



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 **MR COPPEL:** Good morning. Welcome to the public hearing for the
Public Hearing for the Productivity Commission Inquiry into Australia's
Intellectual Property Arrangements. My name is Jonathan Coppel and I
am one of the Commissioners on this inquiry, and my colleague, Karen
10 Chester, is the other Commissioner. The inquiry started with a reference
from the Australian Government in August 2015 to examine Australia's
IP arrangements, including their effect on investment competition, trade,
innovation and consumer welfare.

15 We released an Issues Paper in early October 2015 and have talked to a
range of organisations and individuals with an interest in these issues. A
number of roundtables have also been held with groups of interested
parties on specific topics to inform the inquiry. We released the draft
report in late April, which included over 20 draft recommendations and
draft findings, along with a number of information requests. We have
20 received a large number of submissions in response, the total number of
submissions now in excess of 500.

25 We are grateful to all the organisations and individuals that have
taken the time to prepare submissions and many of you will be appearing
in today's hearing. The purpose of the hearings is to facilitate public
scrutiny of the Commission's work and to get comment and feedback on
the draft report. This week the Commission has held public hearings in
Brisbane and Sydney with hearings to be held in Melbourne tomorrow and
Friday, and a second day of hearings in Sydney scheduled for next
30 Monday.

35 Following the public hearings, we will be working towards
completing the final report, having considered all the evidence presented
at the hearings and in submissions as well as other informal discussions.
The final report will be handed to the Australian government later this
year. The participants and those who have registered their interests in the
inquiry will be advised of the final report's release by government, which
may be up to 25 parliamentary sitting days after completion.

40 We like to conduct all hearings in a reasonably informal manner, but I
remind participants that a full transcript is being taken. For this reason,
comments from the floor cannot be taken. But at the end of today's
proceedings, I will provide an opportunity for anyone who wishes to do so
to make a brief presentation.

45

Participants are not required to take an oath, but are required under the Productivity Commission Act to be truthful in their remarks. A transcript of the proceedings will be made available to participants and will be available from the Commission's website following the hearings.

5 Submissions are also available on the website. For any media representatives attending today, some general rules apply. Please see our staff member at the back of the room for a handout that will explain the rules. I don't think we have any media at this point.

10 Observers at this hearing are not permitted to take pictures or recordings of any type and, to comply with the requirements of the Commonwealth Occupational Health and Safety Legislation, you are advised that in the unlikely event of an emergency requiring the evacuation of this building that the exits are located next to the elevators.

15 If you require assistance, please speak to one of our inquiry team members here today. Please do not take the elevators in that event. Your assembly point is on Rudd Street, which can be found by turning right on exiting this building, and then turning right again onto Rudd Street.

20 Participants are invited to make some opening remarks of no more than five minutes. Keeping the opening remarks brief will allow us the opportunity to discuss matters and participant's submissions in greater detail. Participants are welcome and invited to comment on the issues raised in other submissions if they feel they wish to do so.

25 I would now like to welcome the first participant who is Simon Bush from the Australian Home Entertainment Distributors Association. So, Simon, if you would like to make yourself comfortable and then, for the purposes of the transcript, if you could give your name, who you represent, and then feel free to give your opening statement. Thank you.

30

MR BUSH: Thank you, Commissioners. My name is Simon Bush. I am chief executive of the Australian Home Entertainment Distributors Association. AHEDA represents the 1.2 billion home entertainment film and TV industry covering both physical discs and digital sales with members including all the major Hollywood as well as Australian independent distributors. I'm also a director of Creative Content Australia. My statement will include data not present in our joint submission.

35

40 We are an industry that has been at the forefront of digital disruption and has embraced each new technology at every turn with the ambition to get content to consumers in new and exciting ways on any platform they choose. Content owners license their content to any platform you can think of and competition is fierce across the industry. The market has

45

been very effective in driving technology adoption and price erosion for consumers.

5 What a robust system of copyright allows is for massive investment in
production of creative content that Australians love so much. Movie
making is inherently risky, and the industry does rely on a small number
of films and TV shows doing very well with most films losing money. It
is against this backdrop of innovation of risk and investment that the
10 copyright serves its original purpose today as it did back when the
copyright was enshrined in the Statute of Anne. Rather than being past its
use by date, copyright has been continuously reformed and updated with
additional exceptions granted and interpreted by Australian Courts to
allow not only fairer use, but also allowing for innovative businesses to
thrive, such as Atlassian in the emerging Fintech sector.

15 There are two draft recommendations in the PC report, however, I
wish to refer. Others, along with our submission, I believe, have talked to
concerns we have with fees proposals. The first is on draft finding 18.1
which says that, “The evidence suggests timely and cost effective access
20 to copyright protected works is the most efficient way to reduce online
copyright infringement”. I’m not sure of the evidence and data the PC
relied upon when it made this statement, but let me put forward some
facts.

25 AHEDA has commissioned respected global analysts, IHS, to conduct
international pricing and the following data is from Q3 2015 and it’s in
US dollars at the exchange rates at that time. The average EST, which is
electronic sell through, standard definition new release and catalogue
prices in Australia were 11.86 for new release and \$7.98 for catalogue. In
30 the UK they were 11.67 and \$8.54. In the US they cost 14.56 and \$9.47.
So what that means Australia was cheaper than both major markets for
everything except 19 cents more expensive than the UK for a new release
film.

35 For high definition new release and catalogue, Australia was cheaper
than the US and the UK by a substantial margin. For example, the
average price for a digital catalogue film in Australia was \$9.73 and in the
US it was \$15.08. For video on demand pricing, which is the largest
method of digital transactional consumption, it also shows that Australia is
40 cheaper than both the US, the UK in both SD and HD across both new
release and catalogue and I’m happy to provide this data, more data as
well. It is incorrect to say then that transactional video prices are higher in
Australia. This is simply not true. So I hope that deals with the cost
effective concerns.

45

Now, turning to the issue of timeliness that would somehow reduce piracy. In 2015 nine out of 10 of the largest box office films in Australia were released here before the US. In Australia, the window between theatrical and home entertainment is being reduced from 120 to 90 days.
5 However, most piracy surge is 300 per cent after the release of the DVD and digital version is available, suggesting availability is not the issue itself, but availability of a quality digital copy for piracy purposes is.

10 Further, if availability and price somehow is a panacea for piracy, then how do you explain that Australians have the largest per capita piracy rates in the world for Breaking Bad when it was available the day after broadcast digitally for a few dollars an episode. Despite this, pirates prefer free, and that is a business model with which we can't compete. We know this from 2015 research by the Department of Communications
15 that confirmed free content was cited as a major reason for content theft by 55 per cent of Australia, and 2016 CCA research found that 68 per cent of pirates submit that the main reason they download or stream from infringing sites is because it's free. We are very aware that when we do surveys into piracy, and we were told by analysts, there is a huge
20 difference between stated and actual behaviour. In other words, people will say they won't pirate if they were given it easily and for a decent price, but when that is available their actual behaviour doesn't necessarily change.

25 Dr Brett Danaher, et al, of Carnegie Mellon University, evaluated the effectiveness of three ways of website blocking in the UK on three different dimensions. Firstly, the effects of blocks on visits to blocked sites; the effect of blocks on visits to all piracy sites, both blocked and unblocked; the effect of blocks on visits to legal streaming sites. They
30 found the following, when the 19 sites were blocked in November 2013 it caused an 85 per cent decrease in visits to the blocked sites, so in other words, they weren't using – only 15 per cent were using VPNs to get around it; it caused a 30 per cent decrease in total piracy visits amongst affected users; and caused a 12 per cent increase in visits to paid legal
35 streaming sites.

When a further subsequent 53 sites were blocked in November 2014, it caused a 90 per cent decrease in visits to blocked sites; caused a 22 per cent decrease in total piracy visits amongst affected users; caused a 6 per
40 cent increase to visits to paid legal streaming sites; and caused a 12 per cent increase in visits to legal free ad supported sites.

Currently before the Australian Courts are two cases around
45 injunctive relief for site blocking which, over time, when a number of sites are blocked it is not unreasonable to expect a similar outcome to that

of the UK. Further, we have research that suggests that media around the Dallas Buyers Club Court case last year did change people's behaviour and attitudes towards piracy on the basis that they may be caught.

5 I firmly believe that the solution to film piracy is a united approach around getting content to consumers in new ways, such as with (indistinct) services like Netflix, Stan, and Presto, at reasonable price points along with government leadership around the value of copyright and some targeted and effective enforcement. This multi-faceted approach will
10 ensure that we have local providers of content as well supporting local jobs and productions. There is also the moral issue of valuing and protecting creativity and endeavour, and the investment that follows.

The second matter I wanted to raise is draft recommendation 5.1
15 which, in essence, is a recommendation that geoblocking should not be allowed and that circumvention should be encouraged. From reading transcripts of Commissioner Chester on ABC Radio on April 29 explaining this recommendation, it seems to stem from a desire that the PC believes that Australians should be able to access overseas platforms,
20 like Netflix, and presumably HBO, NBC and all the US cable networks, from Australia.

The ramifications of this recommendation in impact are quite large and, perhaps, not fully appreciated. Australia's free to air networks rely
25 on, and pay for Australian rights for the major US TV shows to generate viewers and advertising. This, in turn, places a requirement on the network to invest in local productions under government licence models. If Australians access all their content offshore, then the local networks will surely wither and die.

30 Now, in terms of local film production, territorial licensing rights are important to how productions are funded and made. In other words, the project is sold to distributors in various territories, such as the US, UK and Europe, and once presales and advances are made, the production is then
35 green lit. Without such territorial licensing less, rather than more, local productions will be funded.

The logical conclusion of this recommendation is that content will only be accessed and made by global platforms who can apply global
40 rights. There will be no room for smaller projects who have a niche audience. Moreover, by encouraging Australians to access overseas based platforms for content consumption, they will be taking revenue offshore and ensuring the emasculation and bypassing of the Classifications Act, which Australian based platforms legally have to comply, which is
45 arguably another unintended consequence. I'm almost finished.

5 Having read the Productivity Act 1998, I understand the policy
guidelines for the Commission include growing the economy to achieve
higher living standards, growing Australian industries, recognising the
interests of industries, employers, consumers in the community likely to
be effected by proposed measures, increased employment and for
Australia to meet its international obligations and commitments. In my
view, the recommendations on copyright put forward by the PC will, in
fact, result in reduced investment, jobs, and revenue, and shrink the
economy.

15 The film and TV sector supports 46,000 FTEs and contributes 5.8
billion to the Australian economy. The cultural contribution of a vibrant
copyright sector is also worth considering, on top of the significant
economic contributions. Copyright underpins investment in creative
content and the evidence for change is, at best, weak and contentious.
Thank you. I'm happy to take any questions.

20 **MR COPPEL:** Thank you, Simon. Maybe I can pick up first on your
first comment that relates to draft finding 18.1?

MR BUSH: Yes.

25 **MR COPPEL:** You asked what evidence the Commission based that
finding on. It comes from government surveys. It comes from consumer
groups that have done research that looks at the impact of material that's
made readily accessible, as one of the drivers of legal access to copyright
material. I'm wondering whether draft finding 18.1, which doesn't make
that distinction as to whether it's legal or not legal, is the source of your
concern? We are referring to making it readily accessible in a legal
manner.

MR BUSH: Yes.

35 **MR COPPEL:** So I'm wondering if that is something that - - -

40 **MR BUSH:** I think I mentioned it in the statement around stated natural
behaviour. So you can do surveys of people saying, "If it was more
available and cheaper will you pirate (indistinct)" and they'll go, "Yes".
But the reality is the actual behaviour doesn't actually necessarily shift
those pirates. We've done that research and we know. When it is
available, a lot of people don't shift their behaviour. So I think we just
need to be mindful of some of those surveys where you do actually ask
people and focus groups what they will do because it doesn't always

change. So as I said, I think it's a multi-faceted approach, this issue. I think availability is important, the right price is important.

5 I think there was a big media push last year by Choice and others saying, "We don't have Netflix in Australia. Isn't it outrageous? We should access it offshore". By the way I don't believe VPNs are, in fact, legal and I think that's one of your points. But Netflix is available now here, Stan, Presto. The market is working so why do we need to intervene and make – and also there's unintended consequences, I think, of
10 promoting people to access VPNs and go offshore. I think there are some issues there that probably need teasing out and thinking about.

MR COPPEL: Just one more point on this, why do we need to intervene? I mean, in a sense what we're saying is that there's a large part
15 of the responsibility of the providers of materials to ensure that the material isn't illegally accessed. You're arguing there's a multi-faceted approach. What are you then saying, specifically, about the role that the sector plays and the role that government can play in terms of meeting those goals of better access to legal material?

20 **MR BUSH:** I don't think the government needs to play any role. Why does the government need to get involved in this market at all, when the market has proven over decades that it will continue to provide content to consumers?

25 Perhaps there's a misperception from some, I'm not suggesting yourselves, that the studios in particular and distributors and rights owners, want to lock up content. They want to do the exact opposite. They licence content to any platform that's willing to acquire the rights
30 and distribute it to consumer in any way. They're happy to do that and they want to do that. They make content and invest a lot of money in content. They want to make money from it. It's pretty simple economics. They make money from it by licensing it to consumers to purchase it or access it. So the market is very simple from that point of view, they want
35 to make money from their investments and not lock it up, and not control it, and not keep it away from consumers.

MS CHESTER: So I think the evidence that Jonathan referred to, you
40 might want to have a closer look at the Choice submissions and several others that we received, because they also looked at not just survey evidence, but also what actually happened in cases where there were change to content access and the response of consumers. So our position is piracy is a problem. It requires a holistic solution. The evidence base that we've seen suggests that some people will still continue to pirate,
45 others will do the right thing.

To some extent, circumventing geoblocking, based on the evidence that we've received and heard, puts pressure on the business models to change. So you speak of these providers wanting to do the right thing and getting the content out to the folk down under. But it was only after mass circumvention of geoblocking that those business models changed and Netflix became available in Australia.

So, I guess, what we're saying is, in terms of government, it was raised with us in our pre-draft report consultation that there was still some uncertainty around Australian legislation, and whether Australian legislation could be construed to suggest that if an Australian were to circumvent a geoblock that would be illegal under Australian law. Our recommendation is let's just address that uncertainty, and that's something that we're still trying to come to a landing, as you rightly suggested.

So I think we're, kind of, on the same page in terms of a holistic response is required. We're just saying let's remove that legal uncertainty so consumers in Australia can maintain the pressure on overseas content distributors to continue to do the right thing, as you suggest that they'd like to do.

MR BUSH: Look, yes, I think you just need to be careful and mindful, as I said in my opening statement, of what message that's sending and where do you end that process of pushing for people and encouraging Australians to go offshore to get their content. As I said, the networks buy rights. Australian TV networks buy their rights for shows, and that actually draws the audiences and that enables them to, through advertising - and there's the government requirements for local production quotas. If everyone just buys their - accesses their content offshore, that has flow-on benefits or issues, I should say, and concerns.

So I guess it's to be mindful of that, and going back to your charter of the Productivity Commission is not for every Australian to get every piece of content ever made in the world. It's to grow the economy and protect jobs and things of that nature. So it seems like a small thing, but I just think you need to be aware of the - in my view, be aware of the ramifications.

I don't know if Netflix came to Australia specifically because people were using VPNs to the United States, which is your point. I don't know that was the case at all, because they'd rolled out - they had a rollout plan, as I understood, it in the UK, and then Australia, and then parts of Europe, territories in Europe. So they targeted all the Western economies that have copyright protections in place. That's where they rolled out their

services. They didn't roll it out in Spain because they've got massive piracy rates there. They don't roll it out in Asian countries because they've got massive piracy.

5 The other impact of, if you go back to the original Senate, I think the House of Representatives Committee Report into Internet Pricing and IP Pricing, which that was a recommendation from. You can take (indistinct) say, "Well, we should have global pricing". That was one of the things they were really upset about was the fact that things cost more in 10 Australia, particularly business software than – not so much film, but products. So we should have, sort of, this – we should have global pricing. Now, that's got massive ramifications as well. I know you're not suggesting that, but that comes up along with the same recommendation that you're making.

15 **MS CHESTER:** Yes. Simon, we're mindful that you've quoted some examples in your opening statement about there isn't a pricing or a quality disparity for the examples that you gave. We've received evidence that there still remains pricing and content offering disparities, for example, 20 with Netflix Down Under versus Netflix in the US.

MR BUSH: Sure.

25 **MS CHESTER:** So there are still those disparities. Allowing folk to circumvent geoblocking will just maintain the pressure on those disparities to be narrowed if consumers - - -

30 **MR BUSH:** That's got to do with global rights, Commissioner. It's got nothing to do with Netflix – that change between what content is available in the US and what content is in Australia will change over time, as the global rights are applied for different shows. It may well be that the local Foxtel or a local network will buy the rights for Australia and therefore won't be available on the Australian Netflix, and that's as it should be. That is as it should be.

35 **MS CHESTER:** We understand that. We understand the business models. I'm just saying that your opening statement did suggest that content's like for like, prices are like for like. I'm just suggesting that we've got an evidence base that suggests that's not the case, regardless of 40 what underpins it.

45 **MR BUSH:** So this goes back to the point I was making before about pricing standards around the world. That is a very slippery slope and I'll send the Commission some research on that.

MS CHESTER: So the Commission is not making any - - -

MR BUSH: Should something be cheaper in India than Australia?

5 **MS CHESTER:** Simon, just to quickly – the Commission is not making any recommendation on that, nor did we in our draft report.

MR BUSH: Right. Yes.

10 **MS CHESTER:** We're just talking about allowing consumers to express their - - -

MR BUSH: Okay.

15 **MR COPPEL:** Films, DVDs were areas where parallel import restrictions were lifted some years back. Can you talk us through the impacts of that change to – if any?

20 **MR BUSH:** I'm pleased to be able to say that 95 per cent of DVDs, Blue-ray discs sold in this country are manufactured in Australia. So there are massive factories that churn out discs in this country and employ people. Technicolor, Sony DADC, Regency, are the three big ones. They manufacture discs and they ship them off to local retailers.

25 So the whole just in time – we've got local classification requirements. I mentioned that in my statement. So we have to comply with those both digitally and physical product. In fact, any product, from speaking to the classification branch, any product that's marketed or sold to Australians is – there is a requirement for classification markings. So
30 again, encouraging Australian to access their content offshore means they're not getting the benefit and legal requirement for classification markings and consumer advice. So for that differences in the packaging and being able to manufacture it and get it to the local retailers when they ask for more discs, it's all done locally, which is fantastic.

35 **MR COPPEL:** Were there any impacts on the Australian Film Industry?

MR BUSH: No. I mean, there is still region coding on discs which is a form of geoblock, in a way - some people might see it as that. There is
40 region coding on discs. But I don't think region coding is a particular big issue for the consumer or the market. It used to be when I first started this role, 13 years ago. Region coding on discs was a major issue.

45 I haven't had one conversation around region coding on discs for over five years, primarily because most players, DVD players are multi-region

players, so it's not an issue any more. In fact, Blue-ray discs, I think there's only three regions globally for Blue-ray discs. I think for 4K, I hope I'm right in saying this, I don't think there's any region coding on 4K discs at all. But, yes, so look in terms of answering your question, there
5 was no impact on that issue for us, but I think we had unique circumstances and we'd be different from, say, the book industry.

