWN: Yes.

MS CHESTER: You then mentioned when you, as a hygiene factor, went and registered with the copyright agency to say, "I'm here and I want to be an author", to find that many others had used and copied that previous work.

MS FAWN: Through that institution.

MS CHESTER: Yes, through CAL. I'm assuming it's CAL, The Copyright Agency?

MS FAWN: Yes.

MS CHESTER: Had they been collecting royalties on the copying of what you had written at university?

MS FAWN: Yes.

MS CHESTER: Who had those royalties been going to?

MS FAWN: I'm not sure where they store them, allocate them, or how that works. You'd have to ask the CAL people, but it was as if it was waiting to be claimed.

MS CHESTER: Okay. So then they gave you retrospectively everything that you would have been entitled to from all those copies?

MS FAWN: Yes.

MS CHESTER: Was that a material amount of money?

MS FAWN: Thousands of dollars, yes.

MS CHESTER: Do you know over what sort of time horizon they'd been sort of warehousing that money until somebody put up their hand and said, "Hey, it's mine".

MS FAWN: I'm not sure.

MS CHESTER: It's kind of the interesting that the - so who was the original party that asked for your authorisation? Was it an educational institution?

MS FAWN: Yes, the Board of Education.

MS CHESTER: So they tracked you down but CAL didn't, in terms of establishing the author?

MS FAWN: I think the onus is on the author to register with CAL.

MS CHESTER: Okay.

MR COPPEL: How does that process work?

MS FAWN: It's very easy. I just went online and gave them my details for my identity, "This is me. This is my work".

MR COPPEL: You have to have published work. You wouldn't register when you're just starting out and you haven't got material that's published?

MS FAWN: I don't think so but perhaps some people do.

MS CHESTER: I've got a daughter at university who's been writing and she's doing English Lit and I think she needs to register too.

MS FAWN: Yes.

MS CHESTER: I didn't have any other questions, Jonathan, did you?

MR COPPEL: No. Thank you very much.

MS FAWN: Thank you.

MS CHESTER: Chenoa, thanks for coming in.

MS FAWN: Thank you.

MS CHESTER: Okay folks, miraculously we're not too far over time. It's 12.35. We're going to take a break for about just under an hour, so if we could resume at 1.30, that would be much appreciated.

ADJOURNED **[12.36 pm]**

RESUMED **[1.28 pm]**

MR COPPEL: Welcome back, everybody. We will say at the outset we've got nine further participants for this afternoon so I'm going to ask each participant to be very brief in their opening remarks so that we can use the time available to us to engage in a Q and A. Our first participant this afternoon is from the National Copyright Unit COAG Education Council. Welcome, and thank you also for your contributions both pre and post draft report, including submissions but also participation in the

copyright fair use round table. Could I ask you for the purpose of the transcript for both of you to say who you represent, who you are and who you represent, and then a brief opening statement, thank you?

MS BROWNE: Sure. Delia Browne, National Copyright Director, National Copyright Unit, the COAG Education Council.

MS FLAHVIN: Anne Flahvin, Policy Australia, and I'm here with Delia today.

MS BROWNE: So very quickly, thanks for giving us the opportunity to provide further comments to the Commission on your draft report. And as you know, the Copyright Advisory Group to COAG Education Council welcomes the recommendation, the draft recommendation, to enact a fair use exception as we believe it's going to bring Australia into line with leading digital economies such as the US, Israel, South Korea and Singapore, each of which have thriving education publishing markets. So we also welcome the draft report's recommendation, draft recommendation, to expand the copyright safe harbours to include education institutions. We think this is a long overdue reform and also it would help Australia comply with its obligations under the Australian Fair Trade Agreement to include all service providers in safe harbours.

So what I'm going to do is just very quickly talk about three - addressing three points that has come up that I've noticed with past public hearings and issues have been brought up in other submissions. The first thing is I want to reiterate on behalf of the school and TAFE sector that the Australian education sector will continue to rely on educational and statutory licences and voluntary collective licences of fair use is enacted, we do need - I will explain a little bit why we need fair use and why educational publishers and authors would not be harmed by this reform and just basically setting the record straight basically on some comments that have been made about the idea that reform will also decimate education publishing markets.

So again, first off, we have never, ever, ever, ever, suggested that fair use would apply to all or even most of the ways that schools use educational statutory licences. And this is something that we have been saying time and time again in writing in submissions to the Australian Law Reform Commission, to the issues paper and discussion paper, and also to the issues paper for the Productivity Commission and again our submissions to the draft report by the Commission. So we don't think fair use is going to cover all the things that schools are currently doing and we think we're still going to - we have to rely on collective licence arrangements.

And I just want to - this is repeated assurances we've given time and time again so I just want to say that again for the umpteenth time. And also be aware that this is something that has been endorsed by the state and territory Commonwealth Education Ministers as well as the National Catholic Education Commission and the Independent Schools Council of Australia. So it's disappointing that people are still saying that we are, you know, we think that fair use is going to be replacing the statutory licences. That is simply not the case.

We also just want to reiterate it's important to remember that on our conservative estimate Australian schools spend at least $700 million a year purchasing new educational content for students. And that is in addition to the money that we pay under statutory licences. And that's in addition to the money that we - you know, that is also paid by Parents and Citizens Associations also purchasing educational content to schools. So a fair use exception would not have an impact on this spending.

Why do we need fair use? MOOCs is one area that's come up in a few submissions. None of the existing copyright exceptions or licences enable Australian schools to take advantage of the modern education methods such as MOOCs. And so we disagree with the claims made by collecting societies that the statutory licence applies to MOOCs, we don't think that would apply to MOOCs if that content is shared with people outside the education institution. This is to some extent small extracts are permitted on MOOCs in the US and other fair use jurisdictions, we understand when using small amount of content in MOOCs they can rely on equivalent fair use style exceptions.

The other thing to note is also the increasing requirement by governments that schools should be collaborating with business industry just to develop STEM, the STEM skills of Australian students, but again our copyright laws are a bit of an obstacle to do that. So it's hard for us to - we can't rely on the statutory licences or the existing fair deal exceptions to use small amounts of material when engaging with the broader collaborative engagement we have with community, business and industry. And so they are exceptions that only apply to very, very traditional classroom use. And that's kind of one example of the social useful collaboration that could be permitted under a fair use regime and that wouldn't unnecessarily prejudice the rights holders.

With fair use remember it's about what's fair that's allowed, you know, if it harms the rights holder markets it simply shouldn't be allowed. So we think the flexibility of fair use or a fair use style exception is much better suited to an environment where increasingly schools are expected to

engage with industry and the wider community and it will bring us in line with countries like Israel, South Korea, Singapore, the United States, that have laws that facilitate collaboration engagement rather than laws that actually stop it.

Another little point to make is millions of dollars is being spent on freely available Internet material and orphan works. When I tell people overseas about Australian schools paying millions of dollars a year to use freely available Internet content no one ever expected to be paid for sometimes they look at me as if I'm describing something that's a scam. It's not actually a scam. And there's no justification for the Australian schools to be spending taxpayers' money, public funds, on activities that don't affect copyright owners' markets.

Such as printing out online TV guides, printing out health fact sheets, or the About page on a corporate website, printing out free tourism maps of Australia, asking a student to print out a map from Google Maps for a homework exercise, a teacher taking a screen of a section of a webpage that teaches students how to use computer software, reproducing thumb nail images of the book covers on the school intranet so you can show students what's available in the school library, or using orphan works. We think probably in this category about nine million of total amounts of our licence fees is for these particular types of uses and materials.

And I've heard in a previous hearing last week The Copyright Agency thinks this can be fixed by the tribunal by applying a zero rate. We do not agree that the tribunal has the - can do this, or the statutory licence allows the tribunal to apply a zero rate. And we also note that in 2013 in the Copyright Tribunal proceedings involving the copying of survey plans by the New South Wales Government counsel for the Copyright Agency, David Catterns QC was asked, "You say it's not possible for one to say where a statutory advised equitable remuneration that could ever be zero?" And Mr Catterns' answers, "Yes but it is our submission it says it must pay". So the tribunal looked at this question sort of back in 2013 and CAL's lawyers actually said that it wasn't possible for the tribunal to apply a zero rate. So I can stop there because I've probably passed five minutes and you might want to ask me some questions.

MR COPPEL: Seven minutes, actually.

MS BROWNE: Seven minutes, my God.

MR COPPEL: But thank you, Delia.

MS BROWNE: Okay.

MR COPPEL: Maybe I can start with fair use. You've given a number relating to the payments that you make under the statutory licence for materials that are freely available, could you elaborate and explain what you think would be areas that schools could use under the fair use provision should it be adopted that wouldn't be available under the current fair dealing? I'm trying to get at the rate of leakage, so to speak, so what materials that are currently remunerable under fair dealing would not be remunerable under the fair use, other than these free on line examples that you've given?

MS BROWNE: Just to clarify, the fair dealing exceptions in Australia do not cover educational use by schools and other education institutions. They only cover activities done by students in their own capacity with, you know, doing research and studies. So everything under the Part VA and Part VB licence, there was no - the only thing that can be excluded from remuneration - actually everything is in Part VA of the Screenrights Broadcast Licence, there would be nothing that would go out of that, there's no - you would pay for a copy of all television programs. In the current licence or the Copyright Agency Licence, the Part VB licence they administer, fair dealing doesn't have any - there's nothing a teacher can do that can be relied on on fair dealing except for very - when they're doing stuff for the purpose of education instruction or educational purposes of the school or the other education institute.

So there's no leakage there, there's just like anything that you do for the education instructional purpose of the school is in the, what I call the red circle, that's the easiest way of doing it. The only time that something might be outside that is all again to do with some negotiation by the school sector in relation to free Internet material is if it's very, very clear on the terms of use of a website or very, very clear on terms of use, say, if it's a publication, but mainly websites, that is either a Creative Commons licence, therefore it will be out of the equitable remuneration pot, or there's words that clearly say it's intended for educational use. Otherwise it will be in the red pot rather than the green dot, if that makes any sense.

MS FLAHVIN: And can I just add, I mean what you've highlighted there with that question is the difference between fair dealing and fair use. So our fair dealing exceptions are all purpose based and the courts have said that the relevant purpose is the purpose of the person doing the copying. So even though a student might be permitted under fair dealing to do a lot of the uses that we're talking about here, because fair dealing is a purpose based exception it just doesn't apply to anything the school does. Fair use just looks at the question, is the use fair? It's not concerned with, you know, who is doing the copying, it really just looks

at, you know, is this purpose a fair use? So that's just the difference between fair use and fair dealing that is really highlighted by the question.

MS BROWNE: And like in the electronic use survey there's even, you know, where the teachers record the electronic copying and communication activity for a period of time. One of the activities they have to record is if they tell students to print or save or download. So even if you give, say, look, here's some places you might want to go and have a look at as part of your ongoing research and study, even that activity is actually recorded in the survey. So that's another sort of, you know, it really is quite a broad statutory licence, it doesn't actually give very much room for zero rating, it doesn't give very much room for excluding material based on a fairness, at this stage.

MR COPPEL: If you took the fair use recommendation as proposed by the ALRC not that in the draft report, do you have any idea as to what material would no longer be remunerable under such a provision?

MS BROWNE: Under a proposal.

MR COPPEL: Under the ALRC proposal for fair use.

MS BROWNE: The best - - -

MS CHESTER: Assuming the negotiation with the collection agency reflected the negation informed by the new fair use.

MS BROWNE: In our submissions both with the Law Reform Commission and the Productivity Commission the two areas that we think would not attract and continue to attract equitable remuneration under a statutory licence would be freely available Internet material and probably orphan works. There might, you know, those are the two main areas where you see the main impact being which is why we've kind of come up with a guesstimate. We don't - you know, looking at what data we have from the statutory licensing schemes to sort of come up with a, you know, the best approximate we can.

MS CHESTER: So Delia, where does the $9 million go to that's collected that doesn't need to be repatriated to any copyright holder?

MS BROWNE: Well, if it's a - well, the Copyright Agency does its best to try and locate copyright owners. I'm not suggesting that they're not doing their job, but - - -

MS CHESTER: But you said the nine million was for freely available - - -

MS BROWNE: The nine million really is for Internet freely available to you so like 80 per cent, I think, or 85, of the electronic use survey is for Internet material that's not behind a partially protected wall and it's spread to everyone around the world to access and use but in Australia because of our statutory licence we are required to pay for it under the statutory licence. So the nine million - - -

MS FLAHVIN: Well, so some of that money I suppose CAL will be able to identify the rights holders but - the Copyright Agency, but they might be quite surprised to get, you know, a payment. And money that the Copyright Agency can't distribute because if they can't locate the rights holders, identify them or locate them if the works are orphan works, that money goes back into a pool and if it's not distributed after four years it goes to rights holders who had no connection with the work. You know, the view that we've always taken is that's a bit of a windfall for rights holders who have no connection but that work was copied by schools, the money eventually does get distributed to rights holders, just not the relevant rights holders.

MS CHESTER: And what does that sort of amount of money on an annual basis of the whole - sorry, of the whole amount that sort of CAL collects that's distributed just evenly across the pool, I'm assuming.

MS BROWNE: We're not privy to - - -

MS FLAHVIN: We don't know if that data - I think in past years to the best of what we are able to piece together at some points in time there were, you know, $20 million of undistributed funds. I think the best that we can say is that there does appear to be quite a lot of money that either is not able to be distributed or is distributed in circumstances where, you know, there doesn't seem to be any reasonable basis for - nobody expected to be paid for this work, they put it up, they make it freely available, Australian schools are about the only people in the world paying - - -

MS BROWNE: We are the only people in the world. Yes, so universities. So again, it's the Internet has kind of changed everything when you look at the collective licensing. And one of the great benefits of collective licensing has been over the last 30 or 40 years it was very hard always getting direct licences and the models were very difficult so it was actually a very good public policy about having collective licence arrangements but it has changed things. And having a broad stroke across

it, it probably needs to be relooked at and whether it's fair, continuing to be fair, but no one is suggesting from our sector that collective licenses still have not got a place to play, we think they still will have.

MR COPPEL: Many participants to this inquiry that do not favour fair use argue that it will create uncertainty, what - - -

MS BROWNE: We don't agree with that analysis. We, the National Copyright Unit, has the Smartcopying website, smartcopying.edu.au, and we also conduct a lot of education workshop seminars, including online, to the TAFE and school sector. We think that we can provide guidelines in education to the school sector about what and what is not permitted. It's exactly what we do now to the schools and TAFEs, you know, they've got a pretty good idea of what is not and what's permitted and so we think there's been guidelines that have worked in other countries quite well.

And our sector is a sector that actually tries very hard to be compliant with copyright laws and we just think we can put pretty clear guidelines about whether it is or isn't. And if there is grey areas the schools are always encouraged to contact us and we provide, you know, Monday to Friday advice to schools and TAFEs and departments of education a variety of copyright issues on a daily basis by telephone and by email. And that is something that is kind of our unit is actually supported by all the states and territory governments' funding in the non-government school sector. So that will continue. So it will be business as usual with an education kind of campaign. We don't think that will be a problem.

MR COPPEL: You mentioned one of the benefits from fair use that it would allow the development of initiatives like MOOCs, can you give other examples of where you would see benefits from fair use?

MS BROWNE: Collaboration is the big area, particularly with industry and organisation that are not traditional education organisations. I mean, there is a huge push that's typical with the STEM subjects, and also collaboration across schools and across states and territories.

MR COPPEL: So what is it about fair use that allows better collaboration?

MS BROWNE: It doesn't limit it to the four walls of a school or the four walls of a classroom, you know, our exceptions and our statutory licence are of a time where there wasn't such a thing as communications technology and the Internet and the ability to actually do things outside a physical classroom. And even seeing how classrooms and our - the classroom of today, it may not be around in five years' time. I mean, even

think about the fact that the opportunities now for personalised learning are fantastic so more and more you're seeing personalised kind of educational learning kind of apps and resources being available for students and parents to purchase, like Mathletics and Spellodrome. It's a really different environment.

So the way our exceptions and statutory licences are set up really was to deal with the photocopying issue which was a good public policy issue, there was a real concern and a genuine concern that, you know, photocopying was going to mean that teachers were going to start photocopying books and not buying educational resources and the way that we dealt with that public policy issue was really introducing the statutory licence. Things have really changed with the Internet so we need a little bit more flexibility but the fairness thing is very important to still have.

Fair use is not there to allow whole scale copying of other people's materials it should only be there for, you know, short extracts that aren't going to be applied against the fairness factors. It's not meant to be there for a free ride for everybody, it's meant to have an element of fairness. We don't have those fairness components in our current exceptions or our current statutory licence and I think it's time for that transition to start happening. But again it's not meant to be and it's not intended to be a free for all.

MS CHESTER: The business model that wraps around the text book worlds seems to be changing in terms of traditional hard copy texts required for all students to online content and open access sort of poses the question are people conflating concerns about fair use with what's really technological change with the way traditional text books had previously been?

MS BROWNE: Look, that's probably a fair assessment. I think also the fact that we've got new players in the educational resource market that aren't just traditional publishers but also you're seeing some new offerings also being made. You've got the digital course materials thing that CAL is doing now. Learning Fields is another, a new kind of offer into the educational institutes which allows them to do their own kind of digital course for the payment for licence fees to - I can't remember how many publishers are involved in the Learning Fields initiative that's been around with the Copyright Agency for a couple of years.

You're also seeing, probably we're seeing a bit of a transition of the sort of things that are being offered now for educational institutes but, you know, there are new players in the market too such as education apps and

Google Classroom and you can sort of think - but other sort of business that are doing very well under the statutory licensing that will continue to do well under the statutory licensing, such as ClickView which is a great - is a company that offers a 24/7 kind of copying platform for schools and other education institutions and these things will continue to kind of happen.

So I think it is a change of time. Look, how long have we had iPad for? Maybe five or six years. I mean, that's changed everything in the classroom. Mobile phones are being used kind of more predominantly by students and staff, so it's just that technology has changed everything. The publishing industry is probably a little bit stressed by those sort of changes. But again, there are some opportunities we see already happening with the different types of offerings that are more suited for the digital learning environment now being offered by publishers too. So I don't think it's generally all bad news, it's just that times are changing.

MR COPPEL: Can I come to the collecting societies? You mentioned that technological innovations are disrupting the traditional model and there's a lot of adaptation taking place, and in that context it's often being submitted that the level of transparency and accountability is wanting. It's been suggested that the code of conduct, being a voluntary one, could be improved upon. In that context the EU directive offers a model for better transparency and accountability. Do you have any views on the EU model or the current voluntary code of practice?

