



Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

INQUIRY INTO INTELLECTUAL PROPERTY ARRANGEMENTS

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

TRANSCRIPT OF PROCEEDINGS

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5 **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.

10

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
15 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
20 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
25 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
30 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
35 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
40 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,
45 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 Ayres 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.

5 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.

10 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,
15 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.

20 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,
25 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.

30 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
35 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.

40 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
45 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
5 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.

10 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
15 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.

20 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
25 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
30 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.

35 **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
40 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
45 to get your sense of what you think some of those other factors might be.

5 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.

10 **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
15 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.

20 **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?

25 **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
30 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.

35 **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
40 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.

45

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
5 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
10 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
15 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
20 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
25 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.
30 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
35 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
40 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
45 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.

10 **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

5 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.

10 **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?

20 **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.

30 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.

40 **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.

5 **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?

10 **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
15 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
20 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
25 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.

30 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
35 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
40 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.

45 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.

5 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

10 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

15 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

20 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.

25 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.

30 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?

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

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

40 **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

45 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.

5 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
10 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.

15 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
20 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.

25 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
30 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
35 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?

40 **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
45 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.

5

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.

10

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?

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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.

20

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?

25

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

30

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.

35

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.

40

5 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.

10 **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.

20 **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.

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

35 **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.

40 **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?

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

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

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

10 **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?

15 **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
20 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.

25 **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.

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

35 **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
40 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.

45 **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.
5 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
10 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
15 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
20 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
30 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
35 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.
40 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,
45 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 predicated 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,

5 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
10 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
15 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.

20 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
25 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
30 you're suggesting?

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

MR COPPEL: The reason that it hasn't been adopted?
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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
40 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
45 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?

5 **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.

10 **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.

15 **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
20 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.

25 **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
30 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?

35 **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
40 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
45 argument for an international (indistinct).

5 **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.

10 **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?

15 **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.

20 **MR McINNES:** I think it was TPP benchmark.

MS CHIROIU: Yes, it was; quite right.

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

30 **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.

35 **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

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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.

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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.

20

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

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

5 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
10 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
15 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
20 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
25 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.

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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
35 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
40 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.

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5 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.

10 **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.

15 **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.

20 **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.

25 **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.

30 **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.

40 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.

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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?

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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.

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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.

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

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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?

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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.

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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.

5 **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
10 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
15 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
20 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.

25 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
30 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
35 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
40 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
45 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.

5 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
10 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
15 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
20 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
25 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.

30 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
35 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
40 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
45 in that to increase efficiency, increased efficiency, the filament, new materials, new manufacturing techniques. Edison's original lightbulb

5 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.

10 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.

15 Of course, the challenges, considerable challenges in taking six feet long linear light bulb, incandescent light bulb 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.

20 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.

25 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.

30 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.

45

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.

5 **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
10 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
15 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.

20 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?

25 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
30 innovators and government and all the rest of it? So who in government
department land would bring that broader perspective?

35 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.

40 **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?

5 **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?

10 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 - - -

15 **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.

20 **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 - - -

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

30 **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.

35 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.

40

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.

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

MR DOBBIN: Yes, that's okay.

10 **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
15 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.

20 **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.

25 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,
30 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
35 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
40 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.

45

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 - - -

5 **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.

10 **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
15 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
20 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
25 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
30 – 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.
35

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

40 **MR DOBBIN:** I think it's the timing.

MS CHESTER: Okay.

45 **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

5 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.

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

15 **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.

25 **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?

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

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

5 **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.

15 **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.

20 **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?

30 **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.

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

10 **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,

20 **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 where costs and damages are limited, meaning that you can institute proceedings and you can know what your downside is.

25 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.

30 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.

40 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 than the patents going to court. It was just more credible generally, so - - -

5 **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
10 look at replicating something along those lines in Australia, where would we put it, Federal Court or Circuit Court.

15 **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?

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

25 **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
30 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.