MS CHESTER: And was there any impact on, I guess, the issue that the – my colleague might've been getting to was in terms of local content in
10 those products versus offshore content?

MR BUSH: Sorry, I'm not sure what you mean by that, Commissioner. In terms of - - -

MS CHESTER: Well Australian films versus offshore films being – so where the actual content came from as opposed to where the disc was manufactured?

MR BUSH: No. Look, the beautiful thing about DVD, and it's still very
20 – Australians are actually one of the biggest countries in the world to still collect DVDS. We still buy a lot of them. A lot of other countries have gone – they're buying a lot less DVDs. So we're very fortunate it's still a billion-dollar business in this country, albeit is decreasing.

No, it's quite – it's not – when I say it's not cheap to access – to manufacture and press a DVD, it is cost effective if you can sell enough units and get it onto shelf space. Shelf space through the retailers is a big issue these days, they're shrinking what DVDs they do sell, and the mass merchants are coming in and they'll only do the Top 20. Then people say
30 well that's a - digital provides a good opportunity and a cheap distribution platform and a global platform for selling niche and smaller product. That is true in one sense, but also the research shows unless you can create it and people can find it, then you actually don't sell anything. So it's a bit of a false economy.

35 What we're finding is around the digital sites and the streaming sites is you're getting niche streaming sites being established like Dendi's got a streaming site in Australia, subscription site which is just around their arthouse sort of content. Madman, who is a member, an Australian company of ours, they've got a WWF wrestling site and I believe they're
40 building, or they've built, an anime one. So you're starting to see that you can't rely on an iTunes or one of these global platforms to get your product discovered or your film discovered. It's really, really hard. There's so much stuff there, so many titles. So if you can create this little
45 community of - there's another Australian-based subscription service

whose name escapes me, but they're focusing on Australian content - Australian productions and Australian documentaries, which is fantastic. So there's a home - sort of niche homes for these digital films and documentaries, which is great.

5

MR COPPEL: I just want to come back to enforcement, because when we talk about copyright, very quickly the issues of infringement come up and in your submission you are arguing that there are good reasons for not capping costs or damages in the Federal Circuit Court and I think this view is quite a unique one and I was wondering if you could sort of talk us through the reasons for that point of view.

MR BUSH: Not for damages. Look, I am not a copyright lawyer and I cannot give you, other than what was in our submission it would be difficult for me to sort of enunciate that further for someone who actually goes in the Federal Court and argues those cases. Michael Williams, who I believe you've met - we're happy - we would be happy to take any questions you have on notice and come back to you and provide you with details on notice. We are happy to do that.

20

MR COPPEL: Thank you.

MS CHESTER: This issue might fall into the same category then, Simon, but you didn't comment on this in your opening remarks, but in your submission you had some issues with our draft recommendation relating to the repealed section 51(3), which is where under the current Competition and Consumer Act IP licensing and affording arrangements are not subject to the competition laws. So that was something that was subject to the Harper Competition Policy Review and several others prior to that have made the same recommendation. We have revisited the ground.

30

MR BUSH: Sure.

MS CHESTER: And spoke to folk and got evidence on it. So I'm just not sure what is underpinning the concerns of extending the competition laws to - - -

35

MR BUSH: Look, again, I caveat it with I can't delve into this in great detail, but my understanding is that the copyright doesn't - it doesn't protect an idea, but it protects the expression of the idea. So in other words I am not sure where the anti-competition concern lies with film and TV content. So if someone makes a periodic, medieval, mythological drama called Game of Thrones, there is nothing to stop another network or

40

producer making a medieval mythological drama called, I don't know, Vikings or the Last Kingdom, or something else.

5 If someone wants to do a cop show based upon evidence in the lab, then there's nothing to stop another shop being made on exactly the same principles and basis. So - and in fact you get examples in the film industry where there could be the same film made about the same subject and there is a race to get it to market first. You've seen that with the Osama Bin Laden - I think it was Seal Team Six and Zero Dark Thirty - I
10 might get the names wrong, but there are examples where you are getting films made together on the same subject matter.

MR COPPEL: Yes.

15 **MR BUSH:** So I guess that would be only what - that's probably about as detailed as I can get in terms of answering that question.

MS CHESTER: So the issues that were concerning folk with it not being covered was around, sort of, very complex licensing arrangements, particularly in the pharmaceutical and digital contents base, and some of
20 the licensing arrangements could be anti-competitive.

MR BUSH: Right.

25 **MS CHESTER:** So I don't think the initial concerns that you are talking about relate to extending the competition laws.

MR BUSH: Yes. So, look, again, I could take that on notice and get back to you with some further information.
30

MS CHESTER: That would be good. Thank you.

MR COPPEL: Your opening remarks and submission oppose the recommendation - draft recommendation in favour of fair use, as fair use
35 as the basis for an exception.

MR BUSH: Yes.

40 **MR COPPEL:** We are trying to get a better understanding of the thinking behind the opposition in terms of what copyright material that is currently remunerable would no longer be remunerable under a fair use provision basis for an exemption for copyright. .

45 **MR BUSH:** From listening to media transcripts and things, I think you might be referring to particularly educational licences in particular as to

one of the areas why you think fair use might be a better way to go. Is that - - -

5 **MR COPPEL:** Well, we don't see them as either/or. In our draft report we don't make any recommendations in terms of removing provisions for a statutory licence for education or for government use for that matter, but as an illustrative use, the draft recommendation as it relates to fair use does – it's as one of the factors, education. So there will be some material there that is considered fair use and I guess that's the question that I'm
10 asking. There will also be a lot of material that will still be - that would be remunerated under the copyright system.

MR BUSH: Yes.

15 **MR COPPEL:** We're trying to get a better idea - - -

MR BUSH: Yes, I make a general point and I may come to the specific, and look, fair use has been through the ALRC process of which has been very central and involved. You sort of get these polar, opposite views I
20 think and that's - and you get the - sort of the Google on one side saying everything should be made freely available, and you get the content owner saying, "Well, look, the system works fine," and you get the various iterations in between.

25 Look, I think from my experience having been doing what I've been doing for about 13 years, I've seen the Copyright Act and further exceptions being amended and granted, and courts interpreted how they think things should be dealt with virtually every year. So to suggest that copyright is - the current system is inflexible, is outdated and needs to
30 change, I think is inaccurate. I have seen it work and I've seen it to be updated. There is an exceptions-based regime. If an argument is mounted to the government, then they change it. Pretty simple.

35 To suggest that we throw out the system we've got and all the case law, and bring in fair use, without that case law, and with questionable evidence as to its benefits and there is research in Singapore to suggest that it actually will take the economy copyright industries backwards, I think you need to be pretty certain about what you are recommending in order to make that recommendation.

40 The list of examples that you put in your report, we've responded to those in our submission, but a rap song uses another lyric in its opening lyrics as one of the justifications of, well, we'll take a high-risk approach. I think some of these examples are fairly, I guess - I don't think it would
45 be harsh to say that they are trivial.

5 In terms of statutory licensing, I understand you had a fair use hearing,
which is under Chatham House Rules and there was a representative from
(indistinct) there and you probably got a good sense about what the
benefits may or may not be for the educational institutions who deal with
the statutory licensing model and what are the benefits that they may see,
and there's probably not much more I can say on that point, but there is an
ability and they currently have the ability to license any content they want
for use in educational institutions and they do that, whether they think
10 they're paying too much is a matter for them and in the process, in terms
of the exceptions under the Act for certain uses, there are exceptions.

15 If they want further exceptions they can be justified and argued for
education institutions and cultural institutions. There is a vehicle - there
really is a vehicle for amending the Act and, in fact, there is a lapsed piece
of legislation from the last parliament that's going to be renewed in the
new parliament, according to the Mitch Fifield. I think it's non-controversial
so both - either side will bring it back into the parliament around the
Disability Access Measures Copyright Amendment Bill. So that will go
20 through the parliament later this year, I would imagine. So again, it's
another example that you can amend the Act and create additional
exceptions if there is a need.

25 **MR COPPEL:** I think that's one of the arguments that we put forward in
the draft report for fair use in that it is much more flexible and adaptable,
particularly in an environment which is subject to so much technological
disruption. We were discussing earlier before the proceedings started
today the VCR exception which was eventually legislated at a point in
time when VCRs were essentially no longer used. Format shifting,
30 caching; there are many examples and in the period where the legislation
doesn't catch up with the technology can also be a source of uncertainty or
lack of predictability for both copyright holders and users, and having a
more principle-based Copyright Act, you could argue provides greater
predictability. You will never remove entirely uncertainty, but if there are
35 a set of principles which are well understood, those can act as a basis for
an adaptable approach that takes into consideration at the time how things
are changing in this area which is probably one of the areas of the
economy which is at least over the recent period been subject to probably
the most rapid change.

40 **MR BUSH:** Look, I guess all I would say in response is you are talking
about consumer uncertainty or industry uncertainty around how things can
be used today and I assume you are talking about uses on the Internet
primarily and digitalisation of content. That is a small, little area. I don't
45 think you could say that copyright is inhibiting innovation, creativity,

growth and investment, and that's a primary mandate of the Productivity Commission, to grow the economy, jobs and investment. It's not stopping innovation in this country. No-one is suggesting that. What drives innovation and investment is venture capital and a range of other factors.

5

In terms of bringing in a fair use system, I would argue and you won't be surprised by this, for me to say that I think it brings in a lot more uncertainty than it replaces. There is evidence out there to suggest that it actually could have a detrimental impact. So it would be a bold recommendation and I would question it.

10

MR COPPEL: Can you explain a little bit the evidence that you are referring to - the Singapore example.

15

MR BUSH: The Singapore one. I think - I hope I am write in saying this, it was Prof Giblin did some research, I think and then it was Barker, I think, did some corresponding research saying that - - -

20

MS CHESTER: Professor Rebecca Giblin is highly supportive of moving to a fair use system.

MR BUSH: Of course she is, yes.

25

MS CHESTER: She says it is more predictable.

30

MR BUSH: Of course she is. Yes, I understand that. Yes. No, there is a number of academic copyright experts that I know that you have presented with, but they have got no "skin in the game" as I will call it, in terms of actually creating, investing and doing stuff with copyright that support opening it up. It's interesting. You look at - you've got the academic copyright lawyers sort of sitting here and, that's fine, they can have their view as they have a right to have. Then you have got, sort of, the Googles and other people who have a commercial interest in freeing up of copyright, if I can call it that.

35

So I call it the "lifters and leaners", to use that political language if you like. You've got the lifters are the people who create, invest, put money, make stuff, who want to commercialise it. Copyright enables that to happen and I'll call it the "leaners", the people who want to take that and use that for their own purposes to drive advertising to their web site or whatever their purpose might be.

40

So I just think if you're talking about fair use in Singapore, there is evidence coming out of Singapore that it's driven the contribution backwards.

45

5 **MS CHESTER:** So the terrific thing about our Act that you keep referring to, which is about consumer - which is about the wellbeing of all Australians and not just growing the economy, our processes do allow us to listen to everybody and work through to the evidence that they present.

MR BUSH: Sure, I understand that. Yes, of course.

10 **MS CHESTER:** Good, yes.

MR COPPEL: Thank you very much.

MR BUSH: Thank you very much.

15 **MS CHESTER:** Thank you.

MR COPPEL: So the next participant is Jessica Coates from the Australian Digital Alliance. If you could make your way to the table when you are comfortable for the purposes of the transcript. If you could
20 give your name, who you represent and then a brief opening statement, thank you.

MS COATES: Hello, my name is Jessica Coates and I am the executive officer of the Australian Digital Alliance. We are a coalition of non-profit
25 and for-profit organisations that all support the modernisation of Australia in the interests of balancing the interests of both consumers and creators equally within the copyright system. Our members include libraries and archives, schools and universities, the disability sector and the tech sector. So we have a very, very broad base of representation, all of whom come
30 together the idea of balancing interests for the - in the interests of consumers and Australia as a whole.

35 As the Commission knows, the Commission has received our written submission - several, in fact, by now. We are very supportive of the Commission's findings in the draft report, particularly the overall finding that the copyright system has over the years slowly grown more and more weighted in favour of copyright owners and that that weighing currently is inappropriate.

40 We are particularly supportive of four recommendations, the ending of perpetual copyright in unpublished works, which we feel is basically unjustifiable from an economic or moral point of view really. The extension of the safe harbours, which we feel is a logical and easy step to bring us in line with the rest of the world, and the adoption of an open
45 access policy for publicly-funded research, which we just think is great

but most of all, as you know, our primary focus is on fair use. We very strongly support fair use and the Commission's recommendation that we adopt that. We would say that this is not a recommendation that comes out of nowhere. It is the sixth time that there has been a report over the
5 last 20 years; an independent report that's recommended, fair use, and so we are very glad that you guys have added the economic perspective to that.

10 In terms of the debate going on around fair use, we feel that we support it because we feel it is the most important step that could be taken at this time by Australia to rebalance our copyright system for the interests of the broader community representing both creators and consumers. The beauty of the fair use model is that it, of course, does include the fairness test which limits it quite - very substantially and ensures that it won't
15 impact on property right owners. We support the Commission in its focus on using fair use as a way to ensure that the Copyright Act does hone in on the concept of preventing activities that are harmful to copyright owners.

20 We believe economic and moral harms should fall within it, so the fairness factors can cover that, but we feel that the current copyright system certainly goes way beyond that and bans - places a blanket ban on absolutely everything as our previous presenter said. It bans a whole lot of trivial things which might not seem like much, but it seems
25 inappropriate for the system to be crafted to ban everything and then only carve out a very few small things.

We are concerned in looking at the debate that's been going on around the Commission's recommendations, particularly the public debate in
30 newspapers and stuff. We worry that there is a strong misunderstanding of fair use out there, that there does seem to be an equation of it with all uses of free. It's going to allow piracy. It's going to end all statutory licenses in Australia. All three of those statements are clearly not true. Fair use - the fairness factor does limit it substantially and so it doesn't
35 allow all free uses and things like that.

It won't replace statutory licensing, there's no evidence for that; there's no argument for that based on any other system that adopts fair use and so those who have been arguing that viewpoint and putting forward figures
40 based on that viewpoint are misrepresenting the likely impact of it. We feel it will only carve out round the edges of existing activities and very few activities that are currently licensed will be replaced by fair use. A few will.

5 We recognise there will be a little bit of balancing, particularly in the statutory licence for educational use, but only a very small amount. We don't think it will be a large financial amount. The primary benefit that we are seeking from fair use is to increase flexibility to allow institutions such as libraries and archives, schools and businesses who have to obey copyright law, who can't just ignore the trivialities that have been banned, to actually make full use of materials, to not have to focus so hard on the walled garden within which they exist in the current Copyright Act.

10 We are also a bit concerned that in the public debate there has been - and in other submissions there has been a lot of focus on people who are objecting to focusing on fears of the impact of fair use on one particular industry or one particular group of people without engaging with the discussion about how fair use will impact Australia as a whole and we
15 note that even a few of the submissions seem to argue that copyright law should just be about providing incentives for creators, providing funds - money - maximising money back to creators rather than maximising the benefit of - for Australia as a whole, and we strongly don't support that.

20 We do feel that copyright law - we feel that providing financial benefits to creators is very important. We strongly support that. We are not arguing against removing financial benefits for creators at all. We feel that the copyright system as a whole should be aiming to increase the pool of knowledge that we all have access to and that includes through
25 licensing, but it also includes through recognised exceptions and through a system that eventually ends up with strong public domain. So we would just like to add that perspective to the debate that it isn't just about how individual industries work within the commercial market and what money comes in there. It's about the broader landscape.

30 As you know, we have some suggestions - while we strongly support your primary recommendations, those four in particular I was mentioning, we have some suggestions with respect to specific elements of them. Not for you so much, because I'm sure you've read it, but for the transcript I
35 will say, for instance, we favour the fees factors put forward by the ALRC more than the ones proposed by you. We also favour including a few of the other ALRC recommendations, such as saying that we should remove section 200AB and some other exceptions.

40 We would suggest that you should add to your recommendations, add orphan work specifically to fair use, that you should add Crown copyright materials for your open access recommendation and that we should put in something about Australia working internationally to prevent extension to the copyright term and we recognise that Australia cannot reduce its
45 copyright term at all and we don't argue for that, but we thought that in

light of your strong focus on the term, that would be a recommendation you could put that we try not to extend it anymore.

5 We also think it would be good for you to extend your discussion of contract and licensing to include TPMs. I think that there was a little bit of it implicit in there, but you didn't discuss the issues to do with - particularly with the exceptions on TPMs in the Act and they are very - highly restrictive and the TPM provisions are arguably not well targeted at the moment. So it would be good to have your view on that as well.

10 Overall - sorry, just to finalise - we thank you very much for adding the economic perspective to the debate, which is often raised by people arguing about whether or not it would be good for Australia's economy to have fair use and freer copyright. So thank you very much for doing that.

15 **MR COPPEL:** Thank you, Jessica. Let's start with fair use. You made the point that the fair use provision would better serve the Australian community and you mentioned libraries and archives in particular. Can you just maybe give us some concrete examples on how fair use would change practices in libraries and archives in favour of the broader Australian community?

20 **MS COATES:** The primary difference fair use will make - there are two primary differences that fair use will make; library and archives. Library and archives do have an exception that is intended to be flexible, section 200AB that they can have access to. However, section 200AB is quite confusingly-worded. It has a limit based on whether or not there's other exceptions in the Act and people are unsure how that applies. It requires that everything be a special case and there is different commentary out there on how broad it is. We, of course, argue that it is quite flexible and it allows quite a few uses. Other people argue, for example, that it doesn't allow mass use; so you can't mass digitise.

30 The result of this is that there's a lot of confusion and a lot of fear in the industry and it just isn't used that much. Things have improved over the 10 years that we've had this exception so it is starting to be used, but primarily by the big guys, the National Library, some of the state libraries are daring basically to make use of this exception whilst almost the rest of the industry, basically, is very uncertain about whether or not they can use it, and it's- which means it doesn't get used, which means that 90 per cent of the sector really operates within the very limited exceptions that we have at the moment.

40 They, for instance, allow the library to copy and supply material to a member of the public for research and study but not for any other use. So

one of the most frequent questions we get asked is what about a family history project? What about somebody who wants to have this World War II poster for their grandfather's 90th birthday party? And the libraries feel that they can't say yes to that. They feel that because section 200AB is so specific and because they've been told, basically, to stay away from using it, they can't do that.

We feel like the fair use test would - is preferred by the sector, because it essentially is a far more intuitive test. It is likely to make things more flexible and it will make individuals less afraid to do things like that. So that's one of the benefits that it basically is an easier test that provides similar things to section 200AB, well, to our argument of section 200AB. We feel it is also broader than 200AB, but that depends on how you would interpret it.

The other major benefit of fair use to libraries and archives is that at the moment, for example, if you do take a very broad definition of 200AB, you could argue that they could digitise a whole lot of orphan works and put them up online, which is great and we would like to do more of that; however, once they are put up online, they can't be used. Libraries and archives as an industry focus very much on the interests of their clients and the Australian culture and access to knowledge as a whole, not just on what they individually can do within the walls of their institution.