MS BROWNE: I will make a couple of points here. I mean, we've participated a couple of times in the code review, the voluntary code of conduct review, and actually the first time we did it was I think back in 2006 and then we decided we weren't going to do it for a while but we've just done it recently I think last year. Look, there's a few problems with the voluntary code of conduct. It does appear to me that if the parties can't come to an agreement unanimously around the table that the code reviewer doesn't feel like he has the power or she has the power to actually make any reasonable orders directing the collecting societies to do something.

What we were trying to do in the last round of the code review was trying to get some additional clauses into the code of conduct which were in relation to releasing information, high level information, to the licensees. The classes of licensees, i.e., that, you know, the universities, the schools, the TAFEs, government schools, rather than to individual licensees, which was a concern from them. We were unable to come to any agreement on that and the code reviewer declined to make an order and seemed to think that the best way of dealing with this was actually

going to the Copyright Tribunal. I don't think the Copyright Tribunal has that power to make such directions either. We do have a declared some guidelines - the Attorney-General has some guidelines that are very, very old on declared collecting society guidelines, but now that is now - now that the statutory licence is now under the Minister for Communications it's probably timely to review that.

We probably think a better way of looking - that we do think there needs to be a bit more regulation and transparency and ability to direct collecting societies to do things. The Act doesn't give the minister any power to direct collecting societies to act in any particular way in relation to licensing or distribution of royalties, or in fact the general obligations to members or licensees. So we probably think a good thing to look at as a way forward might be the UK as a model, they recently enacted regulations. I think it's called the UK Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014, and that requires collecting societies to enact a code of practice that includes the following obligations: "Ensure that its dealings with licensees or potential licensees are transparent; consult and negotiate fairly, reasonably and proportionally related to terms of conditions of a new or significantly amended licensing scheme; and provide to licensees and to any potential licensees who have requested it information about its licensing schemes, their terms and conditions and how it collects royalties." So we think that's probably a model to look at.

MS CHESTER: Delia, that sounds - I've only had a quick look through the EU directive but it sounds like it's drawn from that, which would - - -

MS BROWNE: Yes, I think it's in compliance with - - -

MS FLAHVIN: It needs to comply with the EU directives.

MS CHESTER: So what would be helpful, though, is we'll obviously look at that as well, but if there's anything else that's in the EU directive that you think would also be sort of best practice in the Australian context, that would be helpful to know.

MS BROWNE: Okay, well I'll have a look. I will look at a bit more detail in the EU but the UK regulations are in compliance with the EU directives, so - - -

MS CHESTER: And that would address the issues that you have?

MS BROWNE: Yes, I think that, yes. It's simple, clean, and it's - you know, the UK is a common law jurisdiction like Australia so I kind of naturally look there.

MS FLAHVIN: One point to the commentary that we saw on those guidelines was that they're based around the ideal that collecting societies really are quasi-public bodies and ought to operate in that way, the rules ought to be set up in that way so that they have obligations to the licensees as well as licensers.

MS BROWNE: Yes, particularly if, you know, the collecting society is administrating a statutory licence scheme, and particularly if that statutory licence scheme - significant moneys are being paid by public money and taxpayer money under that licence scheme, so that would be for the government copying licence scheme and the educational copying licence scheme.

MR COPPEL: In that context do you see any roles for the ACCC to monitor the activities and outcomes of collecting societies, statutory collecting societies?

MS BROWNE: Look, I think that that's a question that's been raised from time to time and it's not something that, you know, we've discussed but I can't see why not.

MS CHESTER: Does this interface at all with the section 51(3) exemption of the CCA?

MS BROWNE: No.

MS CHESTER: It doesn't at all, which is about how licensing - it does go to licensing of copyright material.

MS FLAHVIN: I think that's more the point as to whether or not collecting societies ought to have an exemption from, you know, just general competition principles. This is, I suppose, the point that we're looking at is more a - I suppose the competition concept comes into it in some respects. It's more about transparency and - - -

MS CHESTER: Yes, no, I'm seeing it as - is it at all tangentially linked given that we still want to deal with the governance issues around the agencies themselves. And you mentioned before whether or not the tribunal had the powers to make certain decisions, the example I think that you mentioned was whether or not anything could be sort of zero rated.

MS FLAHVIN: Zero rated.

MS CHESTER: And from your experience nothing is zero rated?

MS FLAHVIN: No.

MS CHESTER: So is there an issue then around the powers of the Australian Copyright Tribunal or is it how decisions are being made, I'm just trying to get an understanding of what are the impediments and obstacles for using the tribunal in that way to help with - - -

MS FLAHVIN: We think it's a power issue. Our analysis of the relevant provision in the Copyright Act, and we've looked at it quite closely, is that the tribunal would have no jurisdiction to determine a zero rate. As Delia said, that's the view that was expressed by David Catterns, the senior counsel for the Copyright Agency in some recent tribunal proceedings. The Copyright Agency has, you know, historically applied, if you like, a zero rate to the disability statutory licence, and provisions there are the same, but the view that we reached was that the tribunal would have no power to do that, it's something that the Copyright Agency decided to do.

But it possibly has no power to do that, if any rights holder complained about that possibly, you know, the position would be that they had no power to do it. Then I suppose the practical overlay in all of that is that the statutory - the disability statutory licence will soon be replaced with an exception in the - you know, the legislation, the draft legislation that was released for discussion and the government has said that it will put forward in the next sitting of parliament, the disability statutory licence will be replaced with a free exception. That just makes a whole lot more sense with things, you know, with copying that all parties agree ought not to be remunerable, there doesn't seem to be much for obtaining a statutory licence overlaying with administrative obligations, et cetera. It makes more sense to treat that kind of copying as being subject to an exception.

MS BROWNE: Even the other thing is it's like where we can we should be focusing the data collection on stuff that is actually going to be remunerable rather than non-remunerable because there is a burden on the people filling out the survey then having to record stuff that actually isn't going to go anywhere towards remuneration.

MS CHESTER: Well, that was my next question, so the government does require an assessment of what's the regulatory impost of policy changes so it would be good to get your feedback on, given the current regulatory cost burden to schools and other educational providers under

the fair dealing provisions in terms of how it interacts with the statutory licensing, how might that change that regulatory burden if we move to an arrangement of fair use?

MS BROWNE: Yes, well, I just have a minor correction. Fair dealing is an area that really has little impact on the educational copying by schools and other education institutes. Look, and I just have to also give a bit of a positive talk about CAL. We actually try very hard with CAL and Screenrights to try and minimise the burden in data collection and we actually do kind of work quite close together to make it as accurate and reasonable as possible on the burden. So I just want to make that very clear on the public record. But with a fair use regime we will be able to probably furnish that a lot better and also stop actually recording stuff that clearly would be falling into that kind of green dot rather than the big red circle.

So I think that there is a huge ability to sort of try and improve the data collection methods. I'm just saying we are trying to do that all the time, both sides, all sides, Screenrights as well the Copyright Agency, you know, so that is something we are always trying to do but I think that there's a much better scope for us to actually be very innovative. Again making sure we're getting data that's going to help with the distribution and also the ongoing setting of fair use either by negotiation or by the tribunal if we fail. But hopefully, fingers crossed, so far we've been pretty good at negotiating with each other.

MS FLAHVIN: I was going to say, it's not just the burden on schools, on teachers having to collect the data, it's the burden on the Copyright Agency having to process the data when everybody accepts that these copying instances ought to be zero rated, just it seems a little inefficient to us to do that through the process of a statutory licence.

MR COPPEL: Okay, I'm going to stop here as we have another eight participants. So I thank you both, Delia and Anne, for participating today and again for the contributions throughout the inquiry process.

MS BROWNE: Thanks for the opportunity.

MS FLAHVIN: Thank you.

MR COPPEL: Our next participant is David Barnett from Pearson Australia. So David, when you're comfortable for the record if you could give your name and who you represent, and a brief opening statement? Thank you.

MR BARNETT: Commissioners, thank you for your time today. My name is David Barnett, I'm the managing director of Pearson Australia. Let me say that we welcome the discussion on ways to simplify the way that industry stakeholders work together to deliver better value to consumers. Pearson is the world's leading learning company. In Australia we're the market leader in learning resources, Access, and education services. Pearson has invested in Australia many, many millions of dollars over the years in developing Australian products and services and very much would like that to continue.

We do that because as a commercial organisation we believe we can achieve a good return but Pearson also has a bigger mission which is to help people make progress in their lives through learning. Every single day we work with schools and universities, teachers, lecturers, to help support them with their teaching and learning resources. Having said that, we appreciate that there won't be too many tears shed for a multinational corporation losing out through the changes that are proposed through the Productivity Commission's draft report.

But what we can't accept is the impact that we foresee on the Australian learner. Let's be really clear, the Australian learner will suffer because if the fair use recommendations are accepted then our ability to develop content, products and services in the future will be seriously compromised. I understand the Commission has rejected parallels to the Canadian experience but I believe that's probably semantics. Essentially what we think has happened in Canada is through the overhaul of the copyright regime the education authorities, having said they would continue to pay for licences, then back flipped, with quite serious consequences.

Let's also be clear what's proposed in the draft report in terms of the adoption of fair use would fundamentally undermine our business model and compromise our ongoing operations. This is because there is a serious misunderstanding included in the report. On page 19 of the draft report it states, "Most new works consumed in Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia's fair use exceptions." This is wrong. In schools publishing the vast majority of content is created from the ground up to align with the Australian curriculum and local environment. Australian education publishing is highly competitive which sees the creation of high quality print and digital learning resources. Australian educators are in fact spoilt for choice. And for the vast majority of instructors and institutions access to high quality learning resources is critical to supporting teaching and learning, including implementation of new curricula. This was I think

very clearly supported by the AEU in their submission to the ALRC review.

We think the existing copyright regime has struck the right balance between access for consumers and a fair return for creators. It means that a teacher who wants to copy a chapter of one of our books understands what he or she can do. The evidence of the number of pages copied would support this. I think we're looking at around one and a half billion pages per sampling period, or 300 pages per student per year. All at a very reasonable rate of $17 per student per year, which is a tiny percentage of the total education spent.

This fair regime has helped create an environment conducive to ongoing investment and innovation. And Delia talked about collaboration, we see lots of examples of good collaboration and it's actually taken place within the existing regime. So, for example, Learning Fields, which Delia also mentioned, has come out of the existing copyright regime, it's a collaboration, it's an industry collaboration which has taken to schools and students a very different offering of access to content at chapter level through a learning portal on a subscription basis, it's a world first. Learning Fields was created because the market, the teachers were telling us you need to be more innovative publishers, which we accepted, and the evidence also that we looked at about the level of copying which was taking place. All investments of course are inherently risky but companies need stability and certainty to support investment decisions.

So let me just be clear on the specific recommendations and just some final comments. Firstly about PIRs, which I haven't mentioned yet, our view on them is clear in our submission, we don't believe that that would be a positive development for higher education learners who are the consumers of imported products in general in education. Were the recommendations in the report around fair use to be accepted, and I'm talking specifically about the example of a teacher copying a chapter of a book for their entire class over and over again. We think this would significantly undermine Pearson's confidence in the market. As a global commercial organisation Pearson's is constantly looking for - are looking to make decisions about where it will allocate its capital and ongoing investments. And those decisions are constantly reviewed.

As the AEU submission, as I referred to earlier, to the ALRC suggests, this would have serious impacts on the development of appropriate learning materials for learners. So ultimately if there's no product to copy any more then there's no product to copy any more, there's no product for students to learn from if there's no ongoing

confidence and platform to support investment. Ultimately learners are the casualties in this exercise.

MR COPPEL: Thank you. Maybe I can begin by asking a similar question that I asked Delia and - the previous participant, with respect to the introduction of fair use and how it interplays with the education statutory licence. Do you have a view as to what would be the leakage, that's the term, leakage, from such a change in the Australian copyright law and on what basis do you form that view?

MR BARNETT: Are you talking about the remunerable and the non-remunerable leakage?

MR COPPEL: Yes.

MR BARNETT: Can I actually get a glass of water? I'm just about to expire. Look, I don't think it's clear actually what the - I appreciate Delia's comments about the specific number she mentioned that are around the orphan works and freely available Internet material. The first think I would say is I think we understand the concern around that material being caught up in the Copyright Agency sampling activity, we understand that, but we think the mechanism exists through the Copyright Tribunal to deal with that and have a discussion about what could be zero rated and what should be included for copying.

What I want to make really clear about our position on this is we're talking - Pearson is talking about the materials it spends significant moneys investing and developing to help learning. That is the thing that we're most focused on, both because that's our core business but also because that platform and having security of that platform then allows us to develop new innovative learning products. So it creates an environment to support innovation. I mentioned Learning Fields, that's a good example in the past.

From Pearson's experience specifically we have created a product called Lightbook, which is a, for want of a better phrase, a digital learning environment. It's not a physical book, it's a place where students learn. It contains interactive material. It contains assessment objects that help students learn in quite a personalised way. Like most new products that you build you don't get a payoff immediately, you get a payoff maybe in years two or three, or whatever it might be. For Pearson to have the confidence to invest ahead of a good return in a product that's brand new that's quite risky, the business here needs to have an ongoing platform to provide it with that financial security.

I think that, back to the fair use proposal in the PC's draft report, the idea that a teacher can make a copy of a chapter and distribute that to 30 students and for that not to be remunerated provides - that's our core business, teachers using our content in the classroom either in the classroom setting or to give the students to take home to use in their own time, that's the business that we are in every single day. That's what is potentially threatened by the extension of fair use.

MR COPPEL: So is the crux of the issue uncertainty as to the impact of the change of shifting to fair use rather than accepting the idea that if fair use were adopted there would still be remuneration for educational materials under the education statutory licence the leakage would be low?

MR BARNETT: Well, at the moment if I - I'm just referring to your fact sheet here and there's a number of example scenarios, short scenarios at the bottom of that page, those are scenarios that refer to what goes on every single day in the classroom that's core to our business. If that was no longer remunerated because it was considered fair use and therefore exempted from remuneration that would create a scenario, we would have to say, is clear. What is the environment that we are publishing into, if a teacher can take our print product and run off 30 copies and then next week 30 more copies, and then in three weeks' time 30 more copies, then how much of the book remains that hasn't been copied?

But it doesn't have to be multiple times, a single instance, which at the moment is remunerated under the statutory licence, that creates a significant issue for us and it would therefore create both an immediate business risk of our existing operations but an environment in the future where we would have to say, well, is it really worth investing these millions of dollars here or should we take this money and invest it in another market in another part of the world.

MR COPPEL: But Pearson is represented in over 70 countries, are there other countries with fair use where you can draw on that experience, the US, Philippines, Korea, Israel, which have a fair use exception, is the scenario that you're painting here from the adoption on fair use on that has materialised in these jurisdictions?

MR BARNETT: I think those markets face challenges all the time. Canada is an example of a market that has faced real recent challenges. I can't speak for those markets, I can speak for my market, and that reality is a very real one for us in the future.

MR COPPEL: I think Canada is one of those examples that's often being put forward. It's not a fair use country, it's a fair dealing exception.

But as I understand, there were a number of changes that took place there that were unrelated to what we're proposing in our draft report. But you do still operate - you operate in Canada?

MR BARNETT: We do operate in Canada.

MR COPPEL: So maybe you can - - -

MR BARNETT: But the environment is far less attractive and the investment is being considered far more closely than it perhaps was in the past.

MS CHESTER: But you are unable to copy - a comment on any other jurisdiction that Pearson operates, in just Canada and Australia?

MR BARNETT: Not specifically around the issue of fair use.

MR COPPEL: What about parallel imports, you've noted that you don't agree with the proposed recommendation that the submission says that it could lead to low cost, low quality import editions, Australia has an Australian curriculum so that the books that are used in schools are specifically designed to cater for that Australian curriculum, doesn't that provide some form of natural territorial boundary that would limit their scope for parallel imports in the school sector?

MR BARNETT: It does, and I'm not talking about the school sector, there's no issue with the PIRs for schools because, as I said earlier, all the content we create here is built from the ground up, 95 per cent of it is created from the ground up. My comments refer to the higher education market where probably about half or a bit less than half of the industry's revenue comes from US originated or UK originated product that's imported and sold essentially in the same form. Students can currently obtain copies for their own personal use from offshore providers such as Amazon and Book Depository without any issue.

They have fast service, they get them here, so there is already a way to deal with the price concerns that have been around this issue in the past. Our concern is this would open the opportunity for resellers to then import from all over the world any edition that they want to and resell it here, including pirated editions. So there's a very active pirate industry that creates very high quality facsimiles of products and distributes them around the world. That would be, I guarantee you, that would become quite a flourishing market here with zero return to authors and publishers.

The other point that's worth making about the higher education sector is that there's a hidden economy that takes place in higher ed around the support of lecturers, is that publishers create high quality materials which they provide to lecturers to support them in their teaching which are not charged for, supported by the sale of the book. So that would be disrupted by the import of low quality or pirated editions from other parts of the world. So I think it's really an unnecessary - for the terms of the - I can only speak for the education market, I don't think there's really any benefit to be gained by changing the PIRs for educational - the principle concern around price, and everyone understands that argument, is really dealt with by students having all sorts of options for accessing from other parts of the world.

MR COPPEL: But on piracy or low quality imports of education text books, why is PIR the sort of instrument of choice to deal with such an issue, we have laws that would enable you to pirated copies?

MR BARNETT: Well, it's very hard to see it. It's very hard for us to see it. So if a large university bookstore chain imports a thousand copies of a pirated edition from some other part of the world and resells through their channel we don't really - we don't see that. We might see a book sitting in a bookstore but we don't have visibility of that activity and it's very - as I said, it's very hard to actually find out and determine whether something is a genuine product that's been imported from a genuine provider in Europe or from a pirate sitting somewhere else in the world.

MS CHESTER: David, what's the current sort of price differential on tertiary text books between Australia and - - -

MR BARNETT: It really varies. It varies obviously depending on the currency, so the currency at the moment is low so the - - -

MS CHESTER: So setting currency issues aside, do you have data that you would be able to share with the Commission?

MR BARNETT: I haven't got it with me but last time I checked we were reasonably competitive with prices particularly in North America.