35 **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
40 discovery and two QC that have two senior counsel on one side and two on the other; that can certainly be appealed.

45 **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.

5

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 - - -

10 **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.

15 **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.

20

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.

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30 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.

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MR COPPEL: Thank you.

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MS CHESTER: Great, Jeremy. Thanks very much.

MR DOBBIN: Thank you for hearing me.

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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 an 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.

5 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
10 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
15 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.

20 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
25 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
30 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
35 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.

40 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.

5 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.

10 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.

20 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.

30 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.

35 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.

45 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.

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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.

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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.

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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.

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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

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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.

5 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.

15 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?

20 **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?

35 **MR KELLOW:** Yes.

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

40 **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.

5

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.

5 **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
10 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?

15 **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
20 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 - - -

25 **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.

30 **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?

35 **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.

40 **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?

45 **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.
5 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.

10 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
15 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?

20 **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
25 Zealand?

MR KELLOW: Yes.

MR COPPEL: Australia has parallel import restrictions.
30

MR KELLOW: Yes.

MR COPPEL: You mentioned you invest in Australian writers.

35 **MR KELLOW:** Yes.

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

40 **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 now publish 15 to 20 books a year. And, in particular, we stopped publishing children's
45 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.

5

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

MR KELLOW: Yes.

10

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.

45

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

5

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.

5 **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.

15 **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, 20 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 25 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.

30 **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 35 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 40 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 45 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
5 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
10 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
15 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.
20

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?
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30

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?
35

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
40
45 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.

5 **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 - - -

10 **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
15 dealt with in other market sectors, Australian copyright in that respect become more expensive than it is overseas.

20 **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 - - -

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

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

35 **MR KELLOW:** No, okay. But why?

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

45 **MR KELLOW:** Right.

50 **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 - - -

55 **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 - - -

5 **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.

10 **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.

15 **MR KELLOW:** Thank you.

MS GEMMELL: Thank you.

20 **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.

25 **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
30 generally.

35 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.

40 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
45 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.

5 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.

15 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.

25 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. 30 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.

40 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 45 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
5 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
10 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
15 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
20 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
25 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.

30 **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?

35 **MS WEATHERALL:** Yes.

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

MS WEATHERALL: Yes.

40 **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
45 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?

5

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

5 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.

10 **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?

15 **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.

25 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.

35 **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.

5 **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?

15 **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
20 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.

30 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.

35 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
40 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
45 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.

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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.

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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?

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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.

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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

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

5 **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?

10 **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?

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

20 **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 - - -

25 **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.

30 **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 -

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

45 **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.

5 **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.

10 **MS WEATHERALL:** Governance arrangements around collecting, they should be as good as they can be, regardless of fair use or 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 - - -

20 **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.

25 **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.

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

35 **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.

40 **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

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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
5 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
10 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
15 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
20 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
25 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
30 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
35 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
40 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?
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MR COPPEL: I wanted to ask your expert view as to how frequent or how much is actually - - -

5 **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
10 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.

15 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
20 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.

25 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
30 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
35 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
40 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.

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MS WEATHERALL: Over 20 years actually, 1995.

5 **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?

10 **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?

15 **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.

20 **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
25 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.

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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
35 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
40 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.

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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

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

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

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

10 **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
15 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.

20 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
25 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.

30 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
35 more patents means more innovation underpins these reforms. Unfortunately it is a faith that appears to have influenced the IP system and needs remedy.

40 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.

5 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
10 medicines, the latest evidence from the World Intellectual Property
Organisation suggests the opposite is true.

15 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
20 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.

25 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
30 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.

35 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
40 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.

5 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".

10 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.

20 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.

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

PROF PALOMBI: No.

35 **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

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

5 **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
10 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.

15 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
20 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
25 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.

30 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
35 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
40 be.

45 **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.

5 **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?

10 **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
15 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.

20 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
25 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.

30 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
35 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.