Even if you say that they can put these materials up online, an orphan work then can't be used at all by anybody else in society under the section 200AB provisions. It also makes it difficult, because they are limited to the operations of the library and archives. It also makes it difficult for them to collaborate for example with commercial businesses, which is a growing area. There has been some great stuff New Zealand about it recently. It makes it difficult for instance for - this is moving outside libraries and archives, but kids can do all kinds of things under fair dealing or the existing exceptions for school projects. They can create great video; put it together and hand it in, but then they can't enter that into video competition, because there is no flexibility outside the walls of the school.

So for these sectors like libraries and archives and education sectors that do have some flexibility already within the Act, that flexibility is very walled. It is within their own activities and so fair use not only benefits - helps them benefit their clients, their students or that kind of thing in a much broader way, but it lets them engage with society in a much broader way and it just increases flexibility. It just makes their lives much easier,

because they can take a sensible and reasonable approach to does this use look fair.

5 I should point out, both of these sectors are very conservative. They are very unlikely to really push them that much. They are not going to be saying it's a free-for-all like some people have suggested and things like that. They will always be quite limited in what they do, but it will just give them that extra flexibility to say in these circumstances we are not harming the copyright owner and we are not asking for money, we are not
10 - you know, sort of, it's a work that is extremely old. We don't know the copyright owner and all those kinds of things. We can do these things, because they seem reasonable. They seem fair.

15 **MR COPPEL:** Just on that point, the critics of fair use have argued that a principle-based approach to an exemption creates uncertainty and that can actually chill the confidence in relying on fair use, because there is always a risk that litigation will follow; that you've gone too far. I am interested in your views on this uncertainty argument and how uncertainty or greater predictability can in a fair use system provide greater
20 confidence as to legitimate use under fair use.

MS COATES: Yes. I think there are three main arguments here that I can think of immediately. One is that there is quite a lot of evidence, mainly by academics from the United States showing that the United
25 States' fair use provisions aren't that uncertain; they are relatively predictable. They tend to have, like, large categories of uses. If you are within those categories you are fine. It is really - there are some grey areas around the edge where there's uncertainty potentially - like, where you are not sure if your use is permitted and whatnot, but of course 90
30 per cent of the time or 99 per cent of the time people aren't acting in those grey areas. Currently, under our Act those grey areas are completely banned. So I don't see that it's necessarily a drawback to allow people to explore those grey areas in the one per cent of times, or whatever that comes out.

35 So, (a) it's not as uncertain as people say it is. (b) Our current system is very uncertain as well, fair dealing includes pretty much the same fairness test as fair use. It is slightly limited but that fairness test is applied all the time. We all apply reasonable reasonableness all the time
40 as part of the laws, like basically there are principle based elements all the way through the Australian copyright and non-copyright laws already. So saying that this particular principle based element is too uncertain seems to be underestimating our ability to cope with these because we have been coping with them for a long time.

45

5 But then the third one, the one that is one of my personal favourites,
and I think we've heard this from me before, is that the current system
already has a great deal of uncertainty based on how complex it is. Most
of the exceptions in the Copyright Act, or at least most of the recent ones,
there's 90 of them, we'd have to go back and see if the old ones are better,
go for a page and a half and have dozens of caveats, only in this case, or if
you do this, and on those circumstances, blah, blah, blah, and particularly
operating within the library and archive sector you see this a lot. And this
is why this creates huge uncertainty.

10 This is why we want something like fair use because the complexity
of the current system creates a whole different sort of uncertainty,
uncertainty as to whether or not a use that you feel seems perfectly okay,
it's logical, it seems reasonable, we're all pretty sure this should be fine,
does it fit within this, and you have to basically be a copyright expert to
get around that uncertainty. That's an uncertainty that favours the expert
in against a lay person, so we feel that fair use, the beauty of fair use, is
that it does open up the ability for your average lay person to make better
use of copyright material and better understand it. This flows into the
whole idea that people do already make a great deal of use of copyright
material, thinking what they're doing is legal when it's not, around all
these frequent uses and things like that, and if we can adjust the Copyright
Act to align with those views of people it reduces uncertainty, if you want
to call it, or within the Act in that basically people understand copyright
law. And that's better.

MS CHESTER: Jessica, one of the issues we're dealing with is trying
to - I guess there's two buckets of uncertainty here. There's whether
moving to fair use in an overall sense and in the longer term will be more
uncertain than fair dealing, and I think you've dealt with that. Then
there's managing the transition in moving fair dealing to fair use, and
we've certainly had some feedback post our draft report to suggest the
Commission bravely straying from the ALRC wording may in effect
exacerbate that transitional uncertainty to the extent that it would
undermine our ability to draw on jurisprudence from other international
jurisdictions.

40 We kind of get that, given that our objectives were very similar to the
ALRC, that by starting to talk about outcomes we could sort of exacerbate
that transitional uncertainty. Are there other unintended consequences
from your perspective of us straying from the ALRC wording, apart from
making it more difficult for us to leverage what's happened in
international jurisdictions in reducing that uncertainty during the
transitional period?

45

MS COATES: Well, the first one that I can think of is definitely that it's not just international jurisdictions we want to pull in, we want to pull in the Australian jurisprudence as well which as Simon Bush, a previous presenter, actually explicitly mentioned that one concern of moving to fair use would be that we would lose all our current jurisprudence, we wouldn't if we use the same fairness factors that we use currently. It would be essentially taking all the law that we have at the moment around fairness and just continuing it, it will just continue seamlessly, and the only thing that would change is that you would no longer have to consider the extra step of was it in a specific purpose. So that actually seamlessly brings in a lot of our existing jurisprudence if we keep them very similar to our existing law.

So that's one. And then within your factors that you suggested we should point out that we actually support you in all your goals in most of those things, mentioned transformativity, talking about whether or not material is commercially available, we understand why it is that you would pull that in, particularly if you want to target these - target uses that aren't harming the copyright owners. So you're basically saying look at what's been done with that. We support them and we think that maybe they'd be very good for EOMS and stuff.

Our concern with putting them in the Act ties in to - and there are different ones for different ones, a good example is transformativity, we are concerned that by using the transform - because transformativeness is such a big issue within the US case law already even without it being mentioned in the Act, we are concerned that if you mention it in the Act it automatically starts implying that anything that isn't transformative use isn't allowed. And obviously that isn't the intention of fair use because there are many uses that aren't transformative that are fair, forwarding an email, that's not at all transformative, almost certainly fair, currently banned under the Australian law.

But then there's another example would be the commercial availability thing. We worry a bit about courts trying to come up with different meanings for different elements. So if you have the impact on the copyright owner up here and you have the commercial availability down here, the court is kind of forced to try to determine what - why it's mentioned twice, those kind of issues, similar issues are considered twice and so they start saying well if it's commercially available at all then it can't be a fair use, which again probably isn't the desired outcome.

MR COPPEL: In your remarks you noted that you preferred the wording of ALRC into the fair use, you also suggested that within fair use you deal with orphan works, which is something that we tried to encompass within

our wording for fair use, based on the fairness factor for administrative uses and so forth. The ALRC's approach often works differently, with a more specific way of managing orphan works, how would you see orphan works being brought within fair use using the ALRC approach?

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MS COATES: I would say that inherently we think that fair use covers orphan works in many, many circumstances and the ALRC said this as well, if you just apply the standard four factors in particularly for older orphan works I think that most of the time you will find uses at least in a non-commercial setting are fair. And a true orphan work that's older and you can't find the copyright owner. We're not opposed to an extra thing like the ALRC recommended but we think fair use itself already will encompass a lot of things.

15 The one thing that we would like to happen with orphan works potentially is it be included in that list of illustrative examples. And we see that as a better place than within the factors themselves just because we do think the factors can already encompass orphan works and we are conservative, we are copyright lawyers, and therefore we favour keeping
20 the system as similar as we can. But that list of illustrative uses I feel is a better place to suggest orphan works because we could actually use - you know, uses with orphan works, might be something that you could include as a purpose.

25 **MS CHESTER:** We did have feedback from some participants to our inquiry that the draft or interim ALRC report also included in the illustrative examples, public administration and then the final report did not. We're trying to connect the dots. Is that something that you're - -

30 **MS COATES:** Unfortunately, I am not. I was out of the country so I wasn't part of the major discussion, so I can't tell you.

MS CHESTER: That's okay, we'll continue - - -

35 **MS COATES:** And I don't think the ADA had an opinion on that. We were happy either way.

40 **MS CHESTER:** Well we'll continue our forensic journey on that one. In terms of fair use running in parallel to statutory licensing, our report also gets into the issue of the governance arrangements, not just from policy perspective but also our collection agencies, and we've been having some feedback from stakeholders on whether or not the current governance arrangements and the code of conduct around collection agencies is kind of contemporary best practice. Is that an area that you
45 have any views on?

5 **MS COATES:** The ADA has very slight views on that in that one of our members group, member groups, are Australian schools, the National Copyright Unit, and we understand from their experience, and from the universities' experience that we work with, that the current code arrangements for collecting societies don't often lead to a lot of changes. Basically that there isn't a very clear independent element in the review process, and it ends up with most of - basically the collecting societies have to all agree to change the code, and it means that the code very rarely actually gets adjusted. I know that they particularly are interested in greater transparency about distributions and things like that. Obviously we recognise commercial privacy elements for the sector but we feel like there should be some ability to see that.

15 Personally, I would say also maybe the ADA also is a bit supportive of we know that the model in Europe and a few other countries, I think it's Europe, or the UK, anyway, requires collecting societies to take into account the interests not only of the creators but also the wider community when they are setting up their licensing systems just as their overarching principles, we'd love to see that included in the Australian collecting societies. Other than that the ADA doesn't have a very strong opinion. We do strongly believe in maintaining collecting societies, we think that they are very, very important and we don't want to rock the boat too much. We just want to have more flexibility in sections around the - - -

25 **MS CHESTER:** I think it is the EU determination which from our discussions with folk in Europe was pointed to as emerging best practice.

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

MS CHESTER: Thanks, Jessica.

35 **MR COPPEL:** Our next participant is a collecting society, APRA/AMCOS. We have Brett Cottle. So if you could when you're comfortable for the purpose of the transcript give your name and who you represent, or your names, and then if you - - -

40 **MR COTTLE:** I'm accompanied by general counsel, Jonathan Carter, is that cool?

MS CHESTER: Yes, that's fine.

45 **MR COPPEL:** Yes. If you just go forth and then feel free to give a brief opening statement, thank you.

5 **MR COTTLE:** My name is Brett Cottle, I'm the Chief Executive of Australasian Performing Right Association Limited, and Australasian Mechanical Copyright Owners Society, APRA and AMCOS respectively, which are collecting societies that represent songwriters, composers and music publishers in the administration of copyright in musical works. APRA covers performing rights, broadly, including the right of communication to the public and AMCOS broadly covers what are called mechanical reproduction rights but are really recording rights on behalf of songwriters and publishers.

10 Between the two societies we represent in Australia and New Zealand directly through membership about 90,000 writers and we have about 100,000 licensee clients across Australia and New Zealand, the vast majority in Australia. Between the two collecting societies in financial
15 '16, we will collect a total of around \$335 million in royalties and our overall expense to revenue ratio is around the twelve to twelve and a half percent mark.

20 It will come as no surprise to the Commission that the draft report issued by the Commission is widely viewed both in copyright circles and in authorship circles quite negatively, and certainly in some quarters with great alarm. I've just come back from a board meeting of the International Confederation of Authors Societies, which as it happened passed a resolution condemning the recommendations of the Commission. And
25 certainly there is a great deal of interest internationally, and as I say, alarm, about the direction of the recommendations contained in the draft report.

30 We have made two written submissions, including the most recent one, addressing the contents of the draft report, and I certainly don't propose to reiterate everything that's in that written submission. There are a couple of important points that I'd like to supplement with some information and there's a couple of pieces of information I'd like to update the Commission on. But by way of general comments, in support
35 of the view that the draft report is being viewed very negatively, I just thought I might make a few general comments, if that's okay, I will only take a few minutes to make those comments?

40 **MR COPPEL:** Sure.

MR COTTLE: Clearly there are aspects of the substance of the recommendations which has caused great concern. I think the recommendation that the extremity of a recommendation concerning term is alarming to authors generally. The idea that having enjoyed a life plus
45 50 and then a life plus 70 term for more than a century, seeing the idea of

that being cut down to a very limited term which would expire well within the lifetime of most authors who would see their own works go out of copyright, has really caused a great deal of disquiet and alarm amongst the authorship community.

5

But I think there are deeper issues in the report and I think that some of those issues do flow from the language of the report. You've received many comments on what we regard as some rather undergraduate language in the report, "Copyunright", and that sort of thing, I think doesn't help. But the very definition of copyright used by the Commission in the report is concerning, it's a definition which emphasises the negative, it says that copyright is a right to prevent the doing of rights when of course the statutory definition is that it's a right to do certain rights.

15

I think that definition employed by the Commission does infect the body of the report in the sense that it heavily emphasises copyright as an obstacle to commerce rather than as a foundation for artistic creativity. I think that's the thing which has unnerved the authorship community the most, there's a sort of failure, if I may say so, to recognise that copyright is something more than at the margins of the professional life of artists and authors, it is the foundation, it's the core of their professional life. Without copyright they literally have nothing to base their professional life on.

25

So in the same way that there are protections in our community or recognition in our community that other forms of property are deserving of recognition, the idea that copyright is a pillar and a foundation of artistic life is something that they would have liked to have seen in this report. I think also there's a view expressed in the report that the purpose of copyright is about creating an incentive to create. I think there's another element that authors see in copyright and that is that it's the element of equity and the notion that having created the work that it's only right that they receive a fair return for its use whenever that use occurs and however trivial that use occurs, they want to see the potential for getting some return for the use of their work.

35

I think that notion of equity in copyright is missing from the report, the extent to which it has economic consequences and can be viewed through an economic prism, I don't know, but I think it's something that authors certainly feel very strongly about. I think the other thing that I would say by way of a general comment is that although there is recognition in the report that the Internet and the digital economy generally have had an impact and have presented challenges for authors and copyright owners, I think there's a singular failure to understand

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exactly how dramatic that impact has been. And it links to the notion that's again a centrepiece of the report, that copyright has overreached, copyright has gone too far.

5 The way authors view what's happened to their livelihood and what's happened to their property rights is that for 20 years they have been under absolutely unprecedented attack, many have seen their livelihoods and means to produce an income completely decimated. The vast majority have seen the Internet dramatically reduce their incomes, even if they've
10 been able to stay in business. I think the report fails to understand just how dramatic that attack has been and just how dramatic those changes have been.

15 All they have is their copyright and here there is an agency asserting the view that in the face of this attack copyright has somehow gone too far and ought to be pulled back, ought to be pegged back in the interests of consumers. Consumers have completely rorted the creativity of musicians and songwriters now for 20 years. It's now trending in the right direction and a lot of the damage that has been done is now being overcome in the
20 marketplace, but the idea that their rights ought to be cut back in the face of what's happened is certainly alarming to them.

25 If I may, there's only one other introductory comment I wanted to make, and that's related to this idea of innovation. And one seems to get from the report is that innovation by users, good, innovation by copyright owners, not so good. Certainly not to be necessarily further encouraged. We just don't understand that idea, the innovation which is important economically for this country is innovation largely to do with originality, it's to do with the creation of new works, as indeed I think is recognised in
30 the incentive idea that the Commission has put forward. Innovation, insofar as the use of works is concerned is, we would argue, relatively marginal and relatively unaffected by the rights that comprise copyright.

35 What's really important is that this country encourage innovation in the creation of new copyright works, that's where the money lies. I just wanted to point to two factual circumstances that kind of illustrate that issue. There's a Melbourne band called Cookin on 3 Burners which has been around forever and it's a sort of a funk, soul band, and it writes and produces original material, it's, I think, self-funded, and self-released,
40 unaided by dreaded intermediaries, about four albums, and it released a song in 2008 called This Girl and the song became a sort of minor cult hit but didn't really go anywhere.

45 That song, skip forward to 2015, that song was mixed by a French DJ, and France being a country that highly respects copyright and values

authors' rights for what they contribute culturally and legally, and economically, that French DJ properly sought permission to mix that track. He wanted the stems to produce a reinvention of the track. And that track is number 1 this week in France and Germany, it's number 2 in the UK this week, and will be number 1 in the UK. So it will be the biggest hit in Europe at the moment. And those songwriters have preserved their copyright in that original composition, the song is heavily mixed on the original composition. And that song will earn a great deal of money for them and for the country.

Of course, the song was a song that didn't become a hit within the first couple of years after its release, it became a hit - it took a while to come to its potential. One of the reasons it came to its potential was of course the French DJ wanting to mix the song. But he got permission and he was able to go through the process very easily through the record label and the relevant publisher, got permission, and everybody will win from that example. To me, that illustrates that the system can work extremely well. The idea of derivative works and transformative works can be accommodated in a commercial setting well and truly. At the time he made that mix nobody knew that it was going to be a hit, it became a hit about 12 months after release.

So I think it also illustrates the fact that we want to encourage as a nation our songwriters to produce these original works and also it illustrates that there's growth in our export earnings from copyright. In that final connection we have a table at paragraph 23 in our submission which shows what's happened to APRA/AMCOS' export earnings over the last few years for Australian, New Zealand compositions. You will see that in 2013 earnings were just under \$22 million and in 2015 they grew to \$34 million, this year they will grow to \$40 million. So there will have been almost a doubling of export income for Australian songs during that last three year period. It's a very dynamic part of the economy at the moment.

That's really what I wanted to say by way of introductory comments but there's one other issue I wanted to address at the outset and it's the issue of the extension of term from life plus 50, life plus 70 years. This figure that's been used in the Commission's report that gets trotted out every time there's a review of copyright in this country, and it's the figure that derives, I think, from Philippa Dee's research and paper published in 2005, suggesting that the cost to the Australian economy of the extension of term was in the order of \$88 million. I've seen that figure trotted out, I think, in the context of a report done by Henry Ergas, I've seen it trotted out in a New Zealand review of term of copyright, and I've seen it trotted out in Australia in any number of academic papers.

5 It is a complete and utter fiction. I need to explain to you why it's a
fiction. If you go back and look at Ms Dee's methodology in 2005 she
made the assumption that the average work was created 30 years before
the death of a writer so that the 50 years post mortem the average work
was created had a life span of 80 years. She then assumed constant
royalty income for copyright works over the 80 years of their life. So that
if you then added for each of the additional 20 years one eightieth of the
total pot of royalties going to the average work you of course got to 20
10 eightieths of additional revenue, additional royalty income. So that gave
you, that increased the royalty payout pool in respect of the average work
by one quarter, 25 per cent.

15 Well, we've just analysed our distribution statistics, and bear in mind
that we pay out well over \$250 million a year, we're probably the largest
copyright payer in the country, I would have thought, and certainly the
amount of data we have relating to copyright entitlements is larger than
any other Australian company's data. Our assessment, based on our last
four quarters' distributions, is that the total number of works whose
20 copyright is between 50 years and 70 years after the death of the author
receiving an allocation in our distribution amounts to 0.33 per cent by
number of works. They payout for those works by value of the
distribution is 0.19 per cent.