MS CHESTER: So then if we set aside the issue of unauthorised copies that you referred to, what then is the risk of a flood of offshore texts if you guys are price competitive today and you also have the additional advantage of no transportation costs internationally?

MR BARNETT: I think, as I said before, it's the issue around creating uncertainty in the market, that's our concern. The other thing I should say

about higher education is that we invest locally in developing higher education products. So some product can be imported and resold without any changes but we actually do invest in building, for subjects that need localisation we invest in building those products out and driving innovation. We do rely on the certainty from that investment from the products that we import, that we are licensed, because they're Pearson products, to import and resell. We rely on that to create an overall financial position that supports that investment.

MS CHESTER: So your submission did mention that your profits on imported content subsidised local content, can you just explain how that business model works?

MR BARNETT: It's a scale, we're in the scale business, so as I said we need to create a business that has enough scale for us to support ongoing investment. If you are going to create, if you can take the risk in building a big new biology text book or a big new physics text book, you can't do that from a zero base, or it's much harder to do it from a zero base.

MS CHESTER: So I just kind of wanted to understand the cross subsidy issue and how that works, what is the level of cross subsidy between profits on your imported content versus - - -

MR BARNETT: I haven't got that number, Karen, I haven't got that number in my head.

MS CHESTER: Are you able to give us that number, because it's just - - -

MR BARNETT: I'm not sure we actually calculate the - let me take that away as a question on notice.

MS CHESTER: Yes, because it's just difficult, you know, statements are made in submissions that become part of our evidence base and we need to test the efficacy of them. I'm just trying to understand if this is a great advantage to local content through this cross subsidy what's the extent of that cross subsidy, so if you're able to back that up with some evidence that would be helpful.

MR BARNETT: Well, let me take that away as a question on notice.

MS CHESTER: You mentioned before I think the split was about 90/10 on your revenue for local versus imported content for school and then what was it for tertiary?

MR BARNETT: It's 50/50, roughly.

MS CHESTER: How does that then flow through to the royalties for local versus offshore across those two different sectors?

MR BARNETT: Really, royalties will vary by contract, by author contract, so there's no hard and fast or uniform percentages to apply, it really depends on the individual author contracts.

MS CHESTER: Okay. So when Pearson is looking at a business case to go with the local content and then making that assessment based on some sort of required rate of return to Pearson, are there different rates of return that are required for local content in Australia versus the imported offshore content given that cross subsidy that you discussed in your submission?

MR BARNETT: Sorry, can you just repeat the question?

MS CHESTER: So I'm just trying to work out if there's a cross subsidy happening that would suggest that there might be a different required rate of return on publication sales from local content versus publication sales here in Australia from offshore content?

MR BARNETT: Obviously anything that we're building ourselves here generally speaking will sell mostly in Australia. We have to carry the business case based on the performance of that product within the Australian geography.

MS CHESTER: So does that mean that you have the same required rate of return in a business sense on imported content being published and sold in Australia and local - - -

MR BARNETT: That business case would be carried by the originating geography for a wholly, you know, US or UK developed product.

MR COPPEL: I'm going to be brutal on timing. We've just passed the allocated time so thank you, very much, David.

MR BARNETT: Thank you.

MS CHESTER: And if you could come back as soon as possible with those numbers that would be really helpful, thank you.

MR BARNETT: Thank you.

MR COPPEL: Our next participant is Kane Waterworth from Kawat Enterprises. So welcome, when you're comfortable if you give for the purpose of the transcript your name and who you represent and then a brief opening statement.

MR WATERWORTH: I'm Kane Waterworth, I'm from Kawat Enterprises, I'm working mostly with trying to - digital technology trying to solve Australia's labour productivity problem. I've actually got to be a bit careful because I mostly wanted to talk about digital disruption but I understand that's outside the scope of what we're here to do today.

MR COPPEL: Yes.

MR WATERWORTH: So what I want to talk about is that the problem is trying - for a lot of businesses, trying to get information from the government and I was wanting to see if maybe the intellectual property arrangements can be done to include some provisions similar to what the GIPA Act is in New South Wales. The GIPA Act allows a business to get information from the government and the onus is on the government to prove that it is overwhelmingly in the public interest towards non-disclosure because the problem is if it's just not an overwhelming requirement then the government is unlikely to be in favour of the person seeking information or business seeking information.

Now the problem is that - so with the GIPA Act you've got a number of ways in which if the decision is towards non-disclosure that decision can be challenged. So I think there's about three different ways, there's to the Commission, it's to the - there's to the Privacy Commission, sorry, and there's a - you can appeal, actually directly to a lot of government departments, so, yes, there's a few ways to do that. Now the problem is also now once that information if it's successful then another problem is that the government itself is keeping the information accessible and in a compatible format to hand the information over. Because a lot of times they may turn around and say well that's going to be 58 hours or a hundred hours to retrieve that information from multiple data bases which is effectively the same as, you know, you're not going to get the information anyway. So that's a big problem as well.

There may be a self-interest there where governments don't want information released. They wish to make their department's image look good by not allowing information that could potentially make them look bad. That's the main part of what I wanted to talk about, so basically provisions to ensure that information is released and the government really has to prove that they can't release it for it not to be released. There's one more thing, and that is a government application of copyright.

Government, I know in the state government at that level a lot of public sector leaders or whatever apply copyright willy-nilly, and even when the government doesn't wish - has no intention of developing a product or service, and that effectively stops innovation from occurring because now no one can't use that because the copyright has been applied.

MR COPPEL: Yes.

MR WATERWORTH: So they are the two - that's the two main things I wanted to talk about.

MR COPPEL: Great, thank you, Kane.

MR WATERWORTH: Thank you.

MR COPPEL: I think many of the points that you have made relate to the access to information.

MR WATERWORTH: Yes.

MR COPPEL: That's provided by the government, which may be for reasons other than copyright.

MR WATERWORTH: Yes.

MR COPPEL: I think you were referring to things like freedom of information provisions?

MR WATERWORTH: Yes.

MR COPPEL: I will point, however, that in the draft report we do have a recommendation that relates to Australian state and territory government making available in an open access way the material that comes from publicly funded research. So we think that as a default that information should be freely accessible and there should be limited exceptions. So I think that is in a specific context but it is from what I can understand consistent - - -

MR WATERWORTH: But if you included that like as a federal - under federal law, wouldn't you be able to then say be able to sort of systemise that release of information across the state government, or - - -

MR COPPEL: We're recommending that Australian state - the Australian Government, the Commonwealth Government, state and territory governments, implement this recommendation.

MR WATERWORTH: So are they going to be all under a similar standard, or - - -

MR COPPEL: How the actual, if the recommendation is adopted, how they actually implement the recommendation isn't specified, they don't get into that detail.

MR WATERWORTH: Because it's got to be standardised, yes, it's got to be standardised for it to really work because otherwise everyone has got their own system. Yes, so that provision where the government really have to prove that its nondisclosure is in the public interest, that's really important, like, an overwhelming provision because that's it, you are always going to have - it's making work for someone so someone is going to say no, basically. So, yes, so that's about it, that's all, really. Most of the stuff I wanted to talk about was about, yes, the digital disruption and the scope for productivity policies. I guess that's outside the scope of what we're talking about today.

MR COPPEL: Yes.

MR WATERWORTH: And the measure of productivity in new technologies which was cited by the report as being problematic. That's about it. Thanks.

MR COPPEL: Okay, thank you very much, Kane.

MS CHESTER: Thanks, Kane.

MR COPPEL: So we're going to take a brief pause for afternoon tea and stretch our legs and we'll reconvene in 10 minutes' time, so 2.40. Thank you.

ADJOURNED **[2.31 pm]**

RESUMED **[2.41 pm]**

MR COPPEL: Welcome back. We'll reconvene with our next participant who is Rebecca Harris from Universities Australia.

MS FLAHVIN: Also Anne Flahvin from Baker and McKenzie, if that's all right?

MR COPPEL: Thank you. So when you're comfortable, for the transcript, if you could both give your name and who you represent and then a brief opening statement?

MS HARRIS: Sure. Okay. So my name's Rebecca Harris. I'm the Director of Copyright for Universities Australia.

MS FLAHVIN: I'm Anne Flahvin from Baker and McKenzie, wearing my other hat, here with Rebecca today.

MS HARRIS: Yes. So thank you for the opportunity to provide comment on the Commission's draft report. Universities Australia strongly welcomes the draft recommendation to enact a fair use exception. This reform would put Australian universities on a level playing field with universities in the USA, Israel, South Korea and Singapore. In a highly competitive international education market this is significant. We're a little surprised there's been so much of a scare campaign around fair use. There's been a great deal of misinformation about the likely impact of fair use on educational publishers and authors, from our point of view. It would be good if I could set the record straight today.

Firstly, claims by the copyright agency and others that fair use would result in universities refusing to enter into collective licences, are without foundation. It certainly is the case that universities have an increasing number of alternatives to the part 5B statutory licence but that sort of stuff is already happening and it really has nothing to do with fair use or the introduction of the fair use exception. It's due to the increasing range of high quality, open education resources and the increasing spent on direct licences with publishers. For example, the EU announced last month that it is aiming to ensure that all publicly funded scientific papers will be freely available by 2020. This is part of a global trend towards open access for academic publications that will continue to make the statutory licence increasingly less relevant to universities. But this, in itself, has nothing to do with fair use.

The amount that universities spend on library resources has been increased. The most recent figure, from 2014, was $300 million per year that universities spend on education resources through publishers and the like. These licence fees flow directly from universities to the rights holders and will continue to do so regardless of whether or not fair use is enacted. It's also the case that transactional licensing is becoming more efficient and therefore more attractive to universities for many uses.

We do not resile from the fact that some of what is currently paid for under the statutory licences would most likely come within a fair use exception if enacted. To put this in context though, universities currently pay, under the statutory licence, for freely available internet content including content uploaded onto blogs and freely available wikis that no one ever expected to be paid for, and also orphan works. The money paid by universities for this content is eventually paid to copyright agency Viscopy members who have no connection to the works that were copied, that's because copyright agency Viscopy has nobody else to distribute that money to.

Secondly, the copyright agency is wrong when it says that we don't need fair use because the statutory licence covers all uses that universities want to engage in. It doesn't. Some examples of this are, for example, massive online open courses or MOOCs. Neither of the statutory licences permit universities to use small amounts of content in MOOCs, that's because the statutory licences cannot be relied on for content that is made publicly accessible regardless of whether it has been done for educational purposes. None of the existing fair dealing exceptions apply either. Our universities are therefore not on a level playing field in a highly competitive higher education market.

Another example is material that's contained in theses. The statutory licence doesn't apply when a university makes student theses publicly accessible in a digital repository. Often students will include small amounts of third party content in reliance on their own fair dealing rights. But the university is required to remove this content before uploading it to a digital repository or risk being, maybe, sued for infringement unless the student has been able to obtain a permission from the rights holder. We do have a couple of examples of that as well.

Another example is data and text mining. New technologies such as text mining and data mining are transforming scientific research and particularly also in the digital humanities by enabling automated searches of vast quantities of text and data to look for patterns, trends, and other useful information. But since they involved reproduction of entire works, the statutory licence does not apply. This is limiting the ways in which Australian Universities and research institutions can make full use of these cutting edge technologies.

These limitations on academic research and engagement are acceptable in a knowledge economy. They place Australian Universities at a very real disadvantage to their counterparts in jurisdictions such as the USA, Israel and Singapore who have the benefit of a broad, flexible, fair use exception.

Finally, there's been some talk about Canada as an example, and some opponents of fair use have held up Canada as an example of what might happen to the educational publishing market if fair use is enacted. One of the things we could point to is that why haven't these groups pointed to the US, the home of fair use, where the educational publishing market is thriving? The same goes for Singapore and Israel, fair use jurisdictions with thriving educational publishing markets.

As we set out in our submission, there are a whole range of factors that have impacted on the Canadian educational publishing market, not the least of which is greater availability of high quality open education resources. It's also interesting to note that the Canadian reforms do not appear to have prompted access copyright, the Canadian equivalent of copyright agency, to finally agree to offer transactional licensing to universities after many years of refusing to do so.

MS FLAHVIN: They do appear to have prompted.

MS HARRIS: They do appear to have prompted. Sorry, my – I'll read that again – do appear to have prompted the use of transactional licensing to universities after many years of refusing to do so. So they are now enacting transactional licensing to universities. Thank you. So happy to answer any questions that you have.

MR COPPEL: Okay. Thank you, Rebecca. You've given a number or examples of, sort of, inflexibility with the copyright laws in the education, higher education sector and you mentioned MOOCs as being one example of that. It's an example that's been brought up in other hearings so far. Can you tell us then what needs to be done to get a MOOC up and running under the current copyright legislation?

MS HARRIS: I'll probably ask Anne to help because she interfaces a lot with the people who are directly doing this.

MS FLAHVIN: Sure, sure. It's not so much that without fair use you can't operate a MOOC. The point is that in fair use jurisdictions, people putting MOOC courses together have that flexibility to use little bits of content, excerpts from this or that, or tables and charts in a MOOC. In Australia, the statutory licence doesn't apply to that so you can't because the material is made publicly accessible and the fair dealing for research and study exception doesn't apply.

I think in some of the university - individual university submissions to the Commission's first Issues Paper, some universities gave examples and

perhaps it was in the CAUL submission, Council of University Librarians, it gave some examples of the enormous licence fees that universities had been quoted when they sought permission to use, you know, a table, a chart.

In many cases, that was content that had been created by the academic running the MOOC course. But because, you know, their material had appeared in an academic journal, had to go to the journal publisher to seek permission to use the content and in some cases they were quoted, I think, in one case it was something like $40,000 to use this one. So they had to take that content out of the course. So that's the point. It's not so much that we can't run MOOCs, but in a highly competitive, you know, international education market, Australia is placed in, you know, a disadvantageous position not being able to use kinds of content that other, you know, MOOC operators and other jurisdictions can use.

MR COPPEL: Is it the cost of getting the material from a licence or is it the cost of actually going through a process of ensuring that every aspect - - -

MS FLAHVIN: I suppose it's both of those things. So in some cases the permission is just refused in circumstances where in a fair use jurisdiction it might be – and we're talking about very small amounts of content. So, for example, in the States, guidance given to people who are creating MOOC courses is generally along the lines of when you're looking – when you're doing your fair use analysis putting a MOOC course together you need to be much more conservative than you would need to be if you were putting together a course that is just going to be available to, you know, enrolled students and won't be publicly available. Because of the public accessibility of MOOC content, you take a much more conservative approach to determining, you know, is it fair to use. So it's small bits of content, you know, a graph, an illustration here and there.

So the problems that we face in Australia are, you know, permission might not be granted, or it might be granted and you're told, you know, $40,000 and you think, well no thanks. As you say, the administrative burden of having to go and lock down all of those permissions, is a burden in itself.

MR COPPEL: The other example you gave of the lack of flexibility standing in the way of universities collaborating with industry, can you give an example of where the copyright law has prevented such collaboration with industry?

MS HARRIS: In terms of research collaborations with industry?

MR COPPEL: For example.

MS HARRIS: I'd probably have to go back to a specific example at a university. I haven't got one to call to mind, but I can take that on notice and give you several examples.

MR COPPEL: Okay.

MS FLAHVIN: We know, for example, because the statutory licence doesn't apply if universities are engaging with, you know, members of the public, industry, you know, research bodies, et cetera, you just couldn't do it. So, you know, that is one way in which fair use becomes very important for the higher education sector at a time when the, you know, government policy is driving them to engage more and more broadly with industry and, you know, the wider world. The statutory licence doesn't apply to that. The fair dealing and, you know, the existing purpose based fair dealing exceptions certainly don't apply to that.

MS CHESTER: Just so we understand it, so stat licensing, because it's publicly available, are out?

MS FLAHVIN: Yes.

MS CHESTER: Fair dealing with the MOOCs because it's not within the four sandstone walls, it goes outside?

MS FLAHVIN: It's not so much that, it's just that fair dealing – what our Courts have said about fair dealing in Australia is that it can only be relied on by the individual person doing the research. So, for example, copyright agency expressed the view that if two or three academics are engaging in, you know, collaborative research that they couldn't rely on the fair dealing for research and study exception to share bits and pieces of content among themselves, like (indistinct) you do your research you can rely on exception.

That's the point that we've made with theses that, you know, when you put the thesis together you can rely on the exception. In the old pre-digital world, you'd write your thesis, you know, it'd be up there for anybody to have a look at and that would be just fine. In a digital environment, when the university puts it on a digital repository, they're copying that again and they can't rely on the fair dealing exception that the student had. So they're actually cutting content out of theses.

MS CHESTER: So when people have suggested to us this morning that we've got it wrong, that there's nothing in fair – that fair dealing is technologically neutral, that's the language of fair dealing. It's how it's then used with technology and uses changes that makes it non-adaptive?

MS FLAHVIN: It's kind of two points. I mean, it's technology neutral in the sense that, you know, you can – I can use fair dealing if I'm using digital technology. I think the real limitation with fair dealing versus fair use is fair dealing is purpose based and the Courts say you have to look at the purpose of the person doing – and the reason that's such a problem for schools and universities is that our Courts have said they don't have the relevant purpose. They're doing the copying for their educational purposes, not for the student's purpose of research or study. So that's the main difference there.

MR COPPEL: So given these examples relating to MOOCs, collaboration with industry, do you have any idea of whether they are acting overall to prevent that sort of activity or that sort of innovation in the university sector, or are they rare examples?

MS HARRIS: They probably would be going towards that because every university has got a system by which they have copyright offices, and copyright people who are advising people on their regular day to day work, what they use, what they don't use in terms of copyright material. If it's flagged that something isn't allowed under the statutory licence, it's quite likely that there will be a, kind of, no answer, you can't do that. So we probably have not a great knowledge of exactly what is being prevented, as it were, because if people are coming up against those barriers and saying, "Well, we better look at a different way of doing it", or "We'd better not do it that way", then that will intrinsically stymie the, sort of, innovative uses or the research collaborations that they'd be entering into.

MS CHESTER: Rebecca, you mentioned before, similar to our previous participant, that under the statutory licensing the universities are paying for content that's either freely available or subject to orphan works. Do you have a quantum figure on that?

MS HARRIS: We don't have access to that data either. So I can only rely on estimates that have previously been given. So we don't actually have access to the data on what that might be so, yes.