40 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
45 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.

5 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
10 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
15 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
20 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
25 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
30 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
35 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.

40 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
45 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
5 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
10 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
15 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.

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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
25 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
30 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
35 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,
40 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
5 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?

10 **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.

15 **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
20 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.
25 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.
30 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
35 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
40 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.

45 **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
5 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
10 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
15 you've made reference to 1300 patents on a molecule?

PROF PALOMBI: Yes.

MR COPPEL: Is that rhetoric or is that something which is - - -
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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
25 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
30 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.

35 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
40 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
45 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.

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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.

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MR COPPEL: Thank you.

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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?

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

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

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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?

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MS CHESTER: No.

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

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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

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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.

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

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

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

20 **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?

25 **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.

30 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.

35 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,
5 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
10 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
15 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
20 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
25 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
30 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
35 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
40 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
45 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.

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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.

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15 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.

20

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.

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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.

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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

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

5 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
10 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.

15 **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
20 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
25 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
30 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
35 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
40 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.

5 **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.

10 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
15 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.

20 **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
25 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
30 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
35 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
40 codes of behaviour and guidance that can be used by participants within the system.

45 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.

5 **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.

10 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
15 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
20 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
25 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.

30 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.

35 **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
40 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.

5 **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.

10 **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?

15 **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 side changes, i.e. things that we change as an industry. In my opening statement I made numerous
20 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
25 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.

30 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
35 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
40 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
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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.

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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.

15 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.

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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.

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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.

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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?

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5 **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?

10 **MR MULLER:** Through infringing media, yes.

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

15 **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.

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

MS BAULCH: Libby Baulch, Copyright Agency.

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

30 **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.

35 **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.

40 **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.

45 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
5 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
10 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
15 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
20 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
25 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
30 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.

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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,
40 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.

5 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
10 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
15 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
20 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
25 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
30 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
35 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
40 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
45 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.

5 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.

10 **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

15 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

20 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?

25 **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

30 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

35 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

40 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

45 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 - - -

5 **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?

10 **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
15 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
20 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
25 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.

30 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
35 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.

40 **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
5 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.

10 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
15 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.

20 **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 - - -

25 **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
30 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
35 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.

40 **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.

45 **MR SUCKLING:** Yes.

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

5 **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
10 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
15 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
20 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
25 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.

30 **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
35 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,
40 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
45 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
5 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
10 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
15 current code of conduct policy would already address those. But that would be helpful.

MS BAULCH: Sure.

MR SUCKLING: Yes.
20

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 - - -
25

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
30 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.
35

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
40 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
45 education?

5 **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
10 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.

15 **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
20 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
25 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.

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

35 **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
40 tribunal and there was no suggestion that that wasn't something that it could have determined had it not been agreed.

45 **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.

5 **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 - - -

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

15 **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
20 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.

25 **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.

30 **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
35 whether how well the current arrangements are working and your views on at least that draft recommendation in the ALRC report?

40 **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
45 renewing that agreement.

5 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.

15 **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.

25 **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.

30 **MR COPPEL:** Thank you, very much.

MR SUCKLING: Thank you, Commissioners.

35 **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.

45 **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.

5 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
10 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
15 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.

15 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
20 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.

25 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.

30 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
35 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
40 portfolios.

45 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?

5 **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.

15 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.

25 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.

30 **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 - - -

35 **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?

5 **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 - - -

10

MR ALDER: Sorry?

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

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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 - - -

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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.

25

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.

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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?

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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?

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5 **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.

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

15 **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. 20 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 25 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?

30 **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 35 examination they may as well get a standard one because we have to do the same amount of work.

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

MR ALDER: Sure.

45 **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.

5 **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.

10 **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
15 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.

20 **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
25 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
30 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.

35 **ADJOURNED** [3.43 pm]

RESUMED [3.52 pm]

40 **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
45 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.

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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
10 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.