25 **MR COPPEL:** Are those numbers, I mean, broader set of numbers,
material that you could submit to the Commission?

MR COTTLE: Yes, we can provide, we will provide the supporting
documentation to the Commission. But it means that the overestimation
30 by the author of the paper in 2005 of the cost to the Australian economy,
based on data by the largest royalty payer in the country, is a factor of
somewhere between 100 and 125 times. By our estimation the true cost to
the Australian economy of the extension of term is somewhere south of a
million dollars on the total royalty pool as estimated by Ms Dee in 2005.
35 She estimated a total national royalty pool of \$350 million, I don't know
whether that's right or wrong, but on our percentage it would be the
percentage would not be 88 million, the figure would be somewhere south
of \$1 million. The net present value, instead of being \$700 million, would
have been five to six million dollars total cost to the Australian economy.

40
Now, I recognise that our statistics can't necessarily inform
conclusions about the film industry, about the television industry. But
they're the best statistics anyone's produced and we will supplement this
comment by providing them to the Commission. The problem with this,
45 it's not an academic exercise to go through and attack that figure. That is

5 a fundamental factual backdrop to the whole tone and direction of the Commission's draft recommendations, it's that copyright has gone too far and needs to be pulled back in the interests of the Australian consumer, who's had to bear this ludicrous cost of extending term to life plus 70. It's not true. It's absolutely untrue.

10 **MR COPPEL:** Well, if I just turn it around and, given those figures, can you then give your views on the benefit from that extension of term from 50 to 70 years, in terms of an incentive to create things like - - -

15 **MR COTTLE:** It's a completely fair comment, completely fair question. At the time of the extension, of course, we supported the extension of term. Our members are not only writers but music publishers, and music publishers have an inventory of aging works. Of course, it's in their
20 interests to see the value of that industry – inventory be preserved over time. So we supported the extension of term. We have never asserted that there was any enormous benefit to Australian writers and we have certainly never asserted that the additional term would incentivise writers to create more works. I, personally, don't believe for one minute that the extension of term is an incentive to create a new work.

25 I think what is an incentive to create a new work is the feeling that the country respects what they do and is prepared to accord a property right to them, which is consistent with international standards. I think that is something they feel very strongly about. But I think that's the most that can be said.

30 **MR COPPEL:** Can I, before we continue, just for the record, note that the draft report makes no recommendation to reduce the term of copyright. That is a misunderstanding that has been quite widely held, particularly in participants relating to the copyright – in the copyright sector. We did make a finding that the average revenue from a newly published work, typically, flow over the first two to three years and then be very minimal which, I think, is consistent with the numbers that you've presented there -
35 you presented to us today. But, because of our international obligations which has a length of term which is life plus 70, we haven't made any recommendations that go to that. So I wanted to make that point.

40 **MR COTTLE:** So, thank you. I don't think, for one minute, we expected any suggestion that term be reduced at all, let alone to that level, would be one taken seriously. But I think it's important in the context of the general tone and direction of the report, because there is a very strong feeling in the report, at the risk of repeating myself, that copyright has overreached, that copyright – the reforms and changes made to copyright over recent
45 years have all been in favour of the copyright holder and, by implication,

are at the expense of the Australian consumer. I think it's that issue which I'm seeking to address in putting to rest that idea that there was this enormous cost to the Australian consumer.

5 **MR COPPEL:** Okay.

MR COTTLE: There are some other issues related to that, but maybe I could leave those aside for one moment.

10 **MR COPPEL:** Okay. Now all intellectual property is a balance - is the balance between the interests of the owner of the intellectual property and the wider community in terms of the users. It's for a period of exclusivity. When it comes to copyright that term is life plus 70. That's around five or
15 more times longer than it is for other forms of intellectual property whether it's patents, designs rights.

20 You made the point of equity and being able to make a balance between the rights of copyright owners and the broader community. When you think about it in those terms, how do you then incorporate the uses that can come from the broader – to the broader community from
copyrighted works? So, if you could elaborate on how you reached that judgment that you're essentially saying that the existing arrangements that have had – that are appropriate, that they are working?

25 **MR COTTLE:** Yes, sure. Well, I mean, I suppose there are a number of particular prisms through which those arguments are undertaken. The most important of those is, I think, access, availability and enjoyment of a rich, cultural life. I think copyright broadly serves the purpose, as you point out, of providing incentive to create. We would say it also provides
30 this additional purpose of providing an equitable treatment of the works and their authors.

35 I think the current debate is heavily focussed around access and availability by the community in a – in economically reasonable fashion. What I would say about that is that insofar as music is concerned, the current balancing of rights has created, for Australian consumers, a completely unprecedented and unparalleled ability to access the world's musical repertoire, legally, incredibly conveniently, and incredibly cheaply. I mean, for \$10 a month you get access now to the world's
40 recorded repertoire on any one of a number of different services, whereas 30 years ago you would've paid \$10 for a single album. So there's just no comparison between the ability of Australian consumers to enjoy a rich cultural music life, based on the current balancing of interests.

When I talk about the balancing of interests, that goes down to the fact that Apple is able to, and was able to launch its Apple music service here and its download service here amongst the first countries in the world, because it was able to be licensed, it was able to add on a cloud based blocker service. It was able to be licensed, nobody's unhappy. It wasn't hindered in any way in its ability to innovate in that space and nor have any of the subsequent players in that field been hindered in any way.

If you ask Spotify, if you ask Google, if you ask Apple – I have no idea whether they're giving evidence to you – whether they've been hindered in their ability to innovate new music services, which have had enormous benefits for Australian consumers, unprecedented benefits, they will, I'm sure, say, "No. No problem. We've been able to obtain the licences quickly, efficiently, without litigation and without animus". So I would say it's a signal achievement of the Act that's it's been able to create that environment.

I know the argument rages about Game of Thrones and access to disaggregated content. One thing that's worth noting is that the music industry, through the advent of digital services, was forced to disaggregate its content. So the album has effectively disappeared. We're back to individual tracks. That's emerging in the audio visual field. But I would dare say, equally, that the access to content in the audio visual field, you can argue a bit about price, but I would say that the access is as good anywhere in the world. It's as good in Australia as it is, pretty much, anywhere in the world now.

MR COPPEL: I think when it comes to licensing arrangements – legal licensing arrangements and these new business models, I mean, we would say that these are innovations in themselves. They're enabling legal transactions between copyright owner or musician and a consumer. That's all well and good. There's a lot of innovation there. It's given a lot more diversity and it shouldn't be discouraged. I think the points that you were making then in your opening remarks were really getting at the issue of piracy, if I'm not mistaken.

MR COTTLE: Sure. Yes.

MR COPPEL: I'm just trying to – I mean – so enforcement is obviously an issue.

MR COTTLE: Yes.

MR COPPEL: But do you address enforcement through term and scope of copyright or you are looking at something which is much more

focussed on enforcement and what would – in that context, what is the role for government?

5 **MR COTTLE:** Well, obviously, the role for government is to create the statutory infrastructure against which these markets that provide incentive to create, provide equity in returns, and in turn provide a sufficient incentive for technology users of the material also to innovate and to come to market. That's the role of the Copyright Act to enable this trade to occur, I would've thought. I would say, broadly speaking, it functions in
10 Australia incredibly effectively, really, given the lengthy and higgledy-piggledy backdrop of the drafting of the legislation from really the early 1960s onwards.

15 The other point I wanted to – two points really. One is that the content industry, the music industry understands and appreciates the symbiotic relationship with the technology innovators extremely well. The truth of the matter, widely acknowledged within the music industry, is that Apple rescued the music industry with – in formulating a digital service that appealed – that caught consumers' imaginations. So there is
20 no question that the industry is now beholden to, and reliant on, the great technology innovators.

25 The other point I wanted to make is that there are other illustrations of how copyright services the purpose. One of the illustrations I wanted to bring to you was, I suppose, connected to the push for fair use and I don't intend to say a lot about fair use, because I know you've had a round table. We were involved in that.

30 But I did want to say this: really, the significant push for fair use is really coming from the educational sector. But so far as music's concerned, I wanted to put these statistics to you. We, as music collecting societies, have arrangements, licensing arrangements in place with the entire school sector in the country. We have some arrangements in place with the tertiary sector. But the entire schools sector is covered.
35

40 By that I mean, that licenses are in place covering every school in Australia authorising the public performance outside of the classroom, authorising recordings, authorising sheet music photocopying, authorising the various digital uses that go on with a school, covering all music. The arrangements provide for a return to the music copyright owning universe of \$1.97 per pupil throughout the country. So the cost to the community of copyright in music in the education sector is \$1.97 per pupil at the moment, and we'll provide those details to you.

I just would've thought that that's a balance. I don't think it's an excessive sum. I think it's a sum which is fair and reasonable to parents and to the taxpayer and it's probably fair and reasonable in the end to music copyright owners. But the fact that those arrangements are in place, the balance, the backdrop for those arrangements to be in place seems acceptable and has facilitated those arrangements. No one, as far as I'm aware, has complained about those arrangements.

One of our worries is, of course, that if you start altering the statutory backdrop about what can be done and what can't be done and argue about what can be done and can't be done, then you risk interfering with that commerce. I think that's an undesirable impact of fiddling with that expression of a balance in the Act.

MS CHESTER: On the issue of the role of collection agencies - and our report didn't recommend any changes to statutory licensing arrangements.

MR COTTLE: Yes.

MS CHESTER: We do see them working in parallel to fair dealing or fair use.

MR COTTLE: Incidentally, ours is not a statutory licensing arrangement with the schools; it's voluntary.

MS CHESTER: Okay. Sorry. But the overall role of collection agencies and the licensing arrangements that fall around that. So does that mean that your organisation is still subject to the Collection Agencies Code of Conduct?

MR COTTLE: Yes.

MS CHESTER: One of the emerging things in our report is let's make sure the governance arrangements are contemporary best practice both in terms of policy in Canberra and we've got half a chapter that deals with that.

MR COTTLE: Yes.

MS CHESTER: We didn't really get too much in our draft report into the issue of the governance arrangements around the collection agencies, Brett, and it's something that has come up in some submissions and round tables. It'd be good to get your views on the code of conduct and where you see that in an international sense in terms of contemporary best practice.

MR COTTLE: Yes.

5 **MS CHESTER:** When we were in Europe, and in particular in the UK, we met with someone you probably know, John Mottram.

MR COTTLE: Yes.

10 **MS CHESTER:** He was pointing to the EU determination for collection agencies and he, kind of, pointed to that as the high tide mark of contemporary best practice for governance arrangements for collection agencies. Just good to get your views on whether the Australian Code of Conduct stakes up against the EU determination, if you're familiar with it.

15 **MR COTTLE:** Yes. Ours, of course, was the first code of conduct for collecting societies internationally, certainly that I am aware of. So it really has become the benchmark and the template, in many respects, for subsequent codes that have been developed. I think that the European directive in relation to collective management is heavily directed towards
20 the way in which societies have to operate against each other, if you like, in competition with each other within a single market. So, I think, that the directive is heavily influenced and directed towards that scenario and, of course, ours is not. Ours is more focussed on pure governance issues, transparency, accountability, consultation, all of those kinds of things.

25
There's been some criticism, I understand, of the independence of the review process. The fact of the matter is that the code is pretty broad in its ambit and coverage. It's broad in its range of obligations in collection societies. The code reviewer, who is of course an ex-Federal Court Judge
30 and we've had a history of ex-Federal Court Judges and I can assure you they're fiercely independent, they have the ability in their review to examine any area of the behaviour of a collecting society. They could examine the way in which we relate to licensees, consult with or communicate with licensees. They can examine the level of transparency we make to members. They can examine our financial accountability, our
35 distribution rules, all of that.

40 Of course, in APRA's case, we're also subject to authorisation by the ACCC, and the ACCC can examine all of our input and output arrangements as well. So I would say there's a very high level of scrutiny. The fact that the code reviewers have successively chosen to conduct their review by way of examining complaints against societies and use those as the sinkholes to look at what societies are doing, is a completely logical and understandable way of doing it. You can argue that the reviewers

could look more holistically at what the societies do. How much do you want to add into the system?

5 I would say that the obligation is on us in terms of accountability, the scrutiny on us in terms of those range of government functions, is as high as anywhere in the world. You're not going to expect me to say we need a compulsory mandatory review of collecting societies. I think the current, the sort of light touch voluntary review is pretty good. What it means in practice is that whenever we receive anything that looks or smells or
10 resembles a complaint, we know that it has to be reported and we have to show the code reviewer how we've dealt with it. So it's an alarm bell for us.

15 **MS CHESTER:** So two quick follow on questions, so I understand the review process.

MR COTTLE: Yes.

20 **MS CHESTER:** So, firstly, when they're conducting a review, apart from looking at – and I understand that's an annual review or bi-annual reviewer or something.

MR COTTLE: Yes, annual.

25 **MS CHESTER:** Apart from looking at complaints that have come in, do they actually look at new emerging code of conduct practices globally?

MR COTTLE: I might ask Jonathon. There's a review of the code itself every three years.
30

MS CHESTER: Three years, okay.

MR COTTLE: Certainly the first thing the code reviewer would do in that context is look at what's happening internationally, I'm sure.
35

MS CHESTER: Okay. We'll go and have a look at what they've looked at then, and see if that might be helpful.

40 **MR COTTLE:** Sure.

MS CHESTER: The other question is, have they made any material changes to the code since it's been in place?

45 **MR COTTLE:** There have been some relatively minor changes. Can you recall?

MS CHESTER: Sorry, you better state your name for the transcript, if we're going to do it on transcript.

5 **MR CARTER:** It's Jonathan Carter, and I'm general counsel of APRA and AMCOS. The changes have been relatively minor, in my understanding. There was a change to capture the activities of the Copyright Agency in its administration of the resale royalty right because, strictly speaking, it fell outside.

10
There was a lot of debate last year in between the declared collecting societies and some of their licensee stakeholders as to whether or not the code went far enough in terms of the obligations it imposes on societies around transparency of distributions, in particular. Justice Lindgren, ex-Justice Lindgren, heard a lot of evidence on that and ultimately found that changes did not need to be made to the code, is my understanding. So the short answer is, no, I don't think there have been dramatic changes.

15
MR COTTLE: Can I just add one comment on this, the great irritant for some licensees, a very small number of licensees, in the way the collecting societies operate is that they don't see how much of the money they pay goes to individual writers, and it drives some of them crazy that they can't see their \$1000 a year, how it's divided up amongst the writers we pay. The reason we can't do that is that, of course, without the writers, each of those writer's permissions, we can't disclose their earnings to anybody, except under statutory request.

20
We've gone to an enormous amount of trouble on various occasions to show them how we distribute the fees from a particular sector, what technology we use, how much money goes – comes in, and how much money goes out, how much for administration. It doesn't satisfy anybody. They want to see how much of their money goes to which writers and we can't provide that information. No level of transparency can really get to that point.

35
MS CHESTER: So we'll leave governance.

MR COTTLE: Yes.

40 **MS CHESTER:** I wanted to come back to a point you raised earlier on, particularly in your opening remarks about what, kind of, constitutes new works. I was interested in the example that you mentioned - - -

45 (Announcement made over loudspeaker followed by music playing in background)

MS CHESTER: The example that you mentioned where the French DJ guy did the remix of the Aussie song.

5 **MR COTTLE:** Yes.

MS CHESTER: Did he then register that as a copyright piece of work within France? So was it recognised as a new copyright work?

10 **MR COTTLE:** It's recognised as a new recording, so it has a new international standard recording code, and a contractual deal was obviously worked out between the original artists and the DJ as to the sharing of royalties for the recording. But my understanding is that the composition copyright, the underlying musical work remains the
15 copyright of the original authors, and the original publisher.

MS CHESTER: So he didn't get a copyright around the - - -

20 **MR COTTLE:** Not of the song, no.

MS CHESTER: Okay.

(Discussion in relation to music playing in background)

25 **MS CHESTER:** I guess that then poses the question, where do you draw the line between what's an original new work, like the song that was done by the guys in Melbourne versus when it's transformed so substantively or parts of it are transformed so substantively that it, in itself, becomes a new work. So is that something you have a view on?

30 **MR COTTLE:** Not really. I mean I think that that is something that has to be left to – and I know there's kind of an internal inconsistency in our argument here. I mean, I do think that the issue of substantiality is something that does have to be left to the Courts to decide. I don't think
35 that you can really attempt to formulate mathematical rules about substantiality that are going to assist the industry.

I'd only say that an awful lot of sampling is done, an awful lot of remixing is done. The industry is used to dealing with those requests.
40 There are arguments, I know there are some illustrative figures in the draft report about the theoretical cost of getting clearances for samples. I know there's an avalanche of examples in there. It just seems to me there's so much sampling that is out there, there are so many remixes that are out there – I mean, you go on iTunes, for every – mini tracks have a half a
45 dozen different remixes available. So the commercial arrangements are

being made. It's not actually a problem. It's a problem in the minds of a large number of academics. It's not actually a problem on the ground. Deals are worked out. People do the trade.

5 **MS CHESTER:** No, I was more coming from it in terms of the perspective that it would be easy to misinterpret your earlier comments to suggest that unless something's purely on a stand-alone basis, an original piece of work, that transformation, if it is substantive, couldn't actually be a new work and be subject to copyright?

10 **MR COTTLE:** I think if it's a genuinely transformative work, i.e. it's - -
-
(Announcement made over loudspeaker)

15 **MR COTTLE:** - - - a new original work then, of course, it's subject to its own copyright.

20 **MR COPPEL:** I've got just one final question, sort of, prompted by a news report last week relating to Led Zeppelin.

20 **MR COTTLE:** Yes.

25 **MR COPPEL:** I don't want to talk about Led Zeppelin, although I could. The comment was made that there's been a quite steep escalation in those types of cases. It was referring to the United States. Is that something which is also prevalent in Australia, and what's driving it?

30 **MR COTTLE:** To my knowledge it's not prevalent in Australia. I think it's absolutely going to become much more prevalent in the United States. Really, the big copyright case here was, of course, the Kookaburra Down Under case. That was an experience for everybody involved that was devastating for every single party involved. It was an utterly devastating experience, particularly in terms of the financial obligations imposed on all parties to it. Copyright litigation is a tremendously undesirable thing
35 and is to be avoided at all costs, in our view.

40 I might say, in that regard, in our connection we deal with, as I say, about 100,000 licensees. We deal with 10s of thousands of businesses using music at any one time. We have thousands of infringers. But we institute probably no more than four or five cases a year, and only then at the - when all other avenues, ADR and everything else, have been exhausted. So the amount of copyright litigation in this country is remarkably small. I would say remarkably small.

45 **MR COPPEL:** Good. Thank you very much.

MS CHESTER: Thank you.

MR COTTLE: Thank you very much.

5

MR COPPEL: So we're going to take a break now and we'll reconvene at 11 o'clock. No? We'll have a 10 minute break and we'll reconvene at 10.30. There should be coffee and tea just in the foyer outside the room.

10

ADJOURNED

[10.29 am]

15

RESUMED

[10.45 am]

20

MR COPPEL: We will reconvene and our next participant is Medicines Australia along with the International Federation of Pharmaceutical Manufacturers and Associations. So if I could ask you for the transcript to state your name, who you represent and then invite you to make a brief opening statement. Thank you.