MS FLAHVIN: UA hasn't engaged in that same analysis that CAG engaged in when they went through the data and tried to put that number together. Universities haven't engaged in that. But look, I mean, a big

part of the problem is that we – schools and universities, we just don't have full access to that data that would show us, you know, what – who – which rights holders they haven't been able to identify, you know, what – we don't have that data.

MS CHESTER: When you did get previous data on that, was it, sort of, a comprehensive figure and can you share the order of magnitude in terms of - - -

MS HARRIS: Well, we don't have any data on it, so - - -

MS CHESTER: You were never given it even though - - -

MS HARRIS: No.

MS CHESTER: Okay, all right.

MS HARRIS: So, for instance, the estimate that Delia might've given would be the only type of access to information we'd have. So we don't have that fine grain detail because we don't have the data to analyse.

MS FLAHVIN: It's probably the case that schools are copying freely available internet material more than universities would be.

MS HARRIS: Yes.

MS FLAHVIN: Yes. There's little doubt on that.

MS HARRIS: Certainly we have more accurate figures on things like the amount of money that the sector is paying through digital subscriptions and so on to access things like journal articles and so on and so forth. The Council of University – Australian University Librarians keeps those figures and the most recent estimate from 2014 is around – just a shade under 300 million per year.

MS FLAHVIN: 300 million, yes, yes. Fair use won't change any of that.

MS HARRIS: No, that will still be paid for. The university sector will always need to rely on subscriptions for their research material that's used, you know, both under-graduate, post-graduate and research uses. So that figure will – fair use won't affect that figure whatsoever.

MR COPPEL: There is, though, the onus on the lecturer or the academic to make a judgment as to whether something is fair use or not fair use and

they may not be legally trained so there's a role for tools to support that decision making process.

MS HARRIS: Yes.

MR COPPEL: A number of jurisdictions that have fair use have these tools. Do you have any view as to whether they are effective in reducing that uncertainty?

MS HARRIS: Yes.

MS FLAHVIN: Can I jump in there?

MS HARRIS: Yes, go.

MS FLAHVIN: I mean, one of the real differences, I think, between Australia and some other jurisdictions, and perhaps, you know, Canada might be a jurisdiction to compare us with, in Australian universities that process of making content available to students is generally very centralised. We have those learning management systems that people think of academics putting course content up and students accessing them. Actually, what's generally happening is the student is accessing a link to content that sits on an E reserve and that - you know, the decision to put that content up and to do the copyright clearance, that's done at a very centralised level in most – I think, in all universities.

MS HARRIS: Yes.

MS FLAHVIN: So this concern about academics not knowing how to construe fair use and being concerned about what they can and can't do, there's two points to make about that, one is that, you know, to a very large extent that won't be an issue because they'll just do as they're doing now, they put – they send their content in; the copyright officer, or whoever is tasked with that, makes a decision, does this fall within the statutory licence, you know, it would be, does this fall within fair use. The other thing to say is that the university sector would provide its people with, you know, carefully crafted guidelines that would give detailed assistance.

MS HARRIS: In fact, we have a history of having done that for a long period of time. We operate with all of our 39 university members making sure guidelines are updated, queries are answered, that becomes general knowledge. So that, kind of, iterative process of compiling guidelines that are then widely distributed through the sector has always been our

practice. So we would expect that to continue to give people quite clear guidelines of fair use and those decisions. Yes.

MR COPPEL: Are there ever practices that would serve to limit, at least during a period of transition, the degree of uncertainty or lack of predictability, in your view?

MS HARRIS: I think it'd probably be fair to say that if a fair use exception was enacted, we are already starting the mechanisms of how to actually advise the sector of how to go about using information, making decisions on information, and so on. So a period of uncertainty would be quite limited because we're already operating at that level in terms of being across any guidelines or obligations or compliance that universities would have to measure up to. So we wouldn't think that - given that we've already got the infrastructure in place, that it would be a pretty painless transition in terms of understanding exactly what to tell universities on how they should be behaving.

MS FLAHVIN: We've dealt with copyright reform in the past.

MS HARRIS: Yes.

MS FLAHVIN: And dealt with new exceptions. We've dealt with changes to the statutory licence in the past.

MR COPPEL: A number of submitters on the draft report have argued in favour of fair use, but say that the approach proposed by the Australian Law Reform Commission was preferable to the one in the PC draft report. I don't recall seeing any point on that in your post-draft submission, but do you have a view on that issue?

MS HARRIS: I think it'd be safe to say that we have yet to explore that. Do you want to answer that question? Yes.

MS FLAHVIN: Yes. I think that's absolutely – I think that the position that the sector has taken is, you know, "We want fair use. We think it's a bit of a no brainer. Let's sit down then and talk about well, what should the fair use factors be?" We certainly, at the time of the ALRC Review, expressed strong support for the ALRC's fair use factors. But we haven't really consulted with the sector as to, you know, "If you had a choice between the Commission's factors and the ALRC's factors, which would you prefer?" That's not a discussion that we've had.

MS CHESTER: Yes. If it is possible to have that discussion within the frame of our inquiry, that would be helpful.

MS HARRIS: Okay.

MS CHESTER: Lest we have a further consultation post our report being considered by government. I think the main issue that's been raised with us, and it's probably a reasonable point, is that because we started to import some outcomes based terminology in our fair use factors, that would then make it more difficult to be able to draw on a leverage from offshore jurisprudence and offshore guidelines and the like. When we, sort of, talked through what were really our objectives there, it wasn't that disparate to what the ALRC was trying to achieve through their principles, so.

MS HARRIS: Yes, we can come back to you on that, yes.

MS CHESTER: That would be really helpful. Thank you.

MS HARRIS: Yes. We can come back on that.

MS CHESTER: I don't have anything else.

MR COPPEL: Anything else?

MS CHESTER: No.

MR COPPEL: Great. Thank you very much.

MS HARRIS: Thank you.

MS FLAHVIN: Thank you.

MR COPPEL: Also thank you again for your initial submission and the submission on the post-draft – on the draft report.

MS FLAHVIN: Pleasure, and thanks for the opportunity.

MR COPPEL: So our next participants are from Free TV and also Channel 9 and Channel 7, Sarah Waladan, Justine McCarthy, and Irene. Yes. So please make yourself comfortable and when you're ready if you could give your name and who you represent individually, for the transcript, and then a brief opening statement. Thank you.

MS WALADAN: Sir, my name's Sarah Waladan. I'm the manager of Media Policy and Regulatory Affairs at Free TV Australia.

MS McMONNIES: Irene McMonnies, Nine network Australia, I'm corporate counsel.

MS McCARTHY: Justine McCarthy, legal counsel for Regulatory and Business Affairs at Seven Network.

MS WALADAN: So thank you for inviting Free TV to address the Productivity Commission Inquiry and to answer any questions that you may have. Free TV is the peak industry body representing Australia's commercial free to air broadcasters including Network 7, 9, 10, Southern Cross and Prime. Our members provide 15 channels of content across a broad range of genres free to the public, as well as a range of online and mobile offerings. Over 30 million Australians tune into free to air television on any given day and the most watched shows on television are Australian. In 2015, for example, every one of the top 50 programs on free TV was Australian. Commercial free to air broadcasters invest over $1.5 billion on Australian content and are the major underwriters of the Australian production sector employing over 15,000 people both directly and indirectly.

Australian copyright law provides the fundamental framework that incentivises the production of this highly valued local content and enables broadcasters and other content industry businesses to invest in the industry. It is well established that, for optimal benefit to the economy and community welfare, this framework should strike the right balance between incentivising and rewarding creators, innovators and investors on the one hand, and facilitating individuals and businesses to access and share information, ideas and products on the other. Copyright is also a critical mechanism for supporting the creation of cultural works that capture uniquely Australian stories.

Free TV's overarching concern with the draft report is that it dismisses concerns about the impact of its recommendations on creative industries on the basis that Australia is a net importer of IP. This analysis, however, does not appreciate the cultural importance and welfare enhancement of Australian content creation. The availability of cheaper or more readily available content from other markets is not a substitute for an entire local content industry or the cultural value that that content holds. Local Australian creative industries enrich our society, reflect and contribute to our sense of identity as a nation, and also play an important role in attracting tourism, migration and business to Australia.

Free TV's view, therefore, is that a number of the draft report's recommendations which relate to copyright would have a detrimental impact on the ability of broadcasters, and other content producers, to

continue making and investing in Australian content. Due to time restrictions, I'll just briefly provide two examples which are the key concerns for free TV.

So firstly, Free TV strongly opposes the proposed replacement of the current fair dealing exceptions with a broad fair use exception. The existing fair dealing exceptions for criticism and review, parity and satire and reporting the news, are used on a daily basis by broadcasters in compiling programing and they provide a level of clarity and certainty for broadcasters around the uses of copyright material that can be made for free. Principles of economics suggest that legal rules must be well defined and known in order to achieve efficient outcomes. If rights are not well defined, users will be less likely to seek licences to use copyright works and this will, in turn, undermine the market for those works. Decisions to invest in content creation will be adversely affected as a consequence.

Fair use in the US has been described by academics as a moving target. It's introduction here would massively increase uncertainty and risk negatively impacting both use and creation of copyright works. While it's important that copyright laws adapt and change in response to changing technologies, the question of how this is best achieved in the context of the Australian legal system needs to be considered. Free TV believes that no case has been made out for such a fundamental change.

In considering the introduction of fair use in the UK, the Hargreaves Review effectively found that the economic benefits of a more adaptive copyright regime are more likely to be achieved by an approach of legislating additional prescriptive exceptions rather than adopting fair use. This was because of, basically, the serious doubts about the viability of the US case law based legal mechanism.

Then just very briefly, the second example I'll just briefly mention is the Safe Harbour Scheme. So Free TV opposes an expanded Safe Harbour Scheme to cover a broader set of online service providers, in the absence of any amendments to ensure that the authorisation infringement provisions are also operating as intended in the online environment. So our view is that the law should first ensure that where a service provider is aware of an infringement on its network, and if it is within the power of the service provider to take reasonable steps to prevent that infringement, that it should be required to take those steps. Without effective authorisation provisions, the expansion of a Safe Harbour Scheme, in our view, is illogical. So Free TV's detailed position on these, and other issues, is providing in our written submission. Thank you for having us here and we welcome any questions.

MR COPPEL: Great, thank you, Rebecca(sic). Maybe if we begin with the proposed recommendation on fair use and you've made the point that fair use would undermine the investments in local content. In the hearing so far, we've made the point that fair use doesn't equal free use and the fairness factors would allow for remuneration of copyrighted works. So my question is what, in your view, would be the materials that are produced currently that would no longer be remuneration under a fair use provision?

MS WALADAN: Well our view is that exactly because of the uncertainty and the lack of clarity that would surround a fair use provision, it's very difficult to point to specific exceptions that would no longer be remunerable. However, the point really is that the introduction of fair use will lead to a re-examination by both rights holders and copyright users around what falls within the scope of the free exceptions and what doesn't, what falls outside of that. So the question of what will still be covered, you know, will be a moving feast and will be redefined, and there's a lot of uncertainty involved in that process.

MR COPPEL: The recommendation also comes with measures that are also aimed at limiting that uncertainty during the period of transition and thereafter. There are other jurisdictions that have adopted fair use. Is that a basis for getting a better grip on that issue of loss of potential revenue from materials that are no longer remunerable?

MS WALADAN: So, for example, if there were – what sort of?

MR COPPEL: I'm just trying to get a better understanding of the depth of that concern, because we do have jurisdictions that have fair use including the US, even though it's not exactly the same in terms of the fairness factors.

MS WALADAN: Yes.

MR COPPEL: Are you able to draw in on that experience how a greater degree of certainty as to whether those prospective impacts that you've outlined really will materialise or not?

MS WALADAN: I think, in a sense, it's impossible to say how it – one, it would depend on how the provision is drafted in Australia, and then two, it would depend on how the provision is interpreted by the Courts, whether they would draw on US jurisprudence, you know, it's very hard to say, it'd probably depend on the circumstances and, thirdly, I mean, until a case goes before the Courts and the outcome of that case is known,

there'll be uncertainty during that period and, you know, that's potentially a very long time.

MS CHESTER: So Israel actually parachuted into this system holus.

MS WALADAN: Yes.

MS CHESTER: Including its jurisprudence, such that there were a few cases to have to deal with it. So, I guess, one other way of putting the question, because we keep hearing the sky's going to fall in, but nobody can give us examples of how that's really going to impact revenue streams. So say if Channel 7 and Channel 9 were going to be operating in the US today under their fair use system, what is it there that you would no longer be remunerated for under fair use in the US that you are remunerated for under fair dealing?

MS McCARTHY: There are two areas of concern for us from a business perspective and the first is at the moment, with the existing exceptions copyright, what you can and can't do, and what you will and won't be remunerated for is very well understood by the business to the extent that we actually, as a legal department, get very few questions from program producers or other content makers in relation to copyright. Those things are able to be handled internally by the relevant production areas who have that expertise and have that understanding and don't need instructions.

Any change, and this is a, sort of, radical departure from that, will necessarily involve for us a large additional expense of increasing the legal resources available to assist all of those people to understand what the new regime means. I can't see Australian Courts just holus bolus importing foreign jurisprudence. They will want to make their own determinations based on whatever the actual wording of the provision was and, you know, the unique Australian principles of interpretation.

So I can't imagine that the outcome would just be – will just follow whatever happens in the US. There may be a period of time during which businesses would need to refer to the US as guidance as to what is likely an Australian Court would hold. But you couldn't know for sure, therefore that creates uncertainty. In an environment where revenue – all of our revenue streams are very uncertain and people are very sensitive to risk, you would have to assume that will result in reduced investment in Australia content. We can't say, you know, X program is not going to be made any more if this happens. It's just that it creates an environment in which funding decisions, in relation to content, will attract an increased level of uncertainty.

I would imagine that would be the case for quite a protracted period of time because it will, essentially, be up to rights holders to enforce their rights under this new system and it may actually be quite some period of time before you would have a period of case law on which to draw upon.

MR COPPEL: On that last point, you suggest that there's a shift in the onus towards the rights holder to uphold their rights. Can you explain why that – how that shift occurs between fair dealing where it's – to our understanding is already the rights holder who have that responsibility?

MS WALADAN: Well it's about the clarity though. So fair use, if there are – you know, we don't know what's covered. Fair dealing, currently, is operating very well in my members' newsrooms. So on that basis it is functioning. That's not to say that they are, you know, in every aspect the clearest provisions ever, but they are working well. We've been working with them for a long time and so – whereas fair use would be a clean slate and has often been referred to as, really, a right to litigate. Until that first case comes out we really don't know. A couple of other points that I just wanted to make - - -

MS CHESTER: So is there a reason that Australian industry wouldn't respond the way industries have responded in the US, Israel, South Korea, and Singapore, by developing guidelines to use within industry, whether it be a film production room or an educational institution in terms of how the - - -

MS McCARTHY: I'm sure they would develop internal guidelines that most probably would be based on a combination of existing international jurisprudence until we had Australian case law to draw upon. But certainly my understanding is, at least as far as Singapore is concerned, that the introduction of fair use did at the same time introduce concerns about risk and reduction in investment, certainly in the initial stages. Is that your understanding as well, Sarah?

MS WALADAN: Yes, yes.

MS McCARTHY: Yes.

MS WALADAN: The other point I would just make as well is 200AB is an example, perhaps, of a provision that was introduced that is a fair - you know, fair use style like provision where an industry standard was introduced and, I mean, I think there's still – that was introduced in 2006 and there's still a lot of lack of clarity around that, as I understand it, although the particular sectors would be better to ask about that too. But,

yes, I think that just, sort of, demonstrates the great uncertainty that surrounds these types of, you know, changes and the amount of time that it can take.

MS CHESTER: Yes. So we've had participants, film producers and documentary film makers, that have suggested that the fair dealing makes their lives very difficult. It constrains what they can do and it actually increases their costs and uncertainty. That's, sort of, bread and butter for Channel 9 and Channel 7, I would imagine, for production. So wouldn't you stand to benefit then from moves from fair dealing to fair use if the evidence that we heard from those folk is appropriate?

MS McCARTHY: Look, I think that's why we, in a way, feel quite well placed to comment on this issue because we are both people that are holders of copyright and also significant users of the existing exceptions. There would be some circumstances, no doubt, where we would potentially benefit from broader exceptions. But, on balance, we believe that we would prefer to stay with the existing provisions even though they may add some degree of complexity where you are acquiring rights to use material that's owned by third parties because, I guess, in our mind, there's clarity as to when you do need to go and seek a licence from a third party and when we don't. We prefer that certainty.

MS WALADAN: That's not to say that they're perfect and – but we would prefer an approach of, you know, looking at additional prescriptive exceptions that are required and adding those in a clear form in the legislation compared to an approach of having to fight it out in the Courts, effectively.

MS CHESTER: So what are the additional changes that you'd be suggesting to fair dealing?

MS WALADAN: None today. But if we did want additional, you know – you can envisage that might, you know, be our position at some point. If it is then that would be the approach that we would prefer.

McMONNIES: I would just add to that, to your statement about it being our bread and butter, I mean, coming from the perspective of 9, our bread and butter really is news production. You have to remember that it is happening in real time every day, a number of bulletins every day. So we're using those fair dealing provisions on a daily basis. Not a single news bulletin would go out without us referring to those fair dealing provisions. Because the operation of them is working very well we, obviously, take a risk averse approach. If there's a holus bolus change to

legislation that involves fair use, that is a totally different ballgame for our (indistinct) writers.

MR COPPEL: It's been submitted that very few cases have been brought before the Courts that deal with fair dealing. So regardless of whether you're talking about fair dealing or fair use, there's always an element of uncertainty. That's something that we have to live with. I'd be interested in your perspective as to where are the elements – are there elements of uncertainty that relate to the current arrangements with respect to fair dealing, the fair dealing exception that you confront?

MS WALADAN: There are obviously elements of uncertainty around the existing provisions but, as my colleagues have said already, the way they are currently operating, you know, is working very well on a day to day basis in newsrooms at any given time.

MS McCARTHY: Yes. We would very much take the fact that there have been so few cases as actually indicating that the existing system is operating really well. People are clear what the parameters are and they don't go beyond what's permissible.

MR COPPEL: I mean, in your post-draft submission, this theme of changes creating uncertainty runs across several of the recommendations in the draft report, and one of the other ones relates to the repeal of section 51(3) competition creating additional uncertainty for rights holders.

MS WALADAN: Yes.

MR COPPEL: Could you expand? You didn't mention that in your opening remarks.