15 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
20 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
25 claimed benefits for fair use.

Secondly, Screenrights is concerned that the draft report develops a false rationale to justify its recommendations that reduce copyright
30 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
35 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
40 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.

45

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 approach, 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
5 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
10 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
15 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
20 - - -

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
25 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?

30
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
35 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
40 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
45 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.

5 **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?

10 **MR DICKINSON:** Fair dealing and statutory licences co-exist but don't intersect.

15 **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?

20 **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.

25 **MS CHESTER:** That's what I sort of getting at. There sort of is like a Venn diagram where they overlap, i.e. - - -

30 **MR DICKINSON:** I don't think there is.

35 **MS CHESTER:** - - - the statutory licence and the negotiation is informed by exceptions under fair dealing, aren't they?

40 **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.

45 **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?

50 **MR DICKINSON:** Absolutely not. If they are, then it's a mistake.

55 **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?

60 **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

5 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?

10 **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 15 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.

20 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.

25 **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 30 rights is not an invisible factor for rights owners, it's expensive to be able to go through that process.

35 **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 40 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? 45

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
5 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
10 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
15 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
20 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
25 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
30 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,
35 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
40 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
45 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.

5

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
10 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
15 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?

20

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
25 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
30 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
35 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
40 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
45 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?

5

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.

10 **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
15 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
20 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
25 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
30 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 - - -

35 **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.

40 **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?

45 **MR COPPEL:** In the next week, is that feasible?

5 **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.

10 **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.

15 **MR LAKE:** Okay. Thank you very much.

20 **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?

25 **DR SKILLBECK:** Yes.

30 **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.

35 **DR SKILLBECK:** Should I sit down or stand up?

40 **MS CHESTER:** Yes, make yourself comfortable.

45 **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.

50 I'm an author, as I said, I started my career as a writer as a freelance journalist and I've published many articles as 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.

55 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
5 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.

10 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
15 writing about were refugees, come to Australia and then stuck in detention centres.

20 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.

25 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
30 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
35 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.

40 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
45 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.

5

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.

15

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

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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.

5 **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?

10 **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.

20 **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?

25 **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.

35 **MS CHESTER:** Is it from an eBook platform or is it hardcopy publication that you're doing?

40 **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.

45 **MS CHESTER:** Okay. Do you have anything else? No. Thank you very much, Ruth.

MR COPPEL: Thank you very much.

DR SKILLBECK: Thank you.

5

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?

10 **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
15 behind.

MS O'DONNELL: Absolutely. Yes.

MS CHESTER: So we can take this evidence.

20

MS O'DONNELL: Yes. Please.

MS CHESTER: So if you just want to make some, yes, opening remarks. Thanks.
25

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
30 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.

35 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
40 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
45 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.

5 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
10 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.

15 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
20 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.

25 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
30 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".

35 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.

40 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
45 industrial relations area and in the insurance area with workers'

5 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.

10 **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.

15 **MS O'DONNELL:** New South government and international and world health organisations.

20 **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?

25 **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
30 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.

35 **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.

45 **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.

5

MS SARGEANT: Good afternoon.

MR COPPEL: Good afternoon. So, for the purposes of the transcript if you could each give - - -

10

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.

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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.

20

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.

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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.

35

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.

40

Now the UK laws were intended to come into place in 2020, i.e. in four years' time.

5 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.

15 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.

20 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.

25 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".

40 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.

5 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.

10 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
15 – 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
20 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
25 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
30 the last week alone I heard the word “scare” from five Australian studios. These Australian studios 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.

35 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
40 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
45 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.

10 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.

15 **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 - - -

20 **MS CHESTER:** Enforcement.

MR COPPEL: Or is an enforcement issue?

MS SARGEANT: It's twofold, if I'm understanding your question correctly.

25 **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.

45 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.

5 **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?

10 **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.

20 **MS CHESTER:** The enforcement would only come into effect for a copy, as opposed to a replica, given it's been distinguished?