25

DR SNOKE: Thank you, Jonathon. So it's Dr Martin Snoke, policy and research manager at Medicines Australia. I'd just like to make a brief opening statement if I may, please. So I thank you for the opportunity to appear before this hearing to further discuss the Medicines Australia submission to this latest inquiry into IP. My director Elizabeth de Somer and our chairman Wes Cook would like to tender their apologies for not being available today, but I am here on their behalf.

30

I am here today on behalf of Medicines Australia. Medicines Australia represents the research-based pharmaceutical industry in Australia which brings new medicines, vaccines and health services to the Australian market. Our industry generates around three billion dollars in exports and invests over one billion dollars in research and development every year.

35

40

To achieve this, our industry is highly reliant on ensuring that there is a stable and predictable policy environment in Australia. Many factors influence the industry's decision-making with regard to investment in Australia, including the intellectual property arrangements. As Australia transitions from a resources-based economy towards a knowledge-based one, perceived weakening of IP domestically and internationally will send significant negative signals and have a detrimental effect on

pharmaceutical investment in manufacturing and research in development opportunities.

5 Our submission highlights why this is so and I am happy to answer
any questions on that during the course of the session. It is also worth
noting in this context that biomedical technology is identified by the
Government and the Opposition as a future growth industry which should
be encouraged. Governments of all persuasions are emphasising a need to
10 Australia to improve the pharmaceutical sector's competitiveness in
commercialising biomedical technology. Obviously, IP and IP
arrangements will play a crucial role in this.

The Medicines Australia submission response to the
recommendations made by the Productivity Commission's draft report.
15 We recommend that the commission reconsider these recommendations,
both in the context of Australia's international trade applications and also
in light of the fact that IP is an important ingredient required to grow this
important sector in Australia.

20 As you know, we attended a round-table discussion on Friday,
17 June in Melbourne where the Commission sought further information
on three particular areas; namely patent term extensions, ever-green and
pay for delay. We have a couple of requests for information following that
roundtable, which we are in the process of gathering. We are also happy
25 to provide further information you would like us to provide following this
hearing today.

I'd like to take the opportunity at today's hearing to support
Medicines Australia's submission to the inquiry and clarify any matters. I
30 am joined here today by colleagues from IFPMA and JPMA, which
further emphasises the signals that this inquiry is sending to our
international trade partners. Now, I have to pass to Andrew Jenner.

MR JENNER: Good morning, everybody and thank you very much for
35 having us. My name is Andrew Jenner and I represent the Global
Pharmaceutical Federation in Geneva. I am a former patent examiner,
before I then moved over to be the lead negotiator for the UK Government
in the WTO Trips Council and in the World Health Organisation, and
implemented compulsory licensing regulation during the negotiations in
40 Europe and into the EU Law as well as the implementation of (indistinct)
exemption. So hopefully a useful bit of experience for you, but also I was
one of the respondents to the Gowers Review which was a similar review
that was conducted in the UK Government at that time.

5 So I am now working as a consultant. I specialise in global strategy for UN agencies, including WIPO and WHO, health-based organisations and NGOs as well as multinational organisations and business associations. One of the things I would like to perhaps start off by looking at is where does IP fit when we're thinking about investment decisions, because I think something that the report can perhaps have a little more of an in-depth look into is how do you create those sustainable innovation ecosystems?

10 Something that we have been working very closely with with the International Chamber of Commerce is what are the necessary components that countries should have in order to attract foreign-backed investments, and here the way that the globalised economy is working now is that you are looking for much more synergy between the local
15 innovative industry and the multinational, and what can they do together? How can you create with those partnerships and collaborations? And it really is government that helps drive that.

20 So perhaps some of the four key things; one is is the country innovation friendly? What is the environment like? Is it the kind of a country that not only is innovation happening but that is commercialised. Do you have relevant partnerships between academia and industry? I think when we look at how the pharmaceutical supply chain and value chain has evolved you are looking now at collaboration in virtually every
25 single part in that innovation chain; whether it's with academic institutions or whether it's with clinical trial organisations and so on.

30 So I think one of the things that I'd like the Commission to understand is how do you create that environment and understand how the environment works in practice, particularly when you look at the regulator and the role of the regulator in ensuring that those medicines are both safe and effective. The other thing that Australia does have is you have a trained workforce. You have effective infrastructure. You are open for trade and investment and these are the kind of things that we as companies
35 are looking for. You do not discriminate against foreign investors vis-a-vis local investors.

40 But more critically is that what is the policy intent within Australia? Are you looking to build sustainable innovation ecosystems where there is a very long-term focus? Is there policy coherence between the different government departments or are you looking more for a commodities trade industry and are you looking to be competitive globally on the commodities and service market?

5 The reason I ask that, is that many of the middle-income countries that we are dealing with are also looking at how they can capitalise on these things. I'm losing my voice because I've been on too many air-conditioned planes. So I might stop there, but just to say that when you are making these policy decisions the environment that is created on intellectual property rights is crucial to understand what is it that companies are looking for across the compendium of issues? It is not just intellectual property rights, but that is critical to understand what kind of innovative environment that you are trying to create.

10 I think when the Australian Productivity Commission is having a look at these issues, particularly in the area of pharmaceuticals, you really want to try to understand what is it that makes Australia a unique selling feature? What puts Australia ahead of other countries, because what we are seeing is that a lot of countries are realising that they are in competition with each other. So how can you show that you are the place to do business for the innovative industries? And I think that is something that when we come out into the more specific and detailed questions we can highlight how it could be that Australia demonstrates that they are the place that is innovation friendly and this is the place to do business. So I thank you for that opening statement.

MR COPPEL: Thank you.

25 **MS MAKINO:** I am Yoko Makino. This is my honour to do a presentation as a representative of JPMA. Japan Pharmaceutical Manufacturers Association, JPMA, is a (indistinct) organisation that established in 1968 which represent the R and D-oriented pharmaceutical companies in Japan. JPMA are devoted to (indistinct) to the promotion of the health and welfare in the global population to development of innovative medicines. My submission is on behalf of former (indistinct) I additionally present Japanese - the examination system that shown in draft report table 9.1. If you have the draft report, please see the table 9.1

35 **MR COPPEL:** Yes.

MS MAKINO: So in Japan, eight years the examination appeared for (indistinct) entity as well as (indistinct). Is very important time for post marketing examination to be confirmed efficacy and safety of a drug to ensure health of nation people. Why we need the examination system, you call that data protection period.

45 So, as you know, notwithstanding long R and D time lines, (indistinct) may cause harmful side-effect after the new drug approval, during post-marketing period. Medication-related health disaster may

occur and sometimes causes unexpected serious issue for patient health. Therefore drug approval already in Japan requires originators of newly-approved pharmaceutical product to (indistinct) report (indistinct) on new product through the R and D examination period.

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Turning to (indistinct) drugs, for all manufacturers are prohibited from seeking approval based on originators clinical trial data until the safety and the efficacy will be verified by analysis of outcome from post-marketing examination.

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Why we need eight years? So in Japan in the examination period had been required six years until 2007, and drug approval authority conducted survey and recommended extending into eight years as time necessary for patient. It means that six years was not enough to be confirmed safety and efficacy of a drug.

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Japanese data protection period for new chemical HD (indistinct) is not six years, but eight years, which protect interest of patient rather than the holder of marketing approval and it is currently the examination period for confirming safety and efficacy of an approved drug. The period may be extended to 10 years unless certain conditions - an additional four or six years available as the examination period for new indication and new formulation, new combination et cetera. On the other hand, (indistinct) protection period in Australia for new chemical entity is only five years without any extension for new indication or a new formulation.

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Finally, I will just say the examination system is a (indistinct) providing safety and efficacy of a drug for Australian people, versus more cheaper drugs for Australian people. We have to carefully consider which should be prioritised. The draft report prioritised generic manufacture of cheaper drug, rather than Australian health and welfare. We believe that better protection period must contribute to access to innovate safe and efficient drugs for Australian people. So that is all my presentation. Thank you. So your deep consideration will be appreciated. Thank you.

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MR COPPEL: Thank you. Maybe I should say just by way of introduction, the draft report does recognise that intellectual property, particularly in the pharmaceutical sector is a way in which the large upfront research and development costs can be remunerated without the risk of once the innovation is discovered being copied, and in the pharmaceutical sector, it is quite easy for a molecule to be reverse engineered, and so in the absence of intellectual property there would be certainly less of an incentive to make those upfront investments.

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We have also tried to look at the relationship between intellectual property and innovation, and we would agree that there are many other factors than intellectual property which enter that equation. It is very hard to disentangle the contribution that intellectual property laws make. But if
5 you've got any material on that point I'd be interested in hearing what the evidence is.

In the context of the draft report, we have a number of recommendations that relate to the pharmaceutical sector and one of those
10 was the extension of term, which was introduced explicitly as a means of attracting investment in Australia in the pharmaceutical sector. It hasn't had any noticeable impact, at least on the criteria, and our recommendation is to focus on the design of the extension of term to provide for any unreasonable delay that is due to the Therapeutic Goods
15 Authority, I think it's called, the regulator. In doing so limit the scope for any potential gaming of the system as to who that calculation for extension of term, due to delay, to bring a new drug onto the market.

So I'm interested in getting a sense from you as to the type of
20 processes that you need to go through and the times that are involved in those processes from the discovery of a new drug to the actual marketing of the new drug, to get a better sense of the nature of the types of delays that could be encountered.

MS CHESTER: Focusing very much on the Australian perspective because quite often we're dealing with drugs that have already gone through efficacy and registration processes internationally before that's
25 happening here. So our TGA is getting it after it's already gone through a review process so it would be good to get that sense of what's the difference.
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MR COPPEL: Maybe if you could start, Martin.

DR SNOKE: Sure, and thank you for the question. So I guess it's an
35 interesting perspective to consider the entire chain of the development of a pharmaceutical medicine in an innovative way. It's quite a lengthy process. I guess our perspective is very much the patent term of 20 years plus the extension of the additional five years generally leads to the intention of a 15 year effective life.
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I think the information we provided in our submission shows that some molecules and the effective patent life is actually less than 15 years, less than the intention and we would like to consider how the system could be improved to increase that rate of actually achieving that effective

term of 15 years, rather than just the on paper amount of the 20 or 25 years.

5 In terms of the process, so we'd like to recognise the work that the TGA is currently going through. So there's definitely been improvements over time, in terms of the processes that they have been doing. Obviously we would like to see those improve further, to increase the time to be reduced so that medicine can then be further considered by the Department of Health, through the PBS and feedback processes. So we
10 want to contend that it's not just the regulator's consideration, through the TGA, but it's the entire systems approach where both the TGA and the PBS should be incorporated and considered when looking at the time of the patent and the patent (indistinct).

15 **MS CHESTER:** Martin, when you mentioned the evidence that there's some molecules, I think you said, that the effective life was less than 15 years, what are the underlying drivers of that effective life being less than 15 years, and of those drivers, which of those are in the control of the pharmaceutical company versus those that are in the control of a
20 regulator?

DR SNOKE: The drivers are many and varied. They can be right at the start, in terms of going through the clinical trial process. So one of the issues and concerns that some of our members have is about the
25 fragmented system of the clinical trials process that we have in Australia at the moment. So in terms of going through an ethics committee, providing notification of approval through the TGA and having a consolidated system is what we would like to see that makes it simpler and easier for that process to be undertaken. So that's right at the start, in
30 terms of the early stages of clinical development, so even going through the very initial stages can be highly varied, in terms of the timeframes. I'm happy to look further at some actual times and we can get some examples if that would be of use, and come back to you with those.

35 **MS CHESTER:** I think key there is the attribution, in terms of what's in the control of the pharmaceutical company and what's in the hands of the regulator would be helpful.

40 **MR JENNER:** I think one thing that is always present in this process is that with most areas of technology you can sell your product as soon as you've manufactured it. I think one thing that makes pharmaceuticals unique, and agrichemicals, is that you have to go through that clinical trials process. You probably know that once you - if you do do that early stage research and you find something is safe and effective, in class, so it

cures cancer, to then insert that into the most complex organism known to mankind, the human body, is incredibly complicated.

5 Even aspirin in my country, they used to say, "An aspirin a day keeps the doctor away." Most now believe that aspirin would not be granted regulatory approval because that process is now much more stringent and the side effects that are in place. So, again, you're accounting for the time taken for those clinical trials to take place in order for you to get that regulatory approval to demonstrate to the patients that it's safe and effective. I think this is where you come back to the policy intent. Is it something that Australia would like companies to acknowledge and to see that you are acknowledging that significant period of time taken before you can get that product to market.

15 In another area, an iPhone or whatever it might be, you can market that and it's often first to market play wins the day. In pharmaceuticals you have no control of that. So this is the compensation for those delays and I think many countries acknowledge that that is a significant period of time. If it's less than five years in some countries then you don't get any extension at all. If it goes beyond the five years then there is some extension.

I notice in the report that you have mentioned that sometimes there was a delay between starting clinical trials in one country than say in Australia. I think one of the reasons for that is round about the safety, the Phase 1 clinical trial is for the healthy volunteers phase and if there are any problems you would want to isolate that in one country before you then start clinical trials in, say 20 or 30. So it's important that when you start the clinical trial process that you are seeing the test results around the safety of that (inaudible) therapy before you start to make these approval processes (inaudible) different markets, so that you can amend that medicine as necessary to ensure that whatever side effects that may arise during that Phase 1 safety phase can be remedied before you then start the more wider Phase 2, where you're looking at still a lot of safety and efficacy and your Phase 3, where costs will skyrocket and you're looking at many disease-symptomatic populations where you're really looking at the efficacy in Phase 3.

MR COPPEL: It's been put to us that the pharmaceutical sector isn't the only sector that has delays that effectively are due to regulatory approval processes that reduce the effective life of the patent. The automobile sector, the aviation sector, innovations there need to be tested before they can be legally sold on the market. There's no specific extension of term in those sectors. I think the pharmaceutical is the exception to the rule.

MR JENNER: I think you also find it in agrichemicals as well.

MR COPPEL: In agrichemicals there is the extension of time, true.

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MR JENNER: I think it's partly because of the timeframes involved. The timeframes involved, I mean I was a mechanical engineer that worked in the automotive industry and I think when we were patenting in that space the time taken to do your testing is very small. Also if you're
10 dealing with more complex, specialised technologies, the ability of your competitor to manufacture and to copy is much less. So, again, you're looking to show that you can get to the first to the market, that you're - I was working on air-conditioning units, that your air-conditioning unit is more effective and cheaper than the oppositions. That's within your gift,
15 you can speed up testing as you wish. You can put more people on that particular process if you want to get it through faster.

That's very different from a regulatory approval process where there is a very prescribed method in which you have to do that and it's not
20 within your gift, you cannot predict when you will get marketing approval from the regulator. They want to test your hypothesis, they may need you to conduct additional clinical trials in different patient populations and so, which is absolutely their right. But it's that lack of control and the significant period of time that makes agrichemicals and pharmaceuticals
25 unique in that regard.

MR COPPEL: You also mentioned the approvals, with respect to a new drug being on the Pharmaceutical Benefits Schedule, which is always a risk. It's a commercial risk that you would need to factor in at the
30 beginning as to whether a new drug, not in relation to whether there's a delay to be on the PBS but whether it actually does get onto the PBS and I'm interested in why you think there's a case for the time it takes for the new drug to be eligible on the PBS is something that should be taken into account, in terms of an extension of term.

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DR SNOKE: I think with that one it's more about the universal public health system that we have in Australia. In terms of the private market for innovative medicines that have been approved by the TGA, it's actually going to be quite small in Australia. So functionally, unless a medicine is
40 available on the PBS, its availability is usually quite limited. So we consider both of those factors, so whether it does get recommended by the PBAC to be listed on the PBS, as well as how it's considered through the process, should both be factored into that timeframe consideration, given that it can take many years to go through that PBAC process. It actually
45 can take longer than going through the TGA process at times with that.

5 **MR COPPEL:** I'm just thinking, I mean the research and development is, as you mentioned in your opening remarks, it's very much global and there may be parts of it that's done in Australia, parts that are done in other countries, that's the nature of innovation today, particularly in the pharma sector. To what extent then, when you're making that judgement as to the risks associated with the development of a new drug, for a market like Australia, which is less than 2 per cent, the risk of whether that is on the PBS or if it is on the PBS there's a delay of an extra year or so, how big and important is that in the initial decision to conduct the research and development and maybe to continue the research to the actual development stage of a new drug, considering that the commercial perspective would be looking at this from a much broader perspective than simply the Australian market?

15 **DR SNOKE:** It's an interesting perspective in that the average time of development is between 10 and 15 years of the new molecule, in which case trying to project into the future how long the process may be looking at that time is very difficult to determine the impact on the initial decision for research and development. I'm happy again to consult with our members and find out what their perspective is on whether they have some case examples to highlight whether that impacts the research time.

25 **MR JENNER:** One thing is it's interesting how the business model is evolving. The (indistinct) one-size-fits-all medicine is fast becoming a thing of the past and I think that's well-recognised now. So you're looking now at much more targeted treatments so, therefore, when you're thinking about this subject your patient population size is critical for results of operating in the market, competitors and then, of course, your rate of entry environment, your IP environment is critical in order for you then to decide to launch your medicine.

35 So, again, in terms of when you're thinking about the launching perspective, rather than the research and development perspective, having these kinds of systems in place is critical for that decision, particularly for more specialised medicines or whether patient population size is relatively small. We are seeing that happening in cancer, we're seeing it happen in the therapeutic space, personalised medicines is growing so the large patient population sizes that you experienced, often with chronic diseases, are not necessarily going to be the case where you look at more complex NCDs, non-clinical diseases, such as cancer. So those things will actually have an impact on whether or not you decide to launch a medicine within a given market.

There's other factors as well, of course, but I think those are things that when you look at your risk profile and your reward profile, "What is it that makes this market make sense?" And sometimes it makes sense and sometimes it might not.

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MS CHESTER: So one of the issues that we have to balance here is pharmaceuticals is very much a public policy issue and there are costs to the Australian government and, indeed, the Australian taxpayer, of the extension of terms and a number's actually been put on that, Andrew, of a quarter of a billion dollars every year, and that doesn't include additional costs to consumers.

15 So Jonathan's question is kind of like a fundamental question; given the size of our market and given that it's unlikely the drug has been Australian R&D'd and first in world here through the TGA, what bang for buck is the Australian community and the Australian government getting from allowing the extension of term to be linked to the PBS factor? We need to see some hard evidence that that is material to the decision as to whether or not to proceed to invest, and we haven't got that evidence to date, which is why we're just very much focusing on unreasonable delays of the regulator.

MR JENNER: Just a quick question then. You're acknowledging that a clinical trial process you are merely focusing on the time taken for the regulator, because I think there are almost three discrete elements here. There's the one which is the clinical trials process, that is crucial in order for you to be able to submit your information to the regulator to then assess. Then you have the price and reimbursement system. Those three things I think are different.

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MS CHESTER: So we're just focusing on the extension of term here and the policy objective of the extension of term was to actually uplift R&D in the pharmaceutical sector in Australia. It hasn't achieved that result so now we're looking at the efficacy of the extension of term, so it is quite limited to that policy objective.