MS WALADAN: No.

MR COPPEL: But you could expand on how that works, or is it simply the change is bad?

MS WALADAN: Our concern really there was just in responding to – and our response was quite short in our submission, our point really is that even in the draft report it notes that many of the arguments put in favour of dispensing of the exception rely on identifying instances where anti-competitive conduct might occur rather than instances where it does occur, or has occurred. So, I mean, on that basis we just think until there is evidence to, you know, explain the need for its removal, then we would be in favour of its retention at this point in time. I mean, I think there's already a level of uncertainty in relation to the operation of that provision,

and that was made clear in the draft report and we would – I mean, I think we'd also welcome any guidelines in relation to that, which was also suggested in the report.

MR COPPEL: Yes.

MR COPPEL: Are there licensing arrangements that Channel 9 and Channel 7 are involved in that actually are relying on that exception today?

MS McCARTHY: I think from our perspective that is a task that we haven't yet undertaken to actually review those existing arrangements and determine if this change is something that would affect our existing contracts. So that was part of the concern as to well, this has been proposed. We're not actually sure the basis on which the change is seen as necessary and, obviously, it will cause an administrative issue for us temporarily.

MS CHESTER: So we detailed some concerns, especially around complex licensing arrangements over content and also practices across the pharmaceutical sector, and certainly the Harper Competition Policy Review set out a very clear case for it as well. So in the absence of evidence that we're going to inadvertently capture things that shouldn't be captured, it's difficult to see what case there is not to repeal it and not to have the same competition policy laws apply to licensing and the affording of IP rights.

MS McCARTHY: Perhaps that's something that we could look into further and provide you some further thoughts?

MS CHESTER: That would be really helpful, thank you.

MS McCARTHY: Yes.

MS CHESTER: Just one other quick thing, you mentioned before the Hargreaves Report. Jonathan and I were lucky enough to meet with Professor Hargreaves and the overriding factor for his not recommending any change to the fair dealing provision was that they were unable to, because of the EU, and perhaps that's changed after Friday. But that was the main reason.

MR COPPEL: Do you have local content provision laws that also operate on decisions that you make in terms of your programming?

MS WALADAN: Yes, absolutely.

MR COPPEL: Yes.

McMONNIES: I think the regional licensees, in particular, are operating under local content provisions. So there are, I think, regulations in relation to regional licensees and (indistinct) and also our regional licensee, NBN, and there's a quota system in place which means that there are minimum numbers of material local significance and local news that needs to be produced in these local areas.

MS McCARTHY: That's right. Obviously, we also have the overriding Australian content obligations as well. But at the moment all broadcasters are exceeding the level of Australian content that is technically a requirement of those (inaudible).

MS CHESTER: Okay.

MR COPPEL: Nothing else?

MS CHESTER: No, thanks.

MR COPPEL: Right. Thank you very much for participating today.

MS WALADAN: Thank you.

MR COPPEL: And also thank you for your initial draft – initial submission and your submission on the draft report.

McMONNIES: No worries at all. Thank you.

MR COPPEL: So I'd like to call on Kingston Anderson, Australian Directors Guild. So make yourself comfortable.

MR ANDERSON: Thank you.

MR COPPEL: Then, for the purpose of the transcript, if you could give your name and who you represent and a brief opening statement.

MR ANDERSON: Sure. Great. No worries. I'm Kingston Anderson. I'm the CEO of the Australian Directors Guild, and the Australian Screen Directors Authorship Collection Society – long name. The ADG is an industry body. It represents over 1000 directors across Australia and ASDACS is a sister collection body which also collects money for directors in both Australia and New Zealand, so it covers directors in both those countries.

For screen directors in Australia, the framing of the Commission's draft paper represented an attack on the livelihoods of Australian creators without an understanding of the process of creation or the creative industries. In particular, and with all due respect, assumes that all Australians are simply passive consumers of content rather than appreciating that Australia has a vibrant creative sector that creates, produces and indeed successively exports Australian stories and culture.

It characterises rights holders as monoliths and users as somehow – that they're somehow disenfranchised. Directors are original creators. They create the majority of content across all screens. It's clear that they have – there is an imbalance for directors when it comes to that content creation and their rights. Users of creative content are not simply Australian consumers; they are large foreign corporations, like Google and You Tube who have created business models that leverage others creativity for commercial gain.

Copyright is the linchpin of the creative economy which is a significant financial contribution to the Australian economy. Australian screen directors make vital contributions to culture, diversity and economic growth. Directors are creative and talented individuals which form the basis of all film, television and dramatic productions. Their work brings people together in the form of entertainment, in addition to educating and building empathy in the community. Furthermore, it instils an appreciation of history, Australian culture and our community's perspective on other cultures.

Australian stories, through film and television, are exported to the world. To give you some example of the long term of those, the entire Mad Max series which has become a long term series of movies starting back in the early 1990s and obviously finishing with the most recent, and the most successful of all the Mad Max movies. Many titles such as Peter Weir's Picnic at Hanging Rock; the Rocky Horror Picture Show which is an Australian production, it originated in Britain in the 1970s which is now playing on a screen somewhere in the world every day of the week. So it's been going, and recouping money for those creators, since 1974, I think it is, as well.

Of course, the television. Television is probably the most popular or pervasive. We can't forget Home and Away obviously; Neighbours; and now more recent ones Mrs Fisher's Murder Mysteries and the recent Clever Man; as well as a massive number of children's television productions like Nowhere Boys. It is that reason that the ADG and ASDACS has been lobbying for the expansion of copyright for Australian

directors. In contrast, in many other jurisdictions, including the UK, the Australian Copyright Act does not currently recognise directors as makers of films, or as copyright owners in film, rather this is usually the producer except in relation to a limited retransmission right which was granted to film directors in 2006.

You may be surprised to learn that Peter Weir, one of our greatest directors, does not own any copyright in Picnic at Hanging Rock or Gallipoli. Both those productions are probably two of the most iconic Australian films, again which are playing somewhere every year and, in fact, I've just been in negotiation with the – believe it or not there is a World at War Film Festival that happens in the Champagne District in France. Being the 100th year of the First World War, Peter's film Gallipoli is in great demand around the world, particularly in France. Again, he has no control over that and if that was out of copyright there would be no remuneration. Again, another piece of content that continues to generate income for the people that created it. In the case of that one, the producers of that film.

For the reasons set out in our submission, copyright is a critical incentive for directors to provide fair remuneration for their hard work and success of that work. We reiterate our request to the Commission, probably not in your powers but I'll ask it anyway, for the expansion of director's copyright in its final report, not the reduction in any way. I might just talk a little bit about copyright and a little bit about fair use, if that's okay, and then finish off on that. The Commission has suggested a reduction in the term of copyright to 15 to 25 years from the creation. Sadly, this demonstrates a bit of ignorance in terms of the commercial reality of film and television production, as I've probably just given you some examples.

It is incorrect to suggest that the average commercial life of film is between 3.3 and six years. Even in the writing and production phases alone, televisions programs and films can take up to five years to come to fruition. Probably an interesting example is a film that was made several years – called Diana and Me. As you probably guessed it's about the Princess – well was the Princess of Wales. That film was completed, about to be released and unfortunately the Princess of Wales died. The film was then not released for six years after that because circumstances meant it couldn't.

But if the copyright reduction had taken place, you can see the problem. The exploitation of that work would have been reduced significantly and if it had to wait longer that – and that's something that

happens a lot with films, they may not be released straight away. They take a while after they're created. So that's also part of that.

In many cases films take an enormously long time to develop and make. I mean, probably the classic recent example is Mad Max, the final Mad Max film. They started making that in 2003 or 4 and it wasn't completed until last year. So again you see a huge – we see a huge problem with any reduction in the copyright because it reduces the exploitation of that work. We also welcome the government's statement that they probably wouldn't change the copyright, and we also obviously have the provisions of the Free Trade Agreement with the US, means that we – that it's not possible either. So we're hoping that that is the case. I'll just make a brief comment on fair use, if I've got some time as well.

MR COPPEL: Yes.

MR ANDERSON: We feel that bringing in a US style of fair use really provides no clear benefits to Australian creators or consumers. The Commission's discussion on fair use presupposes that all copyright owners are large corporations and all users of content are Australian consumers, whereas the reality is that many copyright owners are individuals, like my members; and users of copyright content are large multi-national corporations that use other creators content for their own commercial purposes, like Google and You Tube.

I don't know if this has been mentioned – if it has please tell me. A colleague of mine, Angelo Loukakis, who is an Australian author, one of his books was published by Google Books without his permission. He's been, I think, fighting in the Courts for about three years in the US to try and regain control of that book which he owns and he owns the copyright. For me, that's a terrifying thought for an individual author and, in the case for us, not just directors but writers, producers, et cetera. They're not able to sustain that in many ways.

That's one of the major problems that we have, is that the fair use regime really, significantly, make it hard for individual creators to defend their work if they so choose. If they choose not to show it, if they choose that they want to control it, if it's taken away from them, they will not take the legal action. Like my colleagues before me, at Channel 9 and Channel 7 who have the ability to take legal action, my members, in some cases make $25,000 a year, are unable to do that. If we have a system where the only way that they have recourse to reclaim their work or control their work is through the legal system, it will be a disaster and it will stop the creation of content by those individuals, which is the strongest and richest vein of content that is produced by my members and also members of the

film industry. We represent an enormous number of documentary makes and those guys tend to be one person bands who make those documentaries as you go.

So we feel that the two things that were in the report which we feel shouldn't go ahead – and I know you haven't proposed that they do – is the reduction in the copyright term, we think it should be maintained; and the introduction of a fair – a US style of fair use. We'd also love directors to have copyright in audio visual work and we'll continue to push that with the government and wherever a forum gives us that opportunity.

MR COPPEL: Okay. Thank you, Kingston. So you're correct, we do not call in the draft report for a reduction in the term of copyright for the same reasons that you've indicated, amongst others. Can I come to the point about expansion of copyright for directors?

MR ANDERSON: Yes.

MR COPPEL: What do you have in mind there?

MR ANDERSON: Well, it's pretty simple. Australia stands out in the world as one of the few countries that don't have it. In fact, when our Copyright Act – and I'm not a lawyer, so please correct me about the history – but when our Copyright Act was framed in the late 60s, it was very much heavily framed based on the English Copyright Act. In that Copyright Act at the time producers were the owners of copyright. So when that was first framed, theirs was the same as ours.

But, some 20 years later, that was reframed because once England was – although they're leaving the European Union now, when they started to do more with Europe, who has a very clear division of copyright ownership between a writer, a producer and a director, they changed it. Audio visual work in the UK is owned 50 per cent by producer and 50 per cent by directors. They recognised that directors are major creators of audio visual work.

So we look around the rest of the world and we see that we're one of the few countries, literally few countries of say 30 to 40 countries who have copyright for directors, and we're one of the few. It makes no sense to us in terms of providing long term sustainable careers for directors. I mentioned Peter Weir. I mentioned those directors, the great directors. They're not just the great Australian directors, they're great directors, don't have access to that. A lot of our creative people will leave the country because they do lack access to that sort of remuneration, post the creation of that work.

MR COPPEL: So is it more the way in which the copyright receipts are divvyed up rather than the quantum itself?

MR ANDERSON: Yes, at the end of the day. I mean, we have a small right, section 98 of the Copyright Act, which was introduced in 2006 because I felt the government was concerned that directors had moral rights in a work but they had no economic works, unlike producers, writers, composers. But that's been ineffective for us in the last 10 years and it really – in fact, that's interesting because that shows you what can happen when you have an ineffective change to the Copyright Act where the only we could – we've been urged to go to the Supreme Court to push our case. Well, there's no money from our organisation or our individuals to do that. So to assert our rights legally that's a very difficult thing to do, and for individuals almost impossible, and they're not willing to do it because that will mean the end of their careers, effectively.

MR COPPEL: By saying "asserting their rights individually" are you referring to the ability for a director to reach a commercial agreement - - -

MR ANDERSON: Yes, under section 98 of the Copyright Act, yes.

MR COPPEL: Yes.

MR ANDERSON: It is about individuals. I mean, obviously, we're a union, but we're negotiating as much as we can. But under our system if a director, for example, were to pursue it – and this has been said to a number of our directors, "We're not doing it. We're not doing it. Bugger off. You don't get the job". They have no power to fight that against a large production company or a large network. So it becomes an ineffective. So their next recourse is to then take legal action on the basis that they believe section 98 applies to them. They're not going to do that. They're not going to take the next step. They'll never take the next step because they won't win it, because they don't have the resources, and it will be the death of their career because that production company will basically black ball them.

So individual creators have a huge problem with a system where legal action is the only recourse for them. It really puts them at a massive disadvantage so – and that's the majority of my members. I mean, we don't – yes, we have some large members with Baz Luhrmann and Peter Jackson and they can tend to look up because they've got resources. But I've also got numerous documentary makers who make the documentaries that we see across all our networks. Jennifer Peedom, whose magnificent

documentary Sherpa, she would never go down that path because she's a single operator. She has a small company. They'd never survive.

MS CHESTER: So, Kingston, of your members, the 700 - - -

MR ANDERSON: 1000, actually.

MS CHESTER: Sorry, I was looking - - -

MR ANDERSON: No, that's an old one, yes.

MS CHESTER: Okay, thanks.

MR ANDERSON: But since then it's gone - - -

MS CHESTER: It's 1000. So of your 1000 members, how many of them are also film producers?

MR ANDERSON: Very few actually.

MS CHESTER: Is it just like the top end commercially successful ones?

MR ANDERSON: Yes. I'll very quickly break it down. So the documentary directors, yes, they are director producers, absolutely. They take – because of the size of the particular project. So they'll take those roles as writer, producer, and director. There's a whole group of TV directors who are all just directors of TV. So they're directing. Peter Andrikidis, who directs all Ivan Milat, the whole – there's a whole suite of those who work for production companies and/or networks. Then feature film directors who tend to work in collaboration with producers but they're not necessarily producers. Fred Schepisi would also possible be a producer, but he'd mainly be the director. So it's sort of broken down that way.

MS CHESTER: So those that don't have a film production credential or right attached to them are effectively employees of the producer and then it's a commercial contract to - - -

MR ANDERSON: Yes, exactly. Yes, they're contractors, I suppose, is the effective - - -

MS CHESTER: You mentioned there were 30 jurisdictions still left in the world that - - -

MR ANDERSON: Well 37, I think. I'd have to look it up again. Who were all – most of them in Europe and obviously South America, around the world, where copyright exists, obviously, I'm talking about.

MS CHESTER: Yes.

MR ANDERSON: In some places, like China, obviously there isn't any regime for that. So in the jurisdictions where audio visual work is supported by governments, there have very clear copyright support for directors, writers and producers. It's those three groups because what we – we'd consider those above line. They're the people who create the content in form as a group. But those directors in Australia, for some reason, have been left out of this and, you know, it's to the disadvantage – and we lose directors because of it.

MS CHESTER: North America, what's the status there?

MR ANDERSON: The status there is they don't have copyright because the – in the 1950s they were able to negotiate incredibly powerful deals. My colleagues, I look at them with envy, at the Directors Guild of America, are a massive organisation who have got strong, contractual relationships with the studios that dictate those. There's still a whole section of that industry that work outside the law as well, who work outside that structure in the independent. But the studios are the dominant players.

If I had union power like that, it'd be fantastic for us. I mean, all the unions in the United States have massive power to prosecute their case. If anyone gets out of line, I mean, the Directors Guild of America have – they employ like 30 lawyers just looking at those issues. So you see what I mean, they're well equipped to deal with any infringement that goes on. Of course, they're still dealing with the problem with piracy, which is a massive, massive issue. My members deal with it. It's constant.

I mean, we're about to take a film called "Healing" to the US and we wanted to get a copy to someone who was going to do the Q & A in Los Angeles. They said, "Don't worry. It's on You Tube". The director, who was also had – did have part of the producer said, "What do you mean it's on You Tube?" It had been put up two days before. They'd taken it off five times. This continually happens in - you know, it's another issue. But it is connected because it's about whether people think they can get away with it. He would never take anyone to Court over that because he doesn't have the resources to do that. If that regime was here, it would be disastrous for those who didn't want their work shown too.

The other part of this is something that's not – it's a cultural issue, not necessarily a commercial issue, are films that are made by individuals who have – may have them taken away from them and shown when they didn't want them shown. I think that's a reasonable thing for many reasons as well, so. This is something that our members have expressed to me quite clearly.

MS CHESTER: You mentioned your views around fair use. It's quite interesting because we did actually take evidence from a documentary filmmaker in our public hearings in Melbourne last week.

MR ANDERSON: Who was it? Probably a member.

MS CHESTER: Probably. His name will escape me, but it'll be in the transcript somewhere. Hotel Coolgardie was one of his documentary films that was - - -

MR ANDERSON: Which is just at the Sydney Film Festival. Yes.

MS CHESTER: Yes. So he's very much supportive of moving to fair use because, apparently, a fair dealing gets in the way of his ability to, sort of, make documentary films.

MR ANDERSON: Well, it's not true and, obviously, I've got a lot of documentary members. There are some issues in terms of people wanting to get content, particularly archival content, and finding that archival content. But the other issue here, and a lot of the documentary makers have said to me, "Well, if I want my content used by other directors, I would like to licence it to them".

MS CHESTER: Yes, I think he's a bit - - -

MR ANDERSON: "I wouldn't like them to be able to use it in a free way without consideration of why it was made". I'm a documentary filmmaker myself and so I've gone through that process of making documentaries looking for historical material and using other people's material. I totally understand, and it's been expressed to me by all of my many hundreds of documentary members. They totally understand that that's a better way to do it than a free for all which is what they see happening because their work will be exploited and pillaged – I hate to use the – some very emotional words – but pillaged by others to make other people's work that they may not want. Some of that's incredibly sensitive material as well.

MS CHESTER: So the main concern that he had was around incidental music in the background which made his life incredibly difficult.

MR ANDERSON: Right. Yes, I mean, again I understand that but – well, as a documentary filmmaker you can deal with that. It's very easy to deal with, (a) it's not a problem because unless it's part of the soundtrack that's required to move the action forward, if it's incidental music you take it out, put other incidental music that you've got licence for. You can get free music. It's very easy to get the music to fit incidental. So it may be in his situation you've got a jukebox going in the corner, there's a scene going on, it's playing an INXS song which clearly requires licensing. Well, the smart way you take is think about that before you shoot. Good documentary filmmakers do that. It's not a problem. It's a hurdle. But it is like making any film, you require creative thinking and a way around it.