25 **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.

35 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.

40 **MS CHESTER:** So just so we understand, so the EU has moved to lengthen the term of protection - - -

MS SARGEANT: The UK.

45 **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?

5

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.

10

MS CHESTER: Of the copies?

MS SARGEANT: Of fake furniture, not the original furniture. We use the word real and fake.

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MS CHESTER: Unauthorised copies?

MS SARGEANT: Unauthorised, yes.

20

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.

25

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.

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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

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Australia because legally they can sell here. Whereas the UK now, they legally can't, these online sellers can't.

5 **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.

10 **MS SARGEANT:** Yes.

MR COPPEL: Is that what has been adopted, life plus 70?

15 **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 - - -

20 **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.

25 **MS SARGEANT:** Absolutely.

MR COPPEL: So before you do, if you could, for the record, give your name and who you represent.

30 **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.

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40 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.

45 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

5 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.

10 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.

15 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.

25 **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?

35 **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.

40 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.

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5 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.

10 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.

15 **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?

20 **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.

30 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.

40 **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.

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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 accidentally 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?

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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.

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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?

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5 **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.

10 **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
15 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
20 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
25 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
30 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,
35 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
40 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
45 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.

5

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.

10

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.

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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.

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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.

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MS CHESTER: Thank you very much for coming this afternoon.

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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.

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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

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arguments against – or the quests to change the IP laws in Australia and have more relevance to our industry, I suppose.

5 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
10 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.
15 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
20 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
25 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
30 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.

35 **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
40 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.

5 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
10 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.

15 **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?

20 **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?

25 **MR COPPEL:** But is it a question of enforcement, or is it a question of laws that allow the - - -

30 **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
35 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
40 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.

45 **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?

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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.

10 **MR COPPEL:** You use trademarks?

MR MUNAO: We do use trademarks.

MR COPPEL: Use both.

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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.

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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?

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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.

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40 **MS CHESTER:** And the - - -

MR COPPEL: This is - - -

MS CHESTER: Sorry, Jonathan go ahead.

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MR COPPEL: So this is post-term of the registered design?

5 **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.

10 **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.

15 **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.

20 **MR COPPEL:** So the judgment was like saying a replica is a different product from the - - -

25 **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, 30 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.

35 **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?

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MR HOLLAND: Not that I'm aware of.

MR MUNAO: Yes, not that I'm aware of either.

45 **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.

5 **MS CHESTER:** Can we have the catalogues to take?

MR MUNAO: Yes, sure.

10 **MS CHESTER:** Is that okay?

MR MUNAO: Yes.

MR COPPEL: Can we have the chairs? We'll swap you.

15 **MS CHESTER:** Thank you very much.

MR COPPEL: Which one? Pick one.

20 **MS CHESTER:** I want both please. I'll share later.

MR HOLLAND: Thank you.

MR COPPEL: Okay, thank you.

25 **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?

30 **MR ARCHER:** I could make a comment just to answer the - - -

UNIDENTIFIED SPEAKER: We'll get you to speak tomorrow in transcript.

35 **MR ARCHER:** Okay, I'm going to speak tomorrow at some time.

MR COPPEL: Okay.

40 **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?

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MS CHESTER: No, he can have two.

MR ARCHER: I can have two?

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MS CHESTER: You can have two goes.

MR ARCHER: Yes, I just wanted to - - -

10 **MS CHESTER:** No, if it's relevant to the commentary today, that's fine.

15 **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?

30 **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.

35 **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.

45 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

5 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.

10 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
15 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
20 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.

25 **MR COPPEL:** Okay.

MS CHESTER: Thank you.

30 **MR COPPEL:** Thank you.

MR ARCHER: Thanks very much.

35 **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.

40 **MS CHESTER:** Thank you.

**MATTER ADJOURNED AT 5.37 PM UNTIL
WEDNESDAY, 22 JUNE 2016**