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MR JENNER: You're only looking at the price agreement reimbursement extension piece, or are you looking at the clinical trials timetable result?

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MR COPPEL: No, it's through the TGA.

DR SNOKE: So I'd just like to consider further, there, as well that one of the policy intentions was on R&D. We'd like to consider further where there are other policy intentions subsequent as well and in addition to just

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R&D investment in Australia. So happy to get back to you as well, if we can find something.

5 **MR COPPEL:** Can you tell us then, of the new drugs that are being cleared through the TGA how many of those, new in a global sense, so they haven't been also cleared through other health regulators in other markets, and to what extent can you then, in that process going through the TGA, draw on, or the TGA themselves, for that matter, draw on that earlier evidence that's been submitted for that regulatory approval process? I'm just trying to get a sense of where you're starting from scratch, essentially, which could be one of the sources of delay in getting through regulatory approval.

15 **DR SNOKE:** So just to clarify the question, please, the question was around whether a first in class new molecule being brought to the Australian market, relative to any other market in the world, and what the impact of the process here is on that decision?

20 **MR COPPEL:** What the impact is, in terms of the length of time it takes when you are clearing a new drug, which hasn't had the benefit of going through a regulatory clearance process in another jurisdiction, where that information could then be part of the assessment that's used by the Australian regulator and by the proponent?

25 **DR SNOKE:** We'll have to consult with members and find some examples, if available, on whether that's the case. We would probably refer to the TGA, they may have more information on that situation and it compares. Our impression and understanding is that there has been a lot of work recently on harmonisation systems internationally and we're quite interested to see how that's progressing and the impact on timeframes as well. Our understanding is they are getting closer and closer together. Back to your point earlier, Australia, as a market, is less than 2 per cent globally so the case of a molecule being brought here, exclusive of any other market, is probably likely to be a relatively rare situation.

35 **MR JENNER:** From the international perspective, if that's useful to you, there is the International Conference on Harmonisation that is trying to do just that. As part of the TTIP negotiations between the US and Europe, the whole industry, the (indistinct) and the originator industries is trying to push for regulatory convergence on both paediatric clinical trials and mutual inspection of sites so the EU recognises a site inspected by the FDA and vice versa. Those things are still not yet freely available globally. So there is a lot of repetition. We are saying it would make perfect sense if the major regulators could come together to recognise clinical trial results, to recognise mutual recognition agreements of site

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inspections, for example, but that's very much a work in progress. And, we, of course, appreciate that there are some other issues here. In other words, sovereignty issues here. And there is a comfort if the regulator can see how this will respond in Australian patients, vis a vis other countries of the world. But I think that certainly we would be strong supporters of streamlining that system so that you could create these synergies and work is ongoing in multiple fora.

MS CHESTER: In our draft recommendations under the extension of terms there's also a caveat with respect to export and manufacture. I think, Andrew, it might have been in your submission, a suggestion that that caveat would facilitate forms of infringement. I'm just wondering if you could elaborate on what particular forms of infringement you're suggesting it would result in and then what evidence base you can point us to.

MR JENNER: Sure. When you think about what is the rationale and policy intent of any extension period, whether it's in the United States or if it's in Europe or whether it's in Australia, you are compensating for the loss of market during that process. So in theory, you're compensating for that period of exclusivity that no longer could be exploited because of the regulation process.

As part of patent law, you are forbade, under patent law, to export, to manufacture, to import unless you have written authorisation from the rights holder. So if you just look at that rationale behind this is an extension therefore of the patent too, then it would make little sense then to allow activities that are classically associated with (inaudible) to take place during that extension period.

MS CHESTER: So if the extension of term is in the Australian market and the exclusivity in the Australian market is preserved, how does manufacture for export undermine that exclusivity in the Australian market?

MR JENNER: I don't know what you mean by the Australian market. Because under patent law, if you export a medicine then that is patent infringement.

MS CHESTER: So the Australian government has afforded an extension of term and as part of that affording of the extension of term there's an allowance for manufacture for export, we're suggesting that should continue, given the objectives of the extension of term didn't manifest themselves from a policy objective standpoint. So if the extension of term

still protects the exclusivity in the Australian market I don't see what harm allowing export of manufacture during that five year window.

5 **MR JENNER:** I think if you are an Australian manufacturer and you want to licence out your patent rights to a third party, in any given country, whether it's India or whether it's the United States, or wherever, where you might not have patent protection, for whatever reason, then you could enter into a licencing deal with that third party within that country. So if a manufacturer in Australia is allowed to manufacture and export to
10 that given market, that licencing opportunity is lost. That licencing opportunity would be a normal thing that you would expect under patent law.

15 **DR SNOKE:** We'd also be concerned, if I may as well, there's an increased risk of, during that extension, that the products could become available and a patent challenge in the Australian market could occur during that time period, even though it is developed and marketed for manufacture of export only. Plus there is an increased risk through that as well, which we'd be concerned about.

20 **MR JENNER:** The other thing is, as well, a lot of the problems are around diversion of products as well and what you often find is that if a product is manufactured within a market where a patent is protected there is an increased likelihood of infringement activity, given that the product
25 is already physically in the market, so how do you prevent that from seeping into the market in some way?

30 **DR SNOKE:** There's also a risk of how it would impact on any international trade obligations as well, through free trade agreements and TRIPS is mentioned in the draft report. We'd like to see some further clarity on how that would eventuate.

35 **MS CHESTER:** So there was a suggestion, in one of the submissions, that you thought there were some issues with the Australian/US free trade agreement, is that right? Apart from making that suggestion is there an evidence base on which you formed that view?

40 **DR SNOKE:** Our view was based on our reading of the free trade agreement text. I'm happy to explore that further.

MS CHESTER: Thank you.

45 **MR COPPEL:** I'm just picking up on one of the points you make in your submission, trying to get some clarity in relation to data protection and you note that some of the clinical data is already published and it's sort of

5 entered into your thinking on objection to what we say in the draft report, vis a vis data protection, which is essentially keep the system as it is and not recommending any change. But if you could explain how that clinical work data, what do you mean by that data being in the public domain, through research publications or something else?

10 **DR SNOKE:** That's correct. So feedback from our members indicated that in many instances clinical trial data is made publicly available through other methods. So, as mentioned in our submissions and YODA Project, which tries to consolidate clinical trial with data and make it more publicly available.

15 It's also mentioned that our clinical trial data is also provided to doctors generally, as well, to make it available to them so they can see what's coming down the future and through many medical publications as well, to create a better informed environment about what is coming down the pipeline.

20 **MR COPPEL:** So that data that's available to doctors is something that they would use, it's not something that enters into the public domain, other than the doctors themselves?

25 **DR SNOKE:** It would depend on how you would define public domain. But our view is that we consider that is more in the public domain, from that objective.

30 **MR JENNER:** There is a huge amount of information on clinical trials published online. You've got clinicaltrial.gov in the US, you've got a similar system in Europe. I think the people who are expert within those fields can understand that data and they can use that data, but it's also important that you don't pre-empt what the regulator is actually going to endorse, because there are unintended consequences of people second guessing what the clinical trials mean and there have been some notable problems with that, particularly my own personal experience in my city in
35 Swansea there was somebody who pre-empted the outcome of the MMR vaccine and said that this creates autism in children, which meant a lot of people did not take that vaccine, which meant we had an outbreak just a couple of years ago.

40 So I think you have to have a degree of trust of the regulator. There is a lot of information out there that's published but, at the same time, you don't want misinformed people making pre-determined judgements on that data that can undermine the role of the regulator.

MR COPPEL: So once the regulator has made a decision, the data that they have drawn on can't be released for five years, I'm interested in how you make that balance between the type of data that is available in the public domain in pre-regulatory approval and that information that is then
5 held in private, even though it's been cleared by the regulator for a further five years and if you could give some sort of sense as to what are the considerations for that level of difference in the treatment of information?

DR SNOKE: There's quite a substantial investment required to generate that clinical trial data and just to clarify that, the data is kept confidential, our understanding is it's kept confidential by the TGA and that doesn't preclude after the data exclusivity period has ended from others relying on the information when they submit to the TGA. So in that respect, the information can be used, even though it may not be publicly available.
10 One question we would consider further is, what's the intention - - -
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MS CHESTER: Sorry, used by who, if it's not publicly available?

DR SNOKE: By others wishing to make a submission to the TGA that would like to rely on that information.
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MR JENNER: They just have to prove bio-equivalence between the molecule and the originator.

MS CHESTER: So the issue is they can access the data but they can't rely on it, during the five year window? I'm just trying to understand what you said, "It's still available" who's getting it?
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DR SNOKE: Sure. I'm happy to refer to the TGA, they might be able to provide greater clarity on the intricate detail of the process. Our understanding is that a submission can refer to that data that is being held by the TGA, given that it's now been shown to be effective and safe and they can then refer to that information, even though it isn't publicly available. So it is back to the bio-equivalence.
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MR COPPEL: Can I come back to IP protection and the incentive to invest and extension of term when it comes to the end of the effective patent period or is added on to extend the effective patent period. So that can be 15 years after the first commercialisation of the new drug. The value of that, from the perspective of the initial commercial decision to invest, would be discounted back and trying to get a sense from you as to how important is that incentive, or how significant is that incentive at the end of that period of commercial life or exclusive use, I should say, more than commercial life. I guess it gets the initial upfront costs and the
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profile of returns on that investment and how significant those out periods are, in formulating that initial commercial decision.

5 **DR SNOKE:** It's quite significant, is my understanding. So, as noted in our submission, that the required investment in risk taking by innovative manufacturers and research based manufacturers is quite substantial and that return, as you mentioned, would weigh quite significantly on that decision at the start, given the billion dollars that's required during the development process and the long timeframes, a 10 to 15 year investment price is substantial and the average cost of between one and half and just over two billion dollars required to develop a new molecule, on average, is substantial to that time as well. So it's more examining, as you said, a net present value or the discounting back of that time period doing the investment decision, it weighs quite significantly, those additional years.

15 **MS CHESTER:** It might be helpful for the transcript, because the discussions we had last week were a round table with Chatham House rules, but we did ask the question then and I understand we're going to hear back from you, from your membership. So if you would look at it, in terms of return to equity, that additional five years extension of term, what percentage, as a return to equity, does that account for and we need it to be unbundled in terms of just looking at the extension of term in the Australian market. So given, as Jonathan rightly pointed out, it's 2 per cent of the global market. So we're trying to work out what swing factor is it, in the decision of the original R&D to be made and the commercialisation of the drug, of the medicine.

25 We get high level comments that it's really important and it's a billion dollar investment but, at the end of the day, it's discounted, it's 2 per cent of the global market so really, at the end of the day, how much of that is really contributing to the return of equity on that decision to go ahead?

30 **MR JENNER:** I think the decision on R&D that we're so distant in time. You don't even know if you're going to be successful in a given class. It's more relevant when you're thinking about launching your medicine than at the R&D phase. Because the R&D phase you're looking specifically at trying to find a new therapeutic class and so on. So if you then are successful that is when the decision comes as which market do you want to launch in or not. I think that becomes the critical issue, particularly, as we mentioned, the patient population sizes for many of the new therapeutics will be slightly smaller.

40 **MS CHESTER:** So we're happy to look at it from both perspectives, in terms of the original decision to go ahead with the medicine and the R&D which is, as we know the large upfront cost versus will it come to the

Australian market, in terms of the commercialisation costs, which, I imagine, would be a small fraction of the upfront costs.

DR SNOKE: Happy to explore those options.

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MR COPPEL: One of the other issues that we discussed at the round table was the strategic or gaming potential in the system and ever-greening is a term that's used. It's sometimes seen as pejorative because there are examples of drugs that are based on existing drugs but have
10 incremental improvements, in terms of patient wellbeing. There may be, for instance, a variation on the initial drug that has less side effects, for example. Interested in getting an idea from you as to whether there's a difference in those upfront research and development costs for those types of drugs, compared to ones which are, essentially, new molecules,
15 essentially, that treat a particular health issue.

DR SNOKE: I'm happy to consider that but, I think as you mentioned previously, we'd like to challenge the idea that strategic is viewed in a negative context as well. Also the fact that looking at patient outcomes is
20 obviously quite critical and would challenge that idea that any improvement in patient outcomes, in terms of effectiveness or responsiveness to a medicine should have an impact on the decision and on the incentives that are also associated with whether that innovation occurred or not.

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It would be concerning, from our perspective, if there was any change that would impact on that incentive to keep changing and improving medicine when it could have huge benefits for the patient's health. So I believe the example was provided previously on that.

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MR JENNER: We have a publication on incremental innovation that we can give you but I think incremental innovation takes place both through the originator industry (indistinct) and we think all of that increases choices for patients and therefore is vitally important for innovation, as it
35 stands.

In Geneva we have discussions on ever-greening a lot and it's fascinating how the term is mischaracterised or people have very different understandings of what the term means. I mean you have the inventive
40 step objection that is there to stop spurious applications but there's actually more important considerations around that molecule later one, for example, when you submit your original dossier to the regulator to say, "I would like to conduct further clinical trials. I think I've my enhanced efficacy, I think I've got better treatment options for patients, I've got less

side effects.” The regulator will assess that and then say, “Well, yes you can proceed,” or, “No, we don’t think this is useful enough.”

5 If you do proceed you are then based upon that hypothesis that you must achieve. So, again, if your change is not good enough you will not get regulatory approval for that. So similarly, at the end of the process, when you look at pricing and reimbursement systems which you have in Australia, or even a private market, if you’re looking at a given molecule and you believe that on a cost-benefit analysis the incremental innovation
10 is not sufficient to justify the cost you are still free to revert to the original molecule that’s now patent has expired. If you want the new one, well there’s probably a very good reason why you’d want that new molecule because there is actually a significant enhancement for patient treatment options around that new molecule.

15 So again I think that when you look at the incremental innovation space, and that’s pretty much how innovation happens in virtually every single market, it’s important to look at the outcome and not only the IP system but what actually happens with the regulator and in the commercial space, will anybody buy it, because there are plenty of
20 medicines that have gone through but nobody wants to buy them.

MS CHESTER: I think it’s for those very reasons that we actually recommend the way to deal with ever-greening, given we’ve had
25 conflicting evidence on its occurrence in Australia, although the justices do seem to think it’s happening, is that we align Australia’s inventive step in our Patent Act to that in the EU, which is slightly higher, as the best way of dealing with the issue.

30 **MR JENNER:** My understanding is that you have enhanced your inventive step analysis and that’s still ongoing, you’re assessing how that works, is that right?

MS CHESTER: Raising the bar took us there, EU is higher still - yes,
35 we want to get up to the EU.

MR COPPEL: Specifically in relation to the non-obviousness or obviousness aspect. Thank you very much. Our next participant is Belinda Wood, from Generic and Biosimilar Medicines Association.
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MS CHESTER: Did you just offer him a generic, did you?

MS WOOD: Actually in the UK his doctor would be required to prescribe the lowest cost medicine.
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MR COPPEL: Welcome, Belinda. If you could, for the transcript, give your name and who you represent and then if you have an opening statement please go ahead.

5 **MS WOOD:** My name is Belinda Wood, I am the chief executive officer of the Generic and Biosimilar Medicines Association. For the record, we used to be called the Generic Medicines Industry Association, so the Commission would be in possession of some submissions we've made as GBMA and also as GMIA.

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So the Generic and Biosimilar Medicines Association is the national association representing companies that manufacture and supply generic and biosimilar medicines to the Australian market, as well as for export. The Australian industry relies on domestic policy makers to get the balance right between patent and monopoly interests and public interests consideration and we feel that's what this Inquiry is about.

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The situation in Australia has been imbalanced for far too long, resulting in persistent and inappropriate market entry values to the launch of and manufacture of generic and biosimilar medicines here in Australia, which do not exist in our closest trading partners. The Australian public and the Australian government continue to bear the cost of delayed access to affordable medicines in Australia and through lost opportunities to build and utilise world class manufacturing facilities in Australia for the export market.

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GBMA is highly supportive of genuine innovation. Intellectual property protection should be focused at the cutting edge of innovation and not merely used as a commercial strategy to deny market entry of competitors. So GBMA applauds the statements and recommendations of the Productivity Commission in the recent draft report. That report clearly states that ever-greening strategies do delay market entry for generic medicines to the detriment of the Australian community and there is a lack of evidence to support extending market exclusivity rights for pharmaceuticals. Our members believe urgent patent reform is required to right the long-standing and persistent imbalance between pharma monopoly interests and public health needs in Australia. I'd just like to address a couple of the points that were made in the draft report.

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So the report clearly and rightly states that patent term extensions fail to incentivise innovation and GBMA agrees with that statement. The patent term extension system in Australia fails to incentivise product sponsors to promptly introduce new products to the Australian market and, in turn, further delays market entry for generic and biosimilar medicines. In fact, patent term extensions are an expensive gift to patent

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holders that cost the Australian government, tax payers and consumers a quarter of a billion dollars each year.

5 GBMA is of the opinion that competition is what encourages innovation, not extensions of monopoly rights. We support an overhaul of the patent term extension regime in Australia and agree with the Commission that any extension should only be calculated by virtue of unreasonable delays by the TGA in approving medicines. Manufacture for export can and must be implemented in Australia. GBMA strongly supports the urgent introduction of manufacture for export in Australia and believe neither domestic nor international laws, nor agreements, provide any barriers to implementation, as explained in our submission. One important point to make about manufacturing for export is that it doesn't only support the generic sector. It would be helpful for all Australian pharmaceutical manufacturers, irrespective of whether they traditionally sit as originator or generic medicine suppliers.

20 Ever-greening strategies employed by originator pharma companies do delay the supply of generic medicines in Australia. They cost money, as delaying generic medicine into the market, through the PBS, the government and taxpayers, it means that we're unnecessarily overpaying for medicines. The strategic misuse of the patent system in Australia is common for pharma patentees, and there are numerous examples, as we've outlined in our submissions to this inquiry and also to the Pharmaceutical Patents Review from 2013.

30 Pharmaceutical ever-greening strategies and incremental patenting to create patent thickets do occur in Australia because, in part, patents are easy to obtain and inexpensive to maintain. It's important to remember that the pharma market in Australia is relatively small and patent litigation is relatively expensive so there's great risk is challenging patents through the courts. Right now it's only through the actions of generic medicine companies that these challenges are being brought before the courts.

35 I'd like to point out that the strategic element of ever-greening is particularly evident in some life-cycle management strategies, often involved in moving the market from one form of a medicine to another, just prior to patent expiry. Examples here would include Venlafaxine to Desvenlafaxine and Oxycodone short acting to long acting. Changes to the inventive step would be a positive move in addressing ever-greening. Granting a patent only where there is genuine innovation and where that innovation has a genuine health benefit. But we also need a government mechanism that would identify strategic misuse of the patent system so we don't continue to overpay for medicines through the PBS.

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There is no reason to extend data exclusivity beyond five years, in Australia, for small molecules or for biologic medicines. Data exclusivity is not an incentive for innovation. It's an automatic right granted to encourage commercialisation in a jurisdiction and it can't be challenged.

5 We agree with the Commission's view that a five year data exclusivity period is suitable for all medicines, including biologics and there's no reason to extend.