It certainly hasn't stopped some of the best documentary films that are being made in Australia at the moment. I mention Sherpa again because it's got the highest box office of a documentary. I mean, they're going through the roof. Coolgardie as well, I mean, it's very successful at the Sydney Film Festival. So, yes, I mean, I can have a chat to him about that. I can help him out if he wants. But, yes, documentary filmmakers realise there are issues to do that, but they also don't want to exploit other people's work because it's their work that gets exploited as well.

MR COPPEL: In the draft report, what lay behind the finding concerning copyright term was information from the Australian Bureau of Statistics on the, sort of, average commercial life of creative works. You've pointed to a number of examples or that have become cult films that certainly defy that average. Do you have data across your members then that can, sort of, paint a richer picture of the returns?

MR ANDERSON: I don't. But I certainly think the Screen Australia, who collect massive – in fact, they're a very, very good source of data across the board here because they collect data on – they've been collecting data on films for the last 30 years. So that data – and they can actually give you an idea. I'd suggest you – Screen Australia it's a great resource.

Having great respect to the ABS, but I don't think they – I mean, I have to go back to the Rocky Horror Picture Show because that was a theatre piece that was made in the 70s in the UK in a tiny theatre that went on to be a film. Now copyright started when they created the original musical which, of course, also goes around the world. That director was smart enough, when they did that deal, and also being in the UK had more

power to do that, to get it (indistinct) the copyright. It's his superannuation for the rest of his life. That one production has given him the ability to direct a massive amount of work in opera and theatre that he would not have been able to do without the support of that film.

So it's a classic example of how a creative talent can be rewarded across the years and spurn more creative work. I mean, the stuff that Jim does in the theatre and in opera doesn't – it, sort of, half pays the bills. If anyone works in theatre, and I've worked in theatre, it's a hard life to keep going. Certainly, none of us had superannuation. We always talk about this as – with directors and writers that their content, the stuff they make – and my wife's a writer – is their superannuation and without control of that content and the ability to get remuneration from it, they wouldn't have that because we didn't have a superannuation system when we all started.

MS CHESTER: Just one quick question from me and it's just – and you may know the history here, Kingston. So given the fact that directors are not afforded the same, sort of, copyright treatment as they are in other jurisdictions, and there's been other reviews of Australian copyright laws historically, is there a reason that it hasn't been addressed, or why haven't the arguments gotten up before?

MR ANDERSON: Well, it was addressed. Pete Spielman 2006, we put submissions in. Our colleagues around the world – there's a group called Writers and Directors Worldwide who are aiming to get copyright for writers and directors in all jurisdictions including China, and that's through SESAC because obviously as a collection agency we're a member of SESAC International Organisation. Why hasn't it been successful? Well, if I had the answer to that I'd probably be able to turn it around.

I think it's a combination of things. I think it's been a commercialisation of our industry in Australia that's shifted. We've shifted from a smaller industry where the creative talent of individuals was the most valued to a more commercial, and that's also to do with the change in the world. I think it's a range of things. I mean, we haven't been strong enough, I think, to effect that change and, of course, we're operating on our own. It doesn't benefit anyone but us, and my members, for that to change.

We are looking for a view from government that directors are content creators. They are the authors, in our opinion, of audio visual work and they should be recognised as such. They are recognised as such under moral rights legislation, but they're not in an economic sense. I suppose, if they were in an economic sense we wouldn't be having this push from

us. So really, we're just asking for something we think they're due in every jurisdiction.

Obviously, our collection society doesn't collect much money from Australia. Where we collect most of our money is from overseas and it exists because of that. We have relationships with 22 countries and that's because our directors, again, work worldwide and their work is seen in 22 of those countries. So we collect money for those directors under their clear copyright legislation which provides money back to those people and that covers everybody from Peter Jackson down to the humble documentary maker who may have made one documentary but is being seen on French television.

MR COPPEL: In your submission on the draft report relating to an information request we had on the voluntary code of conduct for collection agencies, you said that the government should consider those issues separately. When you refer to those issues, are you referring to the issues that we've raised in the draft report, are you – or are you referring to other issues and if so what are they?

MR ANDERSON: No, no, just referring you to those issues in the draft report.

MR COPPEL: In draft.

MR ANDERSON: We're happy to have reviews of systems that are in place. We obviously believe in transparency and that's important for us as well. We don't collect much money, but it's important to be incredibly transparent because we don't collect much money. So we're happy if there's a view that that would be useful. Ultimately, it's all – for us there's a – we feel there's a code reviewer that works effectively to review the code. So we've never had an issue, I suppose, from our point of view. So, I suppose, you could say we're a little bit agnostic but happy - if there was a wish to do that, we're happy to support that.

MR COPPEL: Okay, thank you. That's all from us.

MR ANDERSON: Thank you very much for allowing - - -

MR COPPEL: Thank you, Kingston.

MR ANDERSON: No worries.

MS CHESTER: Thank you.

MR COPPEL: Our next participants are Delia Falconer and Shannon Stein. So welcome. Please make yourself comfortable and when you're ready if you could each give your name and who you represent, for the purpose of the transcript, and a brief opening statement.

MS STEIN: My name is Shannon Stein. I'm here as an author of fiction. I'm also the administrative officer for the Romance Writers of Australia, and I'm here to basically address some of the proposals in the draft report.

MS FALCONER: I'm Delia Falconer and representing myself as a writer, the author of two works of fiction, one of non-fiction, two edited collections, and I'm also a senior lecturer in creative practice at the University of Technology, Sydney.

MR COPPEL: Good. So would you like to make some opening - - -

MS STEIN: Sure.

MR COPPEL: An opening statement.

MS STEIN: Okay. So I write romance fiction under the name Shannon Curtis and I am published here in Australia as well as over in the States and hopefully soon to be in the UK. I'm also the administrator for a writer's organisation. Some of the elements in the proposed draft report are of concern to me personally and to the organisation and our members. We're about 1000 members at the moment. One of the things I wanted to address was the – I'm not quite sure what the proposal for the term of copyright, is that actually something that you actually want to change at the moment?

MR COPPEL: No.

MS STEIN: Okay. Because one of the points that was raised was that literary works provide returns for between 1.4 and five years on average, three-quarters of original titles are retired after a year, and by two years 90 per cent of originals are out of print. Firstly, I have to disagree with that. I think a large number of our members would disagree with that. I don't know if the digital formats have been taken into consideration when this statement was formed, or if it was factored into forming this statement.

At the moment, when you sell a book you – or when it's contracted we can contract for a number of rights that includes the print version, the digital version, the audio, any – you know, going into, you know, TV, if we're lucky and film. At the moment, we get to say what rights we sign over to the publisher and we control the longevity of our - I guess, as

Kingston (indistinct) our superannuation. This is how we look at our works when we're writing a book, the amount of time that it takes and the amount of effort that we put into it, the proposed changes of having it, first of all, not of our own, I guess, right – that we lose the right after 15 to 25 years, for us, when you have a book that can be available in a digital format going forward for quite some time.

I can tell you that my first novel was published in 2011. What we've found is, and something that we teach our members, is the power of the backlist. So when you have a number of titles that you publish, each subsequent title will find you new readers and those new readers will go back and look for those titles, and they will purchase those titles.

I was thinking of Tomorrow When the War Began by John Marsden, now that book was actually - I think it was published first in 1993 by Pan Macmillan. Now the TV film - sorry, the film for that was actually done in 2010, which is when I found the book. So I went and bought the book because of the movie and now it's on TV on ABC (indistinct). So you will have new readers going back to find that source material 16 years, 17 years later, finding that original publication. With the proposal here is that John Marsden wouldn't receive the benefit for his work there. So I think we do have serious issues with that going forward and I think that the digital capacity to be able to still retrieve those titles and purchase those titles hasn't been factored into this proposal.

MR COPPEL: Thank you. Delia, are you going to make an opening statement or shall we - - -

MS FALCONER: Yes, well thank you for your time. In Fishing in the Styx, the Australian author Ruth Park, who is one of our most loved authors, tells the story about her husband D'Arcy Niland who in 1955 published the Australian classic The Shiralee but through a series of catastrophic errors Niland's publisher in England botched the copyright and the British company Ealing films adapted the book within a year. But the Niland/Park family didn't see a cent. So when Niland met one of the Ealing scouts in a Sydney pub he threw the man across the bar and triggered one of the heart attacks that would kill him at the age of 49.

Now although these details don't correspond exactly to the current situation I have to say that I very much wrote my submission in the shadow of this story because it returns us, I think, very vividly to a time when there was virtually no local publishing industry in Australia when authors were often dependent on their books and films going through the colonial centres of the Northern Hemisphere and before the sophisticated copyright system that we have today. Now as well as being an

academic - sorry, a writer, as I said in my submission, I'm an academic, from a research perspective I find it hard to have confidence in a document that suffers from a lack of peer review and industry consultation.

Recalling that a very significant majority of the stakeholders across all sectors of the publishing industry have opposed many of the changes that are suggested, often based on their own research, it contains concerning errors in terms of grasping the financial basics of a writer's career. And failure to understand Australian copyright, that the importance of the - which Shannon has just spoken about, of the long term investment that authors have in copyright. But I'm not going to speak about that today because I think it's been covered by a lot of other authors.

The major problem I have with the study is that it lacks recent statistics. As the Australian Society of Authors' submission points out, the cost of books in Australia has dropped 25 per cent since 2008, unit prices are now comparable to overseas, even books bought with GST, without GST, and with free postage. And I buy a lot of books online so I speak as a consumer of books as well as a writer of books. In addition the report ignores the deregulation of New Zealand's book industry, which is probably the most relevant model for comparison. As Tom Keneally discusses in the Australian Financial Review, the New Zealand book industry has contracted since the 1998 repeal of PIR legislation. And since 2008 the range of books has contracted by a third and the price of books has risen while the price of Australian books, with PIR restrictions in place, has gone down.

So it's the cost of the potential devastation to the industry that I feel it fails to factor in. I would also note that in advocating for reduced industry the report is going very much against the grain of recent international conversation about soft power in which governments, including those of Japan and China and the UK, have been actively promoting the role of culture as an essential part of achieving economic or cultural influence and I feel that this benefit hasn't been - would be well included in this study. We were sixth in 2015 on the UK based Institute for Government Soft Power Survey.

Now studies of Soft Power recognised that cultural influence comes not just from official sources but from the spread of stories and imageries that strengthen a country's profile. And also from the basic fact that a company is seen to be able to support a cultural sector. The Australian publishing industry has already been doing this work without government subsidy and while employing more than 4000 people. I would also note that having just been in Argentina and speaking at the Cátedra John

Coetzee about our literature, that it's the diversity of our industry and the successes, and particularly often of our indigenous authors overseas that's most often remarked upon positively. And that's a diversity that depends on a local industry dedicated to the idea of Australian literature.

I would also like to speak very briefly about the report's recommendation of moving to a model of fair use. Like most authors I consider remuneration for use of my copyright materials by educational institutions via CAL as an essential part of my income, somewhat like having a diverse investment portfolio. Those CAL payments are around sometimes 900 a year, sometimes a few thousand, along with the LR and PLR payments, which are often around 3000 in my experience. It may seem paltry to the Commission but as part of writers' - as writers' incomes are on average around $12,000 and as an author of a book I earn about only 10 per cent per copy, and I'm taxed on that, that these are actually very significant parts of our earnings, lifesavers sometimes when that money comes in.

So I think this change is likely to stop many writers writing. But also I think the thought of our intellectual investments, and, you know, I speak as a mother of two children as well, that the thought of those investments being appropriated does make some of us feel a bit like D'Arcy Niland clutching our hearts. But it's harder to imagine how such a change might encourage productivity around fair use in my industry, in the publishing industry. Perhaps I think one of the most - one of the ideas is - has at its heart is the idea that Australian works could be used by schools and universities.

However, while the CAL system costs $17 per student in Australia and is funnelled back to writers, I believe it would be very naive to believe in an environment in which universities depend increasingly on digital resources that the alternative would be free or cheaper, especially if Australian authors stop providing content, which I really think is - or that content is limited, which I really think is very likely to be one of the results of these changes. Or they start publishing through overseas publishers. Because universities, and I speak as someone in the university sector, now spend significantly and increasingly large parts of their library budgets on commercial licences to expensive electronic resources, almost all Northern Hemisphere based, such as JSTOR, ProQuest, LCDF, et cetera.

And I would really encourage the commissioners to investigate these figures in the final draft if that's possible. Compared to the relative cheap productive non onerous CAL system and as someone who has to fill in CAL surveys sometimes at work, I can assure they're very infrequent and

very non onerous from my point of view as an academic, one very plausible scenario is that our schools and universities would be spending more on content and accessing less Australian content, which I think would be obviously a very poor outcome. Not to mention that the fair use model does risk becoming a lawyers' picnic in terms of being less clear.

So I believe this draft report is missing so much fine detail in terms of the Australian publishing industry that implementing it would be a very risky and radical experiment that I think will cost far more than in the long term that it will save. Thank you.

MR COPPEL: Thank you, Delia. Maybe I could just begin by clarifying I think what relates to one of the points you made about the report using out of date information, and I think you were referring to information that was in the Productivity Commission's 2009 report into parallel import restrictions. This draft report was asked to look at transitional arrangements following the government's response to the Harper Review to implement the removal of parallel import restrictions but before doing that to look at transitional issues.

The point that you have made about the 2009 report is one that has been made by many other people participating in the hearings. We will be updating some of that work for the final report and we have asked that we also receive the information that lies behind the point that you also made that, well, prices since then have fallen by 25 per cent. So we'll also be looking at that information when we get it.

Shannon, you also made the point about the sort of the average commercial life of a book, and that information is actually coming from the Australian Bureau of Statistics, it's an average across books, films, music. I don't know if that includes digital distribution rights but that will be something that we will look at with the ABS. But in that regard I would be interested in hearing from you based on your work how the royalties that you receive how they relate to those sorts of numbers.

MS STEIN: Certainly.

MR COPPEL: I mean, you're suggesting an experience that's quite different.

MS STEIN: Yes.

MR COPPEL: If you could talk us through that?

MS STEIN: So from my experience, my first book came out in 2011 and it came out as a digital only book over in Canada and sold through the North American market. And each time I've released a title since then I've actually seen more books being sold, it might just be a little bit, little increments. By about the third book that seemed to step up a little bit, by the seventh book - the first book I'm still getting royalties from that first book that are coming through because I'm getting I guess a broader readership. And we have, again anecdotally within the organisation where a lot of writers are sharing their experiences, well, we talk about the magical seventh book where there seems that it used to be the fifth book but it seems now to be the seventh book, where you actually seem to see some traction in developing a career for writing.

So you see some growth in readership, some growth in royalties. And obviously when that happens your earning potential with future books increases because your advances increase. And when that happens you've got publishers who are a little bit more interested in doing a little bit more promotional and publicity, which again fuels that backlist and keeps that building. So from my experience, and I can say from a lot of our members' experiences, the longevity of a career is based on you being productive, you getting a new release out and then another new release out, and then another new release, that will fuel sales for all of your work.

For me, personally, I look at this as I would love to be able to make this my full time role. At the moment I'm doing the admin work part time. I first got published going to an international publisher because at the time there was no publisher in Australia who was publishing the style of books that I was writing. Since then we have noticed at our writers' conferences, for example, we have I think - in 2007 we were struggling to get the attention of a publisher to attend our conference, in 2008 we had six publishers wanting to come to our conference.

I think in 2014 we had 20 professional representatives from agents and publishers wanting to come to our conference. And we noticed that it's so much easier now to find Australian content on a bookshelf in the store. From I would say probably about 2010 it was very hard for me to find a book that I would like to read in romance genre, romantic suspense, or paranormal romance, written by an Australian author and set in Australia. That's now changed. And we're so fortunate in that regard that we have a volume of titles available, we have an increasing number of authors in Australia who are getting published. And our theory is that, especially with the parallel importation restrictions, if they're changed, that it will reduce our, I guess our capacity or our potential to actually get picked up by a publisher.

From what we're seeing with New Zealand it will contract the Australian industry. We can see that with getting the international cheaper versions in that there will be a downward push on prices, perhaps, although from the draft report I'm not sure if that's backed up with some statistical data there. But I don't think in the long term that it would serve the Australian publishing industry, or it would serve the consumers. As Delia mentioned, the cultural aspect of this, I can now find a book set in Australia in the genre that I love. I couldn't do that before. And on the odd occasion that I could find a book it was such a thrill to find something that I could relate to that I can engage with on a home base perspective.

But also, for example, if there was a city or a town that was described there I'd go look for it. I might even go visit it because of the information that you've read about it in a book. And if that gets translated to screen it's, you know, joy, joy, happy days for everybody there. But I think the term of the copyright possibly doesn't also address that potential, where you have - we have a number of our members at the moment who are in talks with Hollywood Studios about their work, and works have been optioned. But that's a very long process to get from the point of talks and options to a box office sort of thing, so - and I don't know if that's been factored in as well. And even though it may the exception to the rule for that to happen we all have the hope that one day that will happen. And this kind of takes away that hope for a creator to be able to build a legacy.

MR COPPEL: When you talk about the impact of a new work on the backlist, is there a difference in terms of the impact that it has on sort of digital sales, is it the non-digital print sales, is there something about digital that - - -

MS STEIN: There is. I think digital is much more accessible and it's more affordable in this regard. And it's, I guess, you can have an e-reader where you can have thousands of titles on it. If you actually had thousands of paperback titles at home the husband is going to have a problem with storage. So it's a lot of people will go for the digital. I personally prefer a paperback copy, but that's just me. There are so many people out there that use - and digital sales was on the increase, I think it's only just beginning to plateau. But even so, the volume of those digital sales worldwide is still quite significant.

It's I think probably when you're looking at it from - you have authors who are only published in digital formats as opposed to the print versions because it's costly for a publisher to put every single title into a print format but they can put every single title into a digital format and put it out in the marketplace. And that's an earning potential. And when an author proves themselves in sales then they can actually straddle both

markets in print and digital, or they can even do something like self-publish their own work. There's a lot of our members have done as well, we call them hybrid authors, where they've published with a traditional publisher but then also because of technology they're able to create their own work, publish it, release it to the market and receive sales from that directly to them.