10 There's currently nothing in Australia's IP system that encourages generic medicines to come to market. In fact, I'm not even going to sit here today and ask you for an incentive for generic medicines to come to market. What we're seeking is the removal of unnecessary barriers. We take all the risk, the risk of developing a generic medicine, the risk of challenging a patent, yet the main beneficiary of generic medicine market

15 entry is the Australian government, through the PBS, and ultimately the Australian taxpayer.

So you may be aware that when a generic medicine comes to market and, for the record, it's important to note that there is an automatic 16 per

20 cent price cut that is applied, simply through market entry, even if that generic doesn't even sell one unit. Over time, through competition, the price is gradually reduced, and that is to the benefit of the government, the tax payer, through the PBS, through price disclosure mechanisms. So you can see that eliminating barriers so that generic and biosimilar medicines

25 can come to the market is actually good for the ongoing affordability of the PBS.

In conclusion, I'd just like to say this is the second inquiry in three years that addresses Australia's pharmaceutical IP system, but the issues

30 are not new. It's not a new conversation and many of these issues are well over a decade old. So we think it's time to recognise that strengthening Australia's IP system is not about granting further monopoly rights to pharma patent holders, it's about ensuring patents are granted for genuine innovation, loopholes are closed and barriers to market entry for

35 affordable generic and biosimilar medicines are removed. Thank you.

MR COPPEL: Thank you, Belinda. Can I ask you if you have any figures on what is the cost of bringing a generic medicine to market?

40 **MS WOOD:** It's significantly lower than it is for a new medicine, obviously, and the development timelines are a lot shorter. I don't have a particular figure that I can point to today, but I'd be happy to provide that. It depends, obviously, on the nature of the medicine itself and on any patent litigation that occurs around that. But, generally, it's significantly

45 less than a new chemical entity.

MR COPPEL: Another point of clarification, you referred to the term of product sponsors in bringing a new medicine to market, who is a product sponsor? Is that a generic manufacturer, for example?

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MS WOOD: A product sponsor can be a generic medicine manufacturer or an originator. The word “sponsor” is just used to identify who is bringing forward the application for market authorisation and also who is bringing forward the application for any PBS listing.

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MR COPPEL: Another point, you referred to new medicine having a genuine health benefit should be a criteria, are you saying that should be a criteria for patentability or a criteria for whether it’s listed in the PBS, because they’re quite different things.

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MS WOOD: They’re very different things. So it’s important to recognise that when it comes to the regulator, the regulator is not looking at any incremental health benefit at all. You produce a dossier of information that shows your medicine is safe, effective and of an acceptable quality you’re more than likely to have that medicine approved.

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I think what it really comes down to here is if we - it’s the inventive step argument really. It’s saying that if we’re granting patents just because of a new formulation are we genuinely weighing up what the implication of that patent is, with the public benefit and, of course, the public cost. So it’s an interesting question because it really looks at taking a step out of the regulator, out of IP Australia, out of the PBS and taking a look at who could take a look at and determine whether there is a genuine health benefit in granting that patent.

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MR COPPEL: So, as Karen mentioned earlier, in the draft report the issue ever-greening was suggested, given the ambiguity in the evidence, that other measures that are proposed in the draft report, relating to the broader area of patents, through an increase in the inventive steps, the non-obviousness criteria. We’ve also got a number of other recommendations that I think you support, relating to fees, relating to an objects clause. These are all measures that, I guess, nudge in the direction of trying to get higher quality of patent and be, at the same time, consistent with international obligations. I’d be interested in your views as to whether they would make a - how big an impact do you think they would make, in terms of that contribution towards limiting, at least, the possibility or the risk of practices, I use ever-greening, I know it’s pejorative, I don’t want it to be interpreted in a pejorative way but I think people understand what we mean when we say that.

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5 **MS WOOD:** Yes, and I don't mean to be pejorative with the term "ever-greening" either. I think, though, that we are sticking our head in the sand if we think that strategic marketing practices are not being used to extend a monopoly. So we need to call out the fact that it does exist and why it's important to call it out is because of the impact it has on the public purse. If we didn't have a PBS we wouldn't be having this discussion about ever-greening, but we do. And ultimately, the taxpayer is paying for any outcome of these strategies.

10 I think the recommendations made in the draft report will go a significant way to addressing the strategic misuse of the patent system broadly. I think there are other ways that generic companies would be seeking to call out ever-greening and I think one of our members, Apotex,
15 is particularly litigious and is often in court to challenge what they believe are invalid and weak patents and they have been very successful, over the years, in doing that.

20 The Pharmaceutical Patents Review also recommended that the Federal government had the ability to challenge patents. Now, that certainly isn't reflected in your draft report but I think it is important to take a look at what other options there are available and I think those options you just outlined would certainly go a long way to addressing the problem of ever-greening.

25 **MS CHESTER:** Another area of strategic misuse that we tried to address in our draft report is the pay for delay. We have a recommendation around that drawing on US experiences, unsurprisingly difficult for us to get an evidence base in Australia. So I guess two questions there, firstly,
30 your membership's view on our proposal to, at least for a five year period, look at some monitoring by the regulator, the ACCC, and then, secondly, I guess some people have suggested to us that pay for delay just doesn't happen in Australia and my question to that is, "Well, tell me what's structurally different about the Australian market and business models for
35 pharmaceuticals that would suggest that pay for delay doesn't happen."

MS WOOD: Structurally I think there's two important differences and one is the relative smallness of our market. The second is the fact that clear distinction between the US and Australia where, in the United States,
40 if you are successful in the patent challenge you are granted 180 days of market exclusivity. So there's actually a reward for even entering into a challenge situation. In Australia there's no such reward and I think that the feedback from our members is that there could be some unintended consequences of applying the Federal Trade Commission's approach here
45 in Australia. I'll try and illustrate. It's conceptual and it's a hypothetical

consequence that could result in generic companies simply not challenging if there is, mainly because of the inclusion of the ACCC and the word “cartel”, the cartel like behaviour. If there is any implication for generic companies to (inaudible) anti-competitive or cartel like behaviour, if that risk is too great, compared to the benefit of challenging a patent, they won’t do it. So it’s an unintended consequence of what you’re proposing, if it is the FTC model where all settlements are slowed, then potentially there could be an unintended consequence there.

MS CHESTER: Sorry, I don’t understand what the unintended consequence is.

MS WOOD: So the unintended consequence is that generic companies won’t challenge patents. They won’t even enter into a challenge situation through the courts.

MS CHESTER: So we’re talking about arrangements that they enter into where - I guess there is a reward for pay for delay in Australia, it’s called the PBS not getting a discount for the period of the pay for delay. So there is an incentive to do it - - -

MS WOOD: For the patent holder.

MS CHESTER: Well, it becomes a zero sum game if you’re paying a generic to delay you’re kind of saying, “Hey, the taxpayer’s funding and we’re going to share.” So there is an incentive. So where people say there’s something different about the Australian market that it wouldn’t occur, I’m really struggling with that, given that the PBS does provide an incentive. I’m not sure what the unintended consequence would be if the ACCC’s getting similar arrangements between pharmas and generics. Are you saying that that would then preclude - so if it’s a settlement agreement, where it’s just to challenge a patent, why would that cause any concern if the ACCC’s looking at that agreement if there’s no pay for delay arrangement embedded in the settlement agreement?

MS WOOD: It depends on the nature of the settlement agreement. Say, for example, if its looking like the generic company might be successful in their challenge and the patent holder comes to the generic company and says, “Look, let’s just settle this,” with a payment, that could be considered to be pay for delay, it could be considered to be a transfer upon situation that would potentially have a negative consequence if picked up by the ACCC and publicised as anti-competitive behaviour.

MS CHESTER: I understand what you’re saying, which helps us with the model.

MS WOOD: Does it help?

MS CHESTER: It does.

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MS WOOD: Good.

10 **MR COPPEL:** In essence you're very much supportive of what we have in the draft report, both in pharma and the broader patent part of the draft report. One of the areas that we're proposing for changes, looking at the use of fees and the structure of the fees for patent claims, do you have any views on what would be an appropriate structure and level of fees for patents, from your perspective?

15 **MS WOOD:** I haven't got any specific details on that because I simply haven't asked the members what their views are on that one. Having said that, I did say, in my opening statement, that patents are relatively easy to obtain and inexpensive to maintain. So I think any change to that system that puts a further consideration, on behalf of the person or organisation
20 seeking the patent, if there's another step for them to consider before seeking out a patent, I think that will go a long way to at least causing the applicant to reconsider whether, indeed, they do need that patent sitting around that product.

25 **MS CHESTER:** It would be good to get your membership feedback. They kind of understand the commercial metrics of the industry better than we do and what those incentives might be at the margin, in terms of looking to structure the fees and the renewal fees in such a way to still allow reward innovation and patents to be granted without genuine
30 innovations but just to curtail at the margin strategic misuse.

MS WOOD: I have sought their views on whether they think that, as a concept, is a positive one and the overwhelming response is absolutely yes. The more detailed question, though, I'm happy to take on notice and
35 get back to you on that.

MS CHESTER: That'd be good.

40 **MR COPPEL:** Another question I had for you is that the patent system, in a sense, is a one size fits all. By international requirements you can't have a system which is tailored for specific sectors, in terms of patent term. This is one of the reasons why we have things like extension of term for the pharmaceutical sector. It recognises that there is particularly large upfront costs associated with research and development of a new
45 drug and it's also to provide that incentive or that initial innovation. So

I'm just interested in your views as to how do you reach an assessment as to whether that balance is correct is always something that needs to be at the back of your mind. We often think about things, in terms of where we're starting from and where we're moving to. But if you were to just
5 look at it purely from removing yourself from the context of the current arrangements would you be confident that the length of term is sufficient in this sector, for originators, to provide sufficient incentive for that new work into research and development of new drugs?

10 **MS WOOD:** The previous figures mentioned that the Australian market is 2 per cent of the global market and I think it's very fair to say that global companies are not specifically developing any medicines with the Australian market in mind. So having a consideration of will we or won't
15 we invest this money into this development because Australia may not have an additional five years of patent life? That's not a consideration, as far as I understand, when it comes to developing a new medicine. So the consideration of the Australian experience would be that if we were to commercialise this product in Australia we would be granted a five year extension of our patent term and, on top of that or maybe not necessarily
20 sequentially, but an additional monopoly provision that is supplied is that data exclusivity period in which no one can seek marketing authority.

So do I think it's sufficient? It's very difficult for me to say that, without anything more than my personal opinion. I think, though, the real
25 consideration here is what impact does a five year extension of term have on that cutting edge, innovative work that these companies do so well and if the current patent term extension was to be rolled back and refined so it really does compensate just for regulatory delay that's not going to stop clever companies from bringing new medicines from the lab to the hands
30 of patients.

MS CHESTER: I guess the flip side there might be, though, given we are only 2 per cent of the global market, what impact, if we strayed too far from global patent settings, would that have on the inclination of global
35 pharma companies to bring drugs and the timing of bringing drugs to the Australian market?

MS WOOD: That's probably more of a question to ask the previous speakers, but my personal opinion here is that there could be a detrimental
40 effect to the availability of new medicines for the Australian population. I'm trying to be as dispassionate as I can be about that. I don't think that strengthening Australia's IP regime should go so far as to deny access to new medicines. I think what's really important though is even if the patent term extension is wound back, there is still that five years of data
45 exclusivity. So even if the patent had expired everywhere around the

world, an originator company bringing in new medicine to the Australian market is still able to have five years of market exclusivity, once they reach Australia. So I think that is an important consideration to think about.

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MS CHESTER: One other issue that you touched on earlier, and also in your submissions, Belinda, was around the cost of challenging a patent or a patent infringement in Australia. We do have some information requests around that and, in particular, our terms of reference asked us to look internationally in other jurisdictions for the kind of best practice. One of the models that we've been looking at is the IP Enterprise Court as a dedicated stream within the High Court system for a lower cost model for IP matters. Good to get your feedback and thoughts on that and then also an understanding of to what extent the costs of litigation, with respect to patents in Australia, are so high such that it just basically channels everyone into a settlement stream.

MS WOOD: Our response to the draft report does say we highly support the option of having a fast-track court system. That would go a long way to encouraging a generic medicine supplier to challenge a patent. I think a combination of all of the recommendations, raising the inventive step, looking at the fee structure for IP Australia and also looking at this option of being able to have a more efficient or expedited court process for challenging patents. I think as a package those things will all go a very long way to reducing some of those market entry barriers for generics. What was your second question, sorry, Karen? You asked about do we think that's a good idea, yes. And?

MS CHESTER: How much of the current costs are seeing everything heading into the settlement stream?

MS WOOD: I'm not sure everything is heading into the settlement stream, so I probably need to go back and have a chat to a couple of members who are particularly robust in their litigation. But certainly the costs are significant and you would be aware of the current proceedings where the federal government is trying to recoup some of the lost savings through the court system.

I think what's important, though, is that all of those costs right now are borne by the generic company. As I said, there isn't an incentive for them to do that. Having a more efficient and more streamlined, if you like, process for challenging that, with an appropriate fee structure, that would go a long way to encouraging and challenging it.

5 **MS CHESTER:** Belinda, if you are going to be speaking to your membership that have experience in enforcement, two questions that would be great if you could put to them. The first one is, which court system should such a streamlined arrangement be put in? There's the option of the Federal Court or the Federal Circuit Court. I guess the other issue is, the sort of legal issues that they would be taking through enforcement, through the court system, do they lend themselves to the IP Enterprise Court model, with very truncated discovery, two days of hearings. Like how much of that model would translate across. I guess
10 what we're trying to get our heads around is if we were to make a draft recommendation to what extent are we creating a new demand for enforcement or are we just switching stuff that would be going to the Federal Court in any event and therefore maybe it still needs to go to the Federal Court and have greater discovery processes.

15 **MS WOOD:** So is your question around are we going to grow the enforcement or are we just going to make it more efficient?

20 **MS CHESTER:** Either is still worthwhile, but from what we heard, from the UK experience and Jonathan and I were lucky enough to meet with Hagen J, who is the judge of the IP Enterprise Court, an academic to do some research around the statistics, which suggested that the IP Enterprise Court did really meet on that demand so there was a growth in enforcement actions.

25 **MR COPPEL:** One final question, in your submission on the draft report, you didn't have a view on the recommendation relating to monitoring pay for delay settlements. I was wondering if you have any views on that recommendation?

30 **MS WOOD:** At the time we wrote the response we hadn't had the round table and since the round table on Friday I've been able to talk to a couple of the members and this is where - the concern, as I mentioned, is maybe the unintended consequences of it, but I think it's fair to say that any
35 activity that seeks to call out and to minimise areas for generic entry we would be supportive of.

40 **MR COPPEL:** Thank you very much. We're going to take a break now and we'll be reconvening at 1.25 and the following participant will be the Australian Publishers Association. Thank you.

LUNCHEON ADJOURNMENT

[12.07 pm]

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5 **MS CHESTER:** We will resume our hearings and I'd like to welcome Michael Gordon-Smith, who we're hearing from next. Michael, if you could just state your name and the organisation that you represent for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks. If you could make sure they're not longer than five minutes, that would be much appreciated.

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MR GORDON-SMITH: My name is Michael Gordon-Smith; I'm the chief executive of the Australian Publishers Association. Rather than rehearse our submission or go over material that you've probably heard quite a bit of in the last couple of days, I thought I'd just try to make three points, I guess, of concern about the report.

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First, it seems to us that it takes an editorial stance that's not just about economic analysis, and that it's actually informed by a pre-judgment and a negative view about copyright, in particular, and intellectual property perhaps more generally. Secondly, that it doesn't offer, especially on the recommendations that concern us, it doesn't offer any measurement of the social welfare benefit that is purported to result from the recommendations for change. Finally, that the recommendations that it does make that apply to our industry risk substantial damage that might be difficult to reverse. I'll try to take those just one at a time.

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You've got a couple of things in the report, the Commission says, "The incentives created by intellectual property to develop new expressions of ideas or creative works". It then defines those as ideas. So right at the beginning of the report it defines as ideas, the things in which creators may have a property right, expressions of ideas or creative works. While it does elsewhere recognise the critical feature of copyright, but it doesn't protect ideas per se, using ideas in that way as the term, the defined term, seems to be either a deliberate or an unhappy division. It conjures up the strawman, that we're talking about ideas and it encourages them out as if copyright was currently applied to ideas and not to their expressions or their instantiation.

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When the report talks about parallel importation restrictions, it twice makes the comparison with parallel import restrictions on books as "the analogue equivalent of geo-blocking". Now that's an inaccurate comparison, which doesn't have any useful explanatory value, so it's tempting to think that it's there mostly to exploit the negative public sentiment associated with geo-blocking. Later on in the report, the report compares this the other way around. It says, "Geo-blocking is the online

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equivalent of parallel importation restrictions which prevent consumers from purchasing physical goods from overseas markets”. Now that’s just inaccurate. The parallel importation restrictions under consideration here that apply to books have very limited application and quite specifically
5 don’t prevent consumers from buying physical goods from overseas.

Again, the report says, “As with many other reforms, those who seek to gain from intellectual property protections are concentrated and have actively sought to shape policy for their benefit, contrasted to those who
10 stand to lose being dispersed and less aware of what’s at stake, and so less vocal and influential”. I think that a quick look at the way in which the respective interests are represented, even in this consultation, gives the lie to that. Authors are dispersed; they work alone; there’s a wide range of publishers. If you look at the membership of my association, many of
15 them are really very small businesses, unable to support the overhead of strong and sustained influence in policy debate.

A quick look at the companies institutions on the other side seeking to dilute their rights, are very, very much larger. I think that’s just an
20 inaccurate suggestion. The Commission quotes approvingly the idea that IP rights “generate monopoly positions that reduce current consumer welfare”. There’s no real sense in which copyright in a work can be fairly characterised as a monopoly over something without close substitutes.

Some of those points have been made about other forms of intellectual property or other industries, but that’s part of the problem with the reports often undifferentiated approach. The only curiously positive
25 remarks it gives to an otherwise critical approach are reserved for plant breeder’s rights where it comments that the introduction of them has introduced competition and price signals to a market that was previously
30 characterised by a heightened degree of state provision. It looks like the heightened degree of state provision is in fact what’s recommended as an alternative in the case of the book industry.

The question of term has no doubt been raised. Clearly the question of term was not something there that was a meaningful recommendation that the government would be able to implement but it is a concern as an
35 indication of the Commission’s assessment of the balance and its analysis of copyright. It should be so clearly unacceptable an idea that a creator would lose all their rights to control the use of their work while they’re
40 still alive. But if the Commission’s calculations about incentives are correct, it should have been alluded to the possibility that an account of copyright as only that sort of incentive was inadequate. Harper Lee, for example, was it copyright? Was it her copyright or some other right that
45 enabled her to refuse or to delay rather and possibly even to refuse

publication of “Go Set a Watchman”? If it’s copyright, an account of copyright that’s limited to its operation as an incentive is not sufficient to explain that.

5 As I mentioned at the beginning, the report doesn’t provide really any measurement of the social welfare benefit, the changes to PIRs and to these in particular, are expected to produce. A generous upper bound, accepting the estimates about price and the changes, is going to be measured in the tens or hundreds of millions of dollars, and that’s going to
10 be largely offset, we would say, by the reductions in benefits in a range of other things. After about four minutes, let me make just in conclusion a couple of remarks about the specific recommendations.