MS CHESTER: Delia, you mentioned earlier concerns around moving from fair dealing to fair use, and that's another area of our report where we were able to look at some work that had been commissioned by stakeholder groups about what might be the potential impact of moving from fair dealing to fair use, and we did a critique of some of those methodologies in our draft report. We were also very mindful that the department - well, previously the Department of the Attorney General but now the Department of Communications, which has copyright policy responsibility, had actually commissioned so that - and sort of an independent government agency has commissioned a cost benefit analysis to be done and we're hoping that that will - well, we're expecting that that will be available for us for our final report.

So that will better than address the issues around the relative merits of fair dealing versus fair use in terms of what might be transitional and ongoing impacts. And obviously trying to capture both benefits and costs, which is not a straightforward nor easy exercise. What in particular do you have concerns about in terms of what you would see as being copyright works that you would be remunerated for today that you would see as not being remunerated under the fair use, the proposed fair use for factors and exceptions, mindful as well that we're not making any recommendations to change statutory licensing for education?

MS FALCONER: Well my work, you know, I have a 20 year body of work now, and a lot of my work is taught at a lot of different universities. It's not as if the CAL method is flawless, I know that often, you know, sometimes if the universities are audited in the year that my work is in that survey I - you know, I miss out. But I can live with that because authors, you know, we do subsidise the culture a lot and we're aware of that and that's I suppose part of feeling like you're part of a literary community. However, I find that my work is, both through CAL but also through the - I haven't had much of a CAL payment this year but sometimes it's quite big, and that payment could be for work that is being taught, excerpts that are being taught from my first novel or my second novel. Or it could be quite recent work. And I find there's actually - I find that it is like an investment portfolio that in fact it's often some of my earlier work that has been canonised in some courses, that tends to be taught, it will appear more often on my statements than recent stuff.

MS CHESTER: Okay, so it's short excerpts from previous publications?

MS FALCONER: Yes.

MS CHESTER: That you are currently getting remunerated for.

MS FALCONER: Yes. Yes.

MS CHESTER: What sort of percentage of the royalties that you're getting from CAL would represent those short excerpts?

MS FALCONER: Now that's a hard question because sometimes shorter pieces and articles that I've published have been included as well. But I'd say it's mostly excerpts, mostly excerpts from my novels. And actually from my Sydney as well which is being taught across a lot of institutions at the moment.

MS CHESTER: When you say excerpts, sort of what percentage of the original work would those excerpts represent?

MS FALCONER: Well at the moment universities aren't able to copy more than 10 per cent of any book. So, and I know that when I set work for my courses the library checks.

MS CHESTER: Yes, you do the same.

MS FALCONER: It's a very straightforward process, it doesn't take very long at all. The difference is that when I as a - in my academic role, say to the library, look, I'd like to publish a copy of the first chapter of Mandy Sayer's Dreamtime Alice, they go, yes, that's less than 10 per cent. The difference is that that's not being - they're not going- or if a short story that has appeared, if I'm publishing that say as a copy as a pdf for my students to then access that's very different to content that exists that say I've ordered from a university academic publication. Now I can't tell you the numbers there but there are some very good studies that I have looked at that are looking at the increasing costs for academic libraries, both at a senior school level and at a university level. One of those studies says that that system is already skewed towards global - of getting content from overseas, and is skewed against the Australian content. But also that is quite expensive as well.

So not only is there an issue for me in terms of that being quite a - sometimes quite a healthy part of my income for the year, I find personally the healthier part of my income is coming from ELR and PLR

payments but not, you know, I have a concern as a teacher teaching Australian literature very often and Australian writing and being part of that culture of teaching students as often as I can our own literature, I worry that that those things are also at risk without those payments because, really, it is at the point where the Australian writing community is so pressed because individual writers have lost 75 - the funding to individual writers has dropped by 75 per cent with all the changes to the Australian Council at the moment. So a lot of us really feel increasingly stretched. So that loss of that sector of one's income just it can often be a quarter, a third sometimes of the average writing income, is a very big deal.

MR COPPEL: Delia, you made a comment that the draft report failed to take adequate account of industry experts, are there any industry experts that you can see from our submissions either on the initial report or subsequent to the draft report where there are obvious people that we should have spoken to?

MS FALCONER: No, I think there are obvious areas of literature that I would like you to speak to. Some of that literature around, and I'd be happy to provide references because I don't have it off the top of my head, but I think certainly around some of the numbers that are being crunched around Soft Power I think are very relevant. Some of the issues around the cost to education through digital services, I mean, I thought - I did think that the research that was done by CAL and by the ASA was very good but I feel the broader - I thought that the emphasis in the report was on the potential gains in the industry but I felt there was a lack of some grey literature, which is just literature outside of - that encompasses broader cultural areas.

MR COPPEL: If you could take that on notice and get back to us that would be helpful.

MS FALCONER: Yes. I would be happy to. I actually took a lot of the references out of what I was going to say today because I thought we wouldn't have time today but I would be more than happy to do that.

MR COPPEL: Thank you. Okay, that's the questions that we have.

MS CHESTER: Thank you.

MR COPPEL: Thank you, again, for participating in the hearing and we've given you a bit of homework and we look forward to receiving that. Thank you.

MS FALCONER: Thank you.

MS CHESTER: It's nice to give the lecturer homework.

MS FALCONER: Well hopefully there will be homework back for you.

MR COPPEL: A slight change in scheduling due to the absence at the moment of Bernd Winter. I understand Tamara Winikoff from the National Association for the Visual Arts - so welcome, Tamara.

MS CHESTER: Don't feel rushed. You being here early is being very helpful for us.

MR COPPEL: Please have a seat. Make yourself comfortable. And when you're ready if for the transcript you can give your name and who you represent and a brief opening statement?

MS WINIKOFF: Okay, thank you. So my name is Tamara Winikoff, I am the Executive Director of the National Association for the Visual Arts and NAVA is the peak body representing the visual and media arts craft and design sector. And it represents a constituency of about 25,000 creators and other people who work the visual arts. Our submission to both the Productivity Commission and the Australian Law Reform Commission in both those submissions we opposed the replacement of the fair deal in copyright regime with fair use because we anticipate that this loosening of copyright regulation will seriously disadvantage visual artists in being able to benefit from the use of their work and thus sustain their careers.

Visual and media artists, photographers, illustrators, cartoonists, craftspeople and designers, are already very substantially contributing and subsidising the public's access to cultural experience. And often they're more than generous when asked for use of their work for a great variety of purposes. But the great majority of artists are low income earners. And within the last national survey it showed that the mean total income that they earned was $23,100 a year and craftspeople about $29,800 a year. So their survival within the profession is extremely precarious. So when it comes to copyright even under the current regime artists face the overwhelming challenge of gaining access to justice in seeking to counter the widespread illicit exploitation of their intellectual property.

According to the art sector survey we did last month of the 643 artists who participated 43 per cent had had their copyright infringed. And while around 40 per cent have earned some income from their copyright payments only 9.24 per cent reported that they received fair payment for

the use of their work. I will just read you some examples of the comments that they made. I mean, we had probably about 500 comments so I've just selected three. So the first one says:

> "Reproductions of my drawings being sold in a public institution were reproduced overseas without my knowledge and reproduced on jigsaw puzzles and then sold to Coles where they were sold nationwide. I had a solicitor follow it up with Coles, I received payment which I did not consider to be fair but which failing a better alternative I accepted. The work was not removed from sale as I requested but as I was very young at the time I accepted the payment and conditions as being better than nothing at all."

Then the second quote is from someone who says:

> "My photographs were used on saleable items without my permission. I contacted the people who used the photos, there have been a few, some people were apologetic and paid but others, mainly record companies, just told me to like it or lump it as they worked by their own rules. I couldn't afford to take them to court. I haven't worked for these companies since."

The third person says:

> "I design trophies for a national member organisation. I design works in order to profit from manufacturing the objects. After the first year the organisation commissioned the same design from a trophy maker in another state. They made these for many years and I lost the 25,000 profit a year for those years after. I rang the managing director of the organisation and told him that this was infringing my copyright and his response was simply, 'sue us'."

Implicit in that sentence was that a one man business has no chance of winning against them. And if this is what it's like under the current regime which imposes certain limited exceptions imagine how much harder it would be if a concept is open and wide to interpretation as fairness became the only test of recognition of copyright. And each time it will have to be prosecuted through the legal system, which for most artists as these demonstrate is unaffordable. And that of course is what the exploiters rely on. We see nothing in the Productivity Commission's recommendations that would be supportive of Australian artists. The thrust of the report aims to privilege users and overshadows completely any consideration of specific impacts on visual artists and other creators.

My organisation, NAVA, is not opposed to changes to the system but we contend that it should focus on streamlining copyright and sharing of content on genuinely fair terms, including fair compensation to creators. The world is voracious for content. I would like to ask the Productivity Commission why you have given so little consideration to the consequences of sacrificing the career viability of the creators of this content. NAVA asserts that fair use risks the creative geese that lay the golden eggs being killed off by greedy giant commercial enterprises.

MR COPPEL: Thank you, Tamara. Can I maybe begin by starting with where you finished, which is the point that a preferable course of action would be to improve the licensing or existing licensing arrangements. And you've given many examples where under the current arrangements it's very difficult to enforce infringement and the nature of any of these works makes it also amenable to infringement. So I'm interested in hearing from you how you would see an improvement in the licensing arrangements limiting those cases of infringement, on deliberate wanton infringement?

MS WINIKOFF: Yes, that's the question that I think that all of us who work in this area have been trying to find the answer to in various ways, particularly in the digital environment. And I guess we're interested in the solutions that have been developed in the UK, the Copyright Hub, as one example of how using open source technology you can enable licensing for a fair payment, or for free, it's up to the person to make their own decision, for high volume and low value transactions. So we see that as one way in which the access to the work can be facilitated without sacrificing the payment that should go to the creator.

I think as time goes on and the development of various technological mechanisms, the way that they develop over time that is going to become easier to actually track use and automate the process whereby - or to some degree automate the process whereby the users can simply dial in what they want to use it for. There will be solutions that have been pre agreed by the creator, and it will all happen on line very straightforwardly. And I think that that is really, our recommendation would be to be cautious and await or allow for the development of those mechanisms rather than changing the law in such a way that the producers of the content or the intellectual property are disadvantaged on a very long term basis. And that their capacity to negotiate fair payment for the use of their work is very much diminished if not eliminated altogether.

MR COPPEL: I mean the music industry is one area where these online options have been developed and have enabled access to content, which is

one of the drivers limiting piracy. What role do you see then for the visual arts industry to pursue the same strategy?

MS WINIKOFF: I think it's a very good thing to do. I think that that's something that we should certainly be aiming for. And I mean we're not a licensing body but there are visual arts licensing bodies like Viscopy and Copyright Agency and I think that that would be a very important course of action for them.

MR COPPEL: So are there any initiatives under way to move down this track?

MS WINIKOFF: You would probably be better asking Viscopy about that because that's their business. I know that it's a matter that's of great interest to everybody across the whole of the art sector and we're all looking into what we're all hoping that those who are responsible for doing the licensing will actually develop those mechanisms. I'm not completely au fait with it but I was told about something that YouTube has developed which allows a similar sort of process to be used. And YouTube is a visual medium as much as a sound medium and so I would imagine that that might, you know, some variation of that might be possible to apply in the visual arts. But it's not my area of expertise.

MR COPPEL: You've also made the point that shifting to fair use would in some instances equate to free use. Can you give some examples of the type of work that was remunerable under a fair dealing exception that would become non remunerable under a fair use provision?

MS WINIKOFF: Well I suppose the problem with the fair use provision is that it's open slather and until those limits of, you know, what the boundaries are between what's fair and what's not fair are tested in the courts it's not going to be possible for that to be negotiated just on a good will basis because it's challengeable legally. And what I understand is that what's happened in the United States is that there's a huge variation in the legal judgments that have been made which is just causing chaos and confusion everywhere.

With something as difficult to define as fair, fairness, you can imagine that the same thing would be likely to happen in the Australian courts. So you know, by the time the case law is developed which is going to be years and years and years because you have to wait for people who have had their copyright infringed having enough money to be able to bring a case in the first instance, you know, there will be a whole lot of creators whose careers have just gone down the drain.

MR COPPEL: I mean the purpose of the case law in a sense is to identify what those boundaries are.

MS WINIKOFF: Of course.

MR COPPEL: There may be an issue as to how wide those boundaries are over an initial sort of transition period. We've identified a need for guidance that can act as a mechanism to reduce the width of those boundaries but we think that litigation really will be in those areas where we're testing - we're very close to the boundary and it's contested as to which side of the boundary it is. There are many other uses where it would be pretty clear cut. So litigation is really only showing the tip of the iceberg. But I would be interested in getting a sense from you as to whether those boundaries would be ones that are initially sort of within a fairly limited range, or do you see an adoption of fair use initially as one where the boundaries could span potentially quite a wide range of remunerable material?

MS WINIKOFF: Yes, I think the real problem is that the users, and on the whole, you know, we can anticipate who the main users are going to be, you know, the Googles and the huge companies, intellectual property - I mean, the online companies. And I think the real problem is that the onus of responsibility then comes back to the creator rather than it being the exception having to be proved, you know, that instead of the presumption being that most copyright uses are not fair unless they're properly negotiated the presumption goes the other way. And so on the basis of that presumption you can imagine because this is a power game that the powerful entities that want to use the intellectual property of the creators are going to take it and wait and see whether somebody challenges them.

So I think that that substantially will expand the scope of what they feel that they can try to get away with. And, you know, because of that power imbalance artists are in a particularly vulnerable position because they're very low income people in the first instance to try to bring any matter of this kind to law, and in fact most of the examples that we have - that, you know, most of the examples that were quoted in the answers to our question in the survey were really done on the basis of negotiation, that it was illegal to use copyright unless you fell within one of those quite limited exceptions. With the presumption going the other way, you know, you can see that the scope for exploitation is magnified many times over.

MR COPPEL: I don't think the presumption does go the other way. It's still the responsibility of the user to be confident that they are using the material in a legitimate way.

MS WINIKOFF: But it only happens when they're tested. You know, they may argue the case that it's fair but unless somebody is there to argue it with them why wouldn't they try to get away with it?

MR COPPEL: But that gets back to the initial point about how wide those boundaries are under a shift from the current arrangements to fair use.

MS CHESTER: One issue that's come up in the context of asking people for their rights holders if they were operating in the US or Israel today what would not be remunerated that would be remunerated if they were operating in Australia, is that a question that you'd feel you'd be able to answer based on your knowledge of your membership and of any of them having worked in those jurisdictions?

MS WINIKOFF: No.

MS CHESTER: Of your membership as well, I'm assuming, and this may be wrong, that some of them might be what we have referred to as transformative artists where they take another piece of creative works and they transform it, and there is obviously a spectrum across which transformative art reside, where do you kind of draw the line in the sand for when it then becomes something so distinct or disparate from the original creative right that it does become a new and separate standalone piece of copyright?

MS WINIKOFF: Look, I think that there are a couple of ways in which that is already being dealt with through the - through both critique, you know, the exceptions for critique and parody and satire, there's already room for transformative reuse. But our simple equation is to say on the whole artists are very generous with their work and in most cases they will say yes to another artist reusing their work for artistic purposes. But where they draw the line and where it was interesting in our survey was that when we asked the question about whether they thought - actually I will just check the question because we were fairly careful about how we asked the question.

Would you be happy for another artist to use your work without your permission or payment and make a profit from it?" I think that there are two issues there; one is the question about "without permission", because you then come into the sort of moral rights territory where artists at the moment have the capacity to say "I feel that that would be derogatory to my reputation if you did that", and that's already protected in law.

The other is that the question around whether the reuse will then enable that re-user to make a profit. In our case, in the case of the people who answered our survey, about 95 - yes, just over 95 per cent of them said no, that they didn't think that that was fair that somebody else could reuse without their permission and make a profit without sharing the profit and without getting permission. I guess in consulting with artists and being guided by them, our bottom line is given that they are on the whole generous to other artists, that the least that should happen is that they should be asked.

MR COPPEL: Is that survey something that you could share with the Commission?

MS WINIKOFF: It's been sent to the Commission, both the survey and all the comments, except for those who said they didn't want their comments shared and there were only about three of those. You've got that material.

MR COPPEL: Okay, I'll follow that one up. I don't seem to have it in front of me but thank you.

MS WINIKOFF: I've got a copy I can give you.

MR COPPEL: That's okay.

MS CHESTER: If you've got a copy, I'm happy to take it today.

MS WINIKOFF: Yes, sure.

MS CHESTER: Thank you.

MS WINIKOFF: The original is in colour, so it's easier to read.

MR COPPEL: Thank you.

MS CHESTER: Thank you.

MR COPPEL: I think that covers the questions that we had for you, so thank you very much for participating in today's hearing, and also thank you for your contributions through the submissions.

MS WINIKOFF: You're welcome.

MS CHESTER: Thanks, Tamara.

MR COPPEL: Our next participant is Bernd Winter from DDI Australia. Welcome, Bernd, and make yourself comfortable and when you're ready, if you could give your name and who you represent for the purposes of the transcript and a brief opening statement.

MR WINTER: Thank you. Bernd Winter, I represent today my company, DDI Australia, but I also represent as the chair of the German International School, I suppose I represent the future of Australia to some degree; I represent those students. I also represent, still holding also a European passport, I represent some of the European community and having migrated to Australia as a designer, I suppose I represent the design community.

My particular concern and why I wanted to speak to you today was that I feel IP rights are the same as ID rights. I think it is a basic human right that people have a right to their IP. I think as the design industry and as the whole media industry evolves - a colleague of mine has just come back from the Cannes Festival and everything is moving into virtual reality. When you look at those new media and you look at the way they integrate, whether it's something is the written word, whether it's sung, whether it's projected, whether it's made into an object. If you design a 3D chair at the moment in a virtual reality game, it's got like one set of copyright. If you design the real chair you've only got five years and you've got to apply for it four years before. I think it's untenable.

Therefore, I suppose I am suggesting that Australia urgently needs to organise this in the same way as the music industry has obviously organised itself to have protection and that Australia should adopt the EU International Design Rights in terms of patent, copyright and trademarks and sign The Hague Agreement, which I think 60 countries have already signed. I think even the Vatican might have signed it now. There are lots of countries internationally that think this is the right standard to agree to and I think it would be important for Australia to do so.

Then most importantly, I think Australia must enforce that law. There should be a six months amnesty in which I suppose people should confiscate in counterfeit product because industrial design I think is the weakest link at the moment. I actually in my design department employ a lot of industrial designers. They actually cannot get a job. They would love to work as an industrial designer but they get ripped off before they even do anything. It's such an issue. You know, they can only either work overseas or just change their industry or work as a barista. It's very poor unfortunately.

Just to give you an example, in the music industry imagine if someone when they're writing a song, instead of putting it on YouTube and seeing how good or bad it is, in the same way designers when they design a new product, they might put it out to test the market. As soon as they do that, Kmart or whoever, Bunnings, all these people just rip it off and abuse it. So before the actual designer can actually lodge the prototype, sometimes the copies are made. These people are designing free for these ginormous companies with massive shareholdings. It's just so grossly unfair and they have not got a leg to stand on.

I think these laws need to be enforced and it needs to be policed. I think in that original document here about the Commission, there was a suggestion there's like economic benefit of reducing IP. I would suggest when you really think that through, it would be like saying there's economic benefit to the South American drug cartel, you know, because that also brings jobs into South America but that can't be real. When you really do the numbers on what it costs society for these young people to go through university and not get a job or to get an education that they then can't pursue in this country because there isn't a basis for it.

If you think of probably the best school that happened in that sort of arena is the Bauhaus in the 1910 and 20s as a movement. If you think the Bauhaus would be possible in Australia right now, well if you really think that through, and we had a discussion one night, and it could never work. Now I'm not saying right now in this climate it would work in Europe necessarily either but at least they would have a chance to kind of see how good they are. They could get a group together and actually work it because they have protection for their ideas and their rights and they can kind of manufacture things and make things.

At the end of the day I believe designers in lots of ways are the backbone of society. They're the people who design artificial limbs. They design better helmets, seat belts. I know who lost or settled out of Court with the New South Wales Government on a fire extinguishing pack because some of them work 12-hour shifts. They kind of have three days on, then four days off or whatever, that kind of system. In his own time he had his own design thing. He developed his own product. When he made it really well and put it to market, basically the government just counterfeited his product and had someone else knock it off cheaper. When he then said, "But I want to be paid on this", they ended up in a $200,000 Court battle and it was just so embarrassing.

This kind of thing is going on where people actually invent things to further society, get their livelihood questioned and their IP stolen. If there is a design industry, there's never going to be a proper industry because

that's the ideas; that's where everything comes from. If people don't design the things - think of fashion, otherwise you're just going to make potato sacks. There needs to be someone who comes up with the ideas.

I firmly believe we've got some great talent in Australia and we need to foster that. We need to find ways of protecting that and encouraging that. I suppose in closing, I'd just like to say, like musicians, there's obviously a great system in place. I'm not sure how good The Hague Agreement is but it's certainly a very good starting point and it's a good standard. Industrial design covers so much more than just furniture. It's like all sorts of everyday products. There are companies in Australia who have done little kitchen products and they actually take them to the US. Some of them don't even produce their stuff in Australia any more. It might get here like two years later because they know if they start here, they'll never get it off the ground. It's that bad. So if we could find ways to help those people and ensure that the policing happens.

I suppose international fines - I just looked that up this morning and I suppose the pound's a little bit different now but you know it said £50,000 in the UK and 10 years' jail. I think the same way as we have introduced good governance in other companies and started punishing white-collar crime, it is a white-collar crime to deprive these young, talented people of their livelihood and of their potential future. With design you can never say, "Is this something that's going to be awesome". Like who is to say that the egg chair ever became such a beautiful symbol of design or any of those products. It needs to be around for 50 years first before people can make that call. There's a German phrase called "im Keim erstickt" which is like you know you kind of squash it before it even germinates; that's what we're doing here. We just cannot have an industry like that, a design industry.

MR COPPEL: Thank you, Bernd. Maybe I can just ask you a point of clarification when you make the statement that designs here are being ripped off with replicas. Are you referring to replicas made after the period of protection from a registered and certified design or before then?

MR WINTER: I refer to firstly, like I said before, I think having to register a design and having like a three-month period or whatever. I think it's completely unworkable. I think that as a system for young designers - I know one of the young designers. He's got 15 designs at the moment. If he puts them up on Instagram tomorrow to see which ones he should develop, they'll be gone. That's just giving it away. It would be like as if someone published a new song and then put it on YouTube. The minute he does that, he's lost that. That is the problem with - whether you call that a replica. It really is counterfeit because people just take that idea

and steal it. There's no recognition. There's no mention of the originator. I think from when people actually create something, they should automatically have the copyright of that, the same as if you now sing and song and you write it and that's yours.

MR COPPEL: In Australia, the registered designs, they cover furniture, they cover bottles, they cover clothes, they cover food packaging. Are you referring to something which is specific to - - -

MR WINTER: I'm referring to that as well because I think the timing for that is probably also out of date. I think all of those copyright and design laws should be the same, which is why I'm referring to now in virtual reality, they're all going to melt. So to have different copyright laws apply to different parts, it's going to be an absolute nightmare. Do you see what I'm saying? Therefore, if you're going to have an egg chair in a video game, do you then pay the person who originally has the deal and pay the company in Denmark that actually still has the copyright on that. It's very, very difficult. I think there need to be some clear strokes to that and make it the same for everyone would be a big part of that.

MS CHESTER: Bernd, we've been fortunate enough to hear from quite a few designers post our draft report. We've received submissions and we've heard from a number of them during our public hearings, indeed, here in Sydney last week, down in Melbourne, and even in Canberra. The issue that you're touching on in terms of this period of risk where sort of the prototype's being developed or the idea's being sort of market tested, that's been raised with us. Is that the main area where you feel the designers are at greatest risk of unauthorised copying, given that there hasn't been a registration process yet?

MR WINTER: Yes, I think that's the biggest area and it probably links a little bit to also enforcing, and there's a company called Cool Hunter. They, at some stage, had I think over a million followers on Facebook before Facebook took the page down. The reason why Facebook took the page down is because they illegally just put everyone else's work up there making themselves look great, "Look, I found this cool thing" but without crediting anyone, and that is wrong. That's a bit of a hassle to find out who created this but if have a piece of architect or you have a piece of photography, just do the right thing and credit the people at least. So if you credit that person, credit that writer, credit that photographer, credit that architect, then anyone has got an easy way now to kind of go, "It's done. Bang. There it is". So anyone can just get back to the source.

In this information age it's a very, very simple thing to do and it's an absolute courtesy and I think that is that human right that I'm talking

about of everyone's IP. If people create something, they should have the ability to kind of say, "Well, if I put it out there, I put my name to it, so that when people reproduce this, just take my name with it, when I'm the photographer". When you open (indistinct) it credits the photographer there. It's not that uncommon but unfortunately people now sort of fast track and where they don't have to, there is none of that crediting. That is a very big problem and that time to market. So when Kmart rips off some of those young designers, of course they don't credit them. They go, "Oh whoops".

MR COPPEL: You have a creative agency that represents many designers. Are you in a position to give us a sense as to the commercial life of a design, the average commercial life?

MR WINTER: Well that's a very good question. I think the commercial life of a design, like at the moment you probably know "Keep Calm". You know that whole campaign; I think it relates back to the Second World War. Is that it's second or its third iteration. I don't know who wrote it but I think if someone did have some point, it would be nice if they still got some sort of credit for it. It's not just in a financial sense but just in terms of attributing things to people in the correct way. That's just a nice, rightful thing for society. I think it is manners. I think when we talk about art, we talk about a Picasso painting. We don't just talk about the back. I think we attribute things to people because they have made a contribution to society of doing something different first and opening up our eyes to other ways of looking at things. People that have written great things, with great writers we can quote things and people say, "Yes, that's Shakespeare, that's Proust, that's whoever". I think it's an important part of our culture to do so.

MR COPPEL: Many of the points you've made relate to deliberate infringement or piracy of others works and a common theme in many of the participants hearings over the last week have been the difficulty of enforcement and I'm interested in your views as to how other laws can complement the intellectual property laws, like passing off. We've heard particularly in relation to design rights, that often the copy comes together with a picture of the original creator against their will, which strikes me as an example of passing off. How do those laws address those sorts of concerns?

MR WINTER: Well the difficulty is that - like let's for example take the guy who designed the fire pack. If he launched a new hit single on The Voice, which I was watching last night, he would have so much backing. If something happened or if he needed to defend his right, easily there would be like a two or 10 million dollar lawyer, just a whole system that

would back him. With these individual designers and creators, unfortunately that's not the case. They quite often - individuals, they kind of do what they do. They're more workers and engineers and designers. They're not good at writing nasty letters and threatening people. So it's very difficult for them to kind of protect themselves. They are kind of hopeless. They don't lodge things on time even if they kind of try and register something. I think that's why we need to kind of have a very simple ruling where we help them and we protect them. I think the media is a very big perpetrator of that.

On the radio, and don't kill me for that, but I listen to Fitzy and Wippa, and they do this thing where they at the moment develop a product themselves and they put it on to this TV show and promote it and say how cool they are and whatever. I'm not sure whether it's to promote the TV show or whichever but either way, when they talk about it, they're sort of, "This morning we're spinning the wheel and we're giving away a Louis Vuitton product or whatever" and they kind of say how cool it is. When they talk about themselves and their wife, they're talking about, "You wouldn't buy the real thing. Just buy a knock off, you know, no one will know". You don't get the real (indistinct) shoes, you kind of get $100 knock-offs. You don't pay 500 bucks for that".

There's an inbred kind of weird attitude in Australia. I don't know where that comes from, but it's that a knock off is kind of an Aussie thing. I think that is the biggest thing we have to stamp out. I think we have to kind of change that to fair go and say you've got to give everyone a fair go and you cannot knock off stuff, because the minute you do that, you're killing your whole industry. I've actually got an example of a design student who was kind of writing on a blog at some stage and said, "This is great. This is a copper metal folded over thing. I could make that for 300 bucks or whatever". Some other design student said, "You idiot. You're arguing against our whole industry here. It's not about that you can knock this off yourself. It is about that someone had the idea and brings it to market and develops it and makes this." I think it's quite a road of understanding and appreciation but I think there is a real long-term benefit to the Australian society.

MR COPPEL: My sense is that consumers that may not deliberately purchase a knock-off can identify the genuine product from the non-genuine product and receiving a knock-off wouldn't see that as the genuine article. I can give the example of my daughter who bought a pair of Nike shoes through a website and when they came, they weren't obviously Nike shoes. She's never worn them; she refuses to wear them. I wonder whether that's something that's more general than that anecdote but you seem to suggest it's part of the Australian psyche.

MR WINTER: I'm not saying everyone but good on your daughter. That's great. It's very considerate of her, but I think there is a part of society that I'm saying that kind of endorses this, "Buy a knock off. Why would you get the real thing? Who wants to pay that sort of money?" I've got Eames chairs in the office that are like 19 years old. You should see them; they're awesome. They're scratched and everything but they're just fantastic. Like all this other furniture would be like those normal office chairs. You just throw them out every five years. It's just landfill. I don't want to get too focused on furniture because I really believe the big opportunity here for Australia is - at the moment we're just scratching the surface with a few people who have kind of made a little bit of furniture, like Adam Goodrum. But actually the design industry when you look at it in a place like Germany, like the stuff that people design, every wheelchair. Everything needs to be designed.

We could be making so many things. Like, you know, the Australian boat building industry, it's like an awesome capacity to kind of build stuff and register it and own as their design, not just from winged keel but from an interior perspective of generating great income for this country. I know we can't compete on mass production but we could very much compete on one-off, on exclusive, on individual, on unique production. We've got some great craftsmen and we have some great designers. I think if we bring those people to the task and let them build, we could achieve some great things.

MS CHESTER: I only had one other question, Bernd. I guess it's trying to distinguish parts of the market and I won't use furniture as an example. We heard from the woman who owns and runs top3 by design and she gave several examples or anecdotes of where some of her customers were mortified when they found out that what they were looking for was an unauthorised copy. It wasn't actually the original design of a piece of work. So just setting aside the confusion factor where it's difficult to distinguish between an unauthorised copy and the original design produced piece, where there is such a price difference between a replica and an original design piece, because of the quality and the workmanship and what's been used, are they kind of like separate markets though anyway? The consumer who's going to buy the cheap replica would never look at purchasing the original design piece of work, it's just not in their budget. The reason I'm asking it from this perspective is do you view that differently if it's someone purchasing a cheap replica if it's outside the design protection period, versus someone buying a cheap replica or an unauthorised copy within the design protection period, given I'm suggesting that to some extent they might be separate component parts of the market. Am I articulating that well enough or not?

MR WINTER: Yes, I think you are articulating that well enough. I'm not sure about the second part of your question. I think to the first part I do think unfortunately a lot of people don't actually know the difference and if they had the opportunity to really think about it, they would rather save up their money, the same as your daughter for the right shoes, and not be passed off with some secondary product, because otherwise they just buy some other cool runners. You know, it's not about that.

I think there are these few examples of design products where the original is much more expensive than the sort of cheap knock offs. I think there's a real cost to society of those cheap knock offs. There are design chairs. You know, there are some great - like the Panton chairs, an exclusion bolt chair that you can buy for a few hundred dollars. The fact that it might be a bit more expensive in Australia is also because those that bring in that furniture fight so hard and they've got such small market share because everyone just wants a knock off so it makes it very difficult. If it became more acceptable and there would be competition, it would actually be cheaper I would argue. If you order those products from Europe, they're actually cheaper there.

MS CHESTER: Would that suggest a bit more of a holistic solution to these concerns in terms of someone would offer an educative campaign so Australian consumers can better - if they do want to do the right thing and save up and buy a piece of furniture that's going to last them 20 years and not three years.

MR WINTER: Exactly, yes.

MS CHESTER: Who do you see playing that sort of educative role?

MR WINTER: My agency. I do think it would be a concerted effort between all bodies. I think it would probably start from the UTS with some of the professors, or from universities. I think it would be a general education process the same way as you educate society that it's unhealthy to smoke. I think it's an important process and I think it is something that we could maybe offer reward programs in terms of getting start-up companies with more like design collectives to help them get off the ground. The most important thing would be that we really protect their work, because under the current circumstances, I can guarantee, I've helped, I've tried everything with some of these people to try and get them - it just doesn't work. They just get defrauded of it left, right and centre. It's not possible. We need to set an environment where they can actually prosper and I think signing that European Hague Treaty as a common ground would be the first and most important step to do so and enforce it.

MR COPPEL: Thank you, Bernd, for participating in today's hearing.

MR WINTER: Thank you.

MR COPPEL: 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 RUNCIE: Yes.

MR COPPEL: If you could give your name for the record and very brief remarks, please.

MS RUNCIE: Yes, very brief because I think we're down to 1 minute, 30 seconds. My name is Sarah Runcie and I come from the Australian Publishers Association. You've heard from one of my colleagues, Michael Gordon-Smith in your Canberra hearing. I don't actually have any opening remarks but we felt we couldn't leave you without giving you something to take away. So we have a list of questions for you that we'd like to give you and to collate on the behalf of rights holders, further questions that we feel are important to be answered for us to fully understand the implications of your report. We would be grateful if you would consider those questions and get back to us because you know where we are. Thank you.

MR COPPEL: Thank you for that homework. Thank you, Sarah.

MS PHILLIPS: Just three things that came up recently and I can be brief, perhaps 90 seconds.

MR COPPEL: The clock's ticking. You still have to say your name again very briefly.

MS PHILLIPS: I'm still Fiona Phillips from the Australian Copyright Council. Just three matters that came up during the course of the day. First, you've raised a couple of times the Israel example and I would fess up that I did actually spend a semester studying at the Hebrew University of Jerusalem. I don't know whether that gives my comments any more authenticity or not, but I would make the observation that the Israeli Copyright Act was updated from the 1911 Copyright Act and then they updated it and it included fair use. As you've rightly identified, there includes in that regime an opportunity for the minister to regulate to make it clear that certain things are definitely within the exception. The question I would put to the Commission is how does that differ from what

we currently have, which is fair dealing, flexible dealing, which is an open exception for specific sectors and then specific exceptions that clearly make it clear beyond a shadow of a doubt that something is covered, for example, section 28, which makes public performance in a class a free exception. That was one point.

Way back this morning I think there was a question to the Australian Society of Authors about what's different between parallel importation of books and other material. I think from a practical perspective one observation I would make is that books is one of the few areas where there is still currency in the physical thing. There is actually still, believe it or not, parallel importation restrictions around films. The reality is though the business model has moved on. No one is, as a commercial business model, importing DVDs, let alone videos, into Australia. The business model has completely moved to the digital environment so I think that's a differentiating factor.

Finally, the third thing I think Commissioner Chester you said this morning no one had questioned the ABS data that the Commission had based its statements about 15 to 25 years. I know when Kate Haddock and I gave evidence on behalf of the Council you referred to our submission. I note that the Australia Council for the Arts submission has just been published on your website and I'd refer you, in particular, to pages 11 and 12 where they make some interesting comments in relation to the age of that data and its completeness and whether there are in fact some better data sources around to base those observations on. That was all.

MS CHESTER: Thank you.

MR COPPEL: Thank you, Fiona, for those further points. Is there anyone else who would like to appear before the Commission today? Thank you.

MS NAHER: My name is Gaby Naher. I'm the secretary of the Australian Literary Agents' Association. Unfortunately you haven't heard from many of us over the course of the days but our members have been sitting in pretty regularly. As this is clearly about the law rather than the value of Australian culture, I would like you to tell us how you propose to address the countless Australian book publishing contracts in which Australian authors have licensed Australian and New Zealand territorial copyright to Australian publishers or licensed the right for those publishers to publish their works exclusively in Australia. These contracts obviously go back decades and are worth considerable dollar funds or dollar values. Australian authors will be in breach of those contracts if

you repeal parallel import recommendations or parallel import restrictions, so I would be very interested to hear what your recommendations to the government will be in regards to remunerating authors and publishers for the consequences of all those breached contracts.

MR COPPEL: I think, Gaby, that point relates to transitional arrangements which I think throughout the hearings we've emphasised as being the aspect of parallel import restrictions that the government has asked us to look at.

MS NAHER: Therefore it's a pertinent question, is it not?

MR COPPEL: Thank you, yes. Is there anyone else who would like to appear before the Commission today? If not, I adjourn the proceedings and this concludes the Commission's public hearing for the IP arrangements inquiry for today and for the inquiry. This is the last of six full days of hearings. Thank you very much everybody.

MS CHESTER: Thank you.

ADJOURNED **[12.36 pm]**