15 I am curious as to what features of parallel importation are seen to work against social welfare. Franchising, for example, involves the exclusive licence to use intellectual property and to use some of the services of a franchisor within a defined geographical area, so a much better comparison with parallel imports and geo-blocking. What is it about an author’s use of franchising at a national level that makes it
20 socially undesirable, whereas franchising by let’s say a retail chain is a desirable form of commerce.

25 While the Commission’s terms of reference ask it to take into account the government’s response to Harper, the Commission has chosen to represent that there’s been nothing different. There’s no change to the previous views on this issue. It was open to the Commission, I think, more accurately to find that previous concerns about the possible effect of the Act on the availability and price of books were no longer present; that the need for change had been very substantially addressed; and that any
30 remaining benefits from further change were likely to be very small, limited to some possible small changes in price and a very limited number of titles, offset by the reduction in social welfare from the damage to other consumer benefits through the publication of Australian titles and the maintenance of a greater level of diversity.

35 The Commission does recognise that there’s some change. One quote from the report, “the low cost of disseminating”, it says, “(and indeed producing) new works, the globalisation of culture, explosion of copyrightable material, including non-commercial works, YouTube, et
40 cetera. Creators are competing for the attention. In all areas of demand, the more substitutes for a good or service, the more responsive are consumers to a price increase in any of a set of substitutes”. It should be clear from that change that the opportunity for people in the book business to keep prices higher is lower than ever. However, instead of concluding
45 that the need had reduced, the Commission concludes not that the need is

reduced but that the industry is better positioned to adapt to the dilution of the property rights that it's based on.

5 Finally, I guess, just on fair use and particularly the extension of an educational right, I think that raises the very reasonable apprehension of a major impact on the revenues of publishers and authors. I think that's a good enough place to stop. That's about seven minutes, slightly less than that.

10 **MS CHESTER:** Thank you, Michael, and thank you for the association's submissions both pre and post our draft report and for your participation in our roundtable on copyright fair use last week, and for sharing some of your further views on excerpts from our draft report. I thought it might be helpful just at the outset just to clarify a few points. I think the first one is
15 that I think a lot of people have relied on media reporting of our draft report, as opposed to prevailing themselves of having a look at our recommendations directly or even our overview.

MR GORDON-SMITH: I can assure you that in our case it's been well
20 read.

MS CHESTER: Just to clarify for the record then that firstly that the Commission has made no recommendation to the term of copyright. Secondly, with respect to parallel import restrictions and the focus in our
25 draft report, if you read our terms of reference in conjunction with the government's response to the Harper Competition Policy Review, which is what the government instructed us to do, we were meant to be focusing on transitional issues as they relate to the removal of parallel import restrictions and that's very much the focus of our report. I'll come back to
30 those transitional issues in a moment.

I do note the point that you raised though with regard to measurement of social welfare benefit and you're more than familiar than others, I'm sure, with the very comprehensive work that was done by the Commission
35 in this area in 2009. We also benefited from the work and the consultation from the Harper Competition Policy Review which is much more recent. But rest assured we are now providing an undertaking that we will be updating the pricing data for our final report and indeed we hope that a cost benefit analysis that's been arranged for by Ernst & Young by the
40 Department of Communications on fair use, we're also hoping that that will be available for us to incorporate into our final report, given they're the two areas, parallel import restrictions and fair use, that are of greatest concern to your association.

If we turn maybe first to the transitional issues around parallel import restrictions. This is where our public hearings have been very helpful in terms of getting a better understanding of progress that the publishing industry has made since our report in 2009. I guess we focused on a couple of transitional issues or areas in our draft report. The first thing that there had been price reductions in books in Australia since our 2009 report. Also the advantageous move in the Australian dollar where it currently stands at the moment would lessen transitional issues for local for local publishers if there are parallel import restrictions. That certainly didn't form our draft recommendation on timing.

I'm also very cognisant of feedback and concerns around potential for dumping of books from overseas jurisdictions and looking at a very recent review of our robust anti-dumping arrangements. I think where we've benefited from the public hearings in better understanding the transitional issues is the evidence that we've received from your industry about how sort of lean and mean they've become over the past six years, which would suggest then that some of the costs that the industry thought might be attached to the removal of parallel import restrictions would be much more reduced than they would have been in 2009.

My question, Michael, after I've been able to make those clarifying remarks is are there any other transitional issues, given that that's what the government has asked us to focus on. Are there any other transitional issues that we haven't identified in our draft report that we ought to.

MR GORDON-SMITH: Well before we go to that, can I just issue take issue slightly with the suggestion that all the report has done is to focus on the transitional issues. I think it would be fair of anyone to report they would not think that that was what you'd done. I think quite a lot of the report, as I went through some of the comparisons, I think quite a lot of the report does rehearse the merits of the idea of removing the parallel importation. It doesn't do so to just the terms of "the government's going to do this and we're just looking at the transitional arrangements". It actually does canvass the merits in a really quite enthusiastic way. I think it would have been open to you, and I've looked through the terms of reference reasonably carefully, I think it would have been open to you to have said different things had you wanted really to represent that all you were doing was looking at the transitional approaches.

In terms of the leanness of the industry and whether those were the costs that the removal of the provisions would impose for it, I am not sure that the issue is about efficiency. To some extent the existence of territorial copyright allows investment in a variety of titles for what's a comparatively small domestic market. So the change is not a question

about the leanness of the industry; that's about removing any of the negative concerns that there used to be about pricing availability. The fundamentals for the requirement to be able to invest with some measure of confidence in a meaningful Australian right is not removed. That's the thing that's at the heart of the question of the removal of parallel importations. Effectively it means that the industry would need to adjust to a situation in which all Australian rights are global rights or global rights are Australian rights. Any right anywhere includes a right to publish in Australia.

10 In the Commission's previous report there was a little bit of canvassing of the question of what the likely results would be in a world where Australia was the only territory that removed territorial copyright, as opposed to a world in which eventually everybody did, in a world in which in either of those cases there's pressure on Australian authors to deal only with global rights. Inevitably, that means that for those who can, that there will be an incentive on them to deal with global companies and that it will be more difficult for global firms to make an investment in Australian titles.

20 **MS CHESTER:** So the author themselves already decide whether or not they're going to enter into global publishing arrangements. Parallel import restrictions just allow a book seller, if they so choose, to avail themselves of accessing those books from an offshore publisher, as opposed to a local publisher.

MR GORDON-SMITH: Sorry, I'm not quite sure I understand.

30 **MS CHESTER:** I don't understand how you say that it takes it from our current arrangements of how publishing rights are granted to making them global rights.

MR GORDON-SMITH: Yes.

35 **MS CHESTER:** They already are kind of global rights because a local author can - sorry, just let me finish, please, so you don't misunderstand what I'm suggesting. It's up to the local author to decide who they then allow to publish their works, either domestically or in any other offshore market.

40 **MR GORDON-SMITH:** Yes, but without parallel importation restrictions it is no longer open to the author to make an exclusive arrangement with a publisher to publish their work in Australia. That is no longer possible for that author. The author can do that. It is open to an

author now to licence you to publish their work in Australia and to licence someone else to publish their work in the United Kingdom.

5 **MS CHESTER:** Well, no, that's not correct because I today can purchase a book online from the US or from the UK of a local author that's been published there. It's just the bookseller is not able to do so.

MR GORDON-SMITH: Yes.

10 **MS CHESTER:** So we already do have those rights. It's just it's not extended in a neutral way across the ways of purchasing in Australia.

MR COPPEL: It's not extended to booksellers, not to book retailers. It's an individual that can.

15 **MR GORDON-SMITH:** It's an individual that can do that and so individuals are able now to avail themselves. Exactly, so the parallel importation rules are a narrowing. It might be better to call them limitations on parallel import protection. The rules, as they are at the
20 moment, do allow Australian consumers to avail themselves of any title anywhere, but it is still for the purposes of the creation, for the publication of physical books, it is still an important element of the relations between authors and their publishers, that the publisher is able to invest with a measure of confidence that for domestic distribution of commercial
25 quantities, they are able to purchase from the author an exclusive right to publish in Australia. That's what you will remove. You will simply remove some flexibility on the part of authors to be able to decide how best to franchise their work in Australia.

30 **MS CHESTER:** Franchise in terms of where booksellers can source the book from?

MR GORDON-SMITH: No, who can publish their work.

35 **MS CHESTER:** Sorry, no, they control who can publish their works. They're the contracts that they enter into. It's just whether or not a bookseller in Australia can buy it from a local publisher or an offshore publisher. That's why I'm sort of struggling to understand how we're
40 changing the moving to a global rights system. We're just allowing a bookseller to buy a book from the US if it's cheaper than buying it here from the local publisher.

MR GORDON-SMITH: In effect there will be - I mean at the moment it is, as you've identified, limited but at the moment there is this, some
45 measure of meaningful exclusive Australian right. You're seeking to

remove that. The author will not be able to appoint someone as their exclusive publisher in Australia.

5 **MR COPPEL:** You've made the argument that a number of others have made that this exclusivity provides a degree of certainty between the author and the publisher to invest in events that promote the work.

MR GORDON-SMITH: But also the creation of the work.

10 **MR COPPEL:** The creation and the work itself. We have other creative works where parallel import restrictions have been removed in Australia.

MR GORDON-SMITH: Yes.

15 **MR COPPEL:** Do you see there being a distinction between say music and film, where parallel import restrictions have been removed, and books with respect to that argument?

20 **MR GORDON-SMITH:** Is it the case that they have been removed for films?

25 **MR COPPEL:** Basically the parallel import restrictions that remain relate to books and they are, as you've noted, more limited in the sense that they allow an individual to directly import from another country or another jurisdiction the book. But there are other creative works where the parallel import restrictions have been removed and the question is has the impact of that decision had an impact on the ability for the creator and the publisher to invest in the promotion of that creative work.

30 We've heard a lot of doom and gloom that would come from removal of parallel import restrictions in books and there's that experience with New Zealand. I'm trying to tease out what was the experience in Australia when parallel import restrictions were removed. If you can talk to that.

35 **MR GORDON-SMITH:** I'm not a copyright lawyer but my understanding is that the territoriality of copyright remains for film. That's my understanding of the law is that parallel importation is not allowed for a feature film.

40 **MR COPPEL:** I'm talking about DVDs, it could be a DVD of a film, is my understanding.

45 **MR GORDON-SMITH:** Yes, okay. We might need some clarification on that.

5 **MS CHESTER:** Harper was quite clear on this as well that it's only books that parallel import restrictions remain for in terms of creative works in Australia. We know that there are some licensing arrangements which commercially might suggest that there are some restrictions but there's none on film or music any longer.

10 **MR GORDON-SMITH:** I'd want to take advice on that because my advice is to the contrary. I believe it remains on film, but let's put the legal question to one side. The question about what effect did the removal of parallel importation provisions have on the music industry. It is difficult to answer the different factors because more or less at the same time that that happened, everything in music went digital. I think if you talk to people from the music industry, they would confirm that it had a deleterious effect on local retail. Yes, I think over time it does mean that
15 Australian artists have fewer publishers, if you like, here available to relate to, work to, to build, develop and market. I think it would have had a deleterious effect on that, but it's really quite difficult to distinguish that because the transition to digital was so complete in the case of music.

20
There's a big contrast in books where the take up of eBooks has shelved at around whatever, 15 to 30, depending on the genre and different levels for different types of work. The importance of the physical object of a book, the eBook is not a replacement technology for
25 that in the way that digital production of music was a replacement technology for previous work.

MR COPPEL: This point about multiple factors and it's hard to disentangle that I think, it's a very real issue at the point that's being
30 contested by a number of participants in this inquiry. In terms of the response to the draft report, I think the same sorts of arguments could be put and if you take the case of parallel import restrictions and what is seen as the value that they provide in terms of being able to invest in Australian authors, we're in a situation where we've had parallel import restrictions
35 for decades, the period that I was growing up and most children's books, in particular, would have been non-Australian authors. Now that's a thriving part of the Australian market. It's quite significant and it's growing.

40 There hasn't been any change - if anything, the only change to parallel import restrictions has been this gradual reduction and yet we've seen this sort of thriving children's book part of the book industry. I just find it very difficult to accept the reason for why there would be such doom and gloom from this change. If you give again the example of New
45 Zealand, New Zealand removed parallel import restrictions in 1998, many

of the effects that have been attributed to that were happening in 2010, and '13. I find it very hard to be able to say with confidence that these are the effects that are going to come from the removal of parallel import restrictions. I'm just wondering whether you've got any reasons or
5 evidence to be more clear-cut.

MR GORDON-SMITH: There's two things. There's New Zealand and there's the question of children's books. Given that we've had parallel importation restrictions have gradually become lessened, why has the
10 industry been able to flourish?

Let's just take New Zealand first. I think the point about New Zealand is less that the removal of territorial property right in New Zealand resulted in very bad things happening, as opposed to yes, there is
15 some questions about what the variety of factors are. I think what's unarguable is that it hasn't resulted in the utopia of massive improvement in social welfare that is advocated by the people who seek its removal. I think to some extent the onus of proof is on the person who's saying, "Take this snake oil; it will help you fly". The comparison with New
20 Zealand is they took the oil but they haven't flown, to the extent that they've also got sick. Maybe there are a series of other factors involved in the getting sick but what's quite clear is that the removal has not resulted in anything good.

There's some questions about price. What's absolutely without question is that there's a marked - and you can find quotes from publishers in stories about New Zealand that provisions such as sale and return are
25 much less likely to be - and it's more difficult for publishers to engage in that which puts a risk of diversity back on to the bookshops, which is probably part of the explanation for the Nielsen book data figures which demonstrate that the range of titles has diminished. That's kind of where I
30 think the onus is on New Zealand.

In terms of how did the Australian industry flourish, the account that I
35 have from members of our association who have been involved in managing enterprises in the Australian industry for a very long time, is that the key transition was actually the creation of an Australian right. If you go back a long time, then Australia was often only packaged as part of a Commonwealth right and that made it very difficult. It was in that
40 context that many of the rights or titles which were unavailable to consumers here, and I remember the frustrations as a consumer myself, were held by publishers who had Commonwealth rights and who were relatively uninterested in the efforts needed to serve a small part of that market for some time. So the window for Australia came later.
45

The account that I have, as I say, from managers with very long standing is that after big industry campaigns on their part and bashing up the people from the UK to separate out a clear purchasable Australian right, that was a transforming moment in the history of the industry.

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MR COPPEL: When did that happen?

MR GORDON-SMITH: It would be prudent of me to say I could get some advice for you on that, rather than to take a guess, but I'm happy to do that.

10

MR COPPEL: Thank you.

15

MR GORDON-SMITH: You would like that?

MR COPPEL: If you have an idea. I mean we can look it up.

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MR GORDON-SMITH: No, I'm afraid I don't. I would be guessing but that's certainly the account of the history of the industry from the point of view of people who've managed it for longer.

25

MS CHESTER: Maybe we could turn to our draft recommendations around fair use and we're certainly not the first independent agency to recommend an Australian view for fair deal and to fair use; there's been a number of precursor reports that have done that. I guess what perhaps we did was try to bring a bit of an economic framework to the relative merit of the fair use system and I guess what we're seeking to do there is to actually inject greater predictability by allowing adaptability and technology for neutrality within the copyright system as it applies to exceptions.

30

I guess two questions, Michael. The first is a lot of folk are arguing that fair use is intrinsically more uncertain than fair deal and yet we've received evidence to suggest that the converse is true. Secondly, a lot of people have portrayed, unfairly so, that fair use is a free-for-all. It's not; it's really just trying to take fair dealing and turn it into fairness factors that would be principal-based legislations as opposed to a prescriptive exclusion legislation. So good to get a sense of what you would see as potentially non-remunerable under fair use that would have been remunerable under fair dealing.

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MR GORDON-SMITH: I think the really big concern here is the education one. I think that if you read at the draft stage rather than the final stage of the Law Reform Commission report and I'm not sure which other competitive bodies you're referring to, but if you look at the

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proposals at that kind of stage, then I think the reasonable concern of people who are engaged in the business of publishing books and particularly publishing books for an educational market, is that the educational right or the expansion of the educational right really doesn't dramatically change the amount of flexibility that is open to educational institutions now. What it does is to remove any of the other side of the fairness which is equitable remuneration, and that it is likely that - and again, there may be different accounts of exactly what factors were at stake, but I don't think the facts of what happened and when are in dispute. If you look at what happened in Canada as a result of the expansion of educational use right and the amount of money that was paid to educational publishers fell up to, so that the fundamental concern about educational publishers is that the assurances about leakage being prevented and money continuing to be paid, we had little of.

MS CHESTER: Canada is probably a good reason why you could take some comfort from a link from fair deal and fair use in Australia because they're distinctly for two reasons. I think firstly that Canada actually doesn't have a fair use, it's a fair dealing system. But dissimilar to our recommendations where we do move to fair use, we have no recommendations that would change the current statutory licensing provisions and those systems would still remain in place and work in parallel with fair use, whereas in Canada that was not the case.

I also do note that the challenges that the Canadian textbook publishing industry faced are those issues had commenced way before those changes as well. So there is quite a long history there, but I think that the key point is that there is no real parallel between what happened in Canada. It was fair dealing and there was a change to removal of statutory licensing arrangements, whereas here it's fair use and in parallel. We haven't recommended any changes to the current educational statutory licensing arrangements. I'm still trying to struggle with what would not be remunerable under fair use with statutory licensing today that it would be at the moment.

I guess the other question then is you mentioned before that there would be a departure from the equitable benchmark. If you could elaborate on what that equitable benchmark is and what underpins it.

MR GORDON-SMITH: Sorry, I don't - - -

MS CHESTER: You mentioned before that moving to fair use, in conjunction with the licensing provisions, would result in a departure from the equitable benchmark of remuneration. I'm just trying to work out what that equitable benchmark is.

5 **MR GORDON-SMITH:** I think I said equitable remuneration. So the provision at the moment under the statutory licence is for the uses that are covered by fair dealing provisions to be matched by some equitable remuneration. That's the phrase and that's the money that is paid.

MS CHESTER: Equitable remuneration being equitable from the perspective of the licensee and the licensor?

10 **MR GORDON-SMITH:** No, it is negotiated and ultimately subject to settlement by the right tribunal, but the phrase in the Act in the same way as I might say to you fair in the context of the user or of the creator, the phrase in the Act is equitable remuneration.

15 **MS CHESTER:** Obviously what is equitable is informed by fair dealing at present from how you just described how that works.

MR GORDON-SMITH: Yes.

20 **MS CHESTER:** Whereas going forward, what would be equitable would be informed by fair use, which kind of takes me back to my original question, what would be the difference? What would be non-remunerable with a move to fair use?

25 **MR GORDON-SMITH:** Let me ask that question the other way around. What uses would be available to an educational institution under fair use that are not currently available under the existing provisions and compensated by the equitable remuneration.

30 **MS CHESTER:** Sorry, I was asking a question of you, Michael, and it would be good if I could get an answer. You have very grave concerns about what's going to happen to educational textbooks in a fair use along with statutory licensing. I'm trying to get an answer of what's underpinning those concerns.

35 **MR GORDON-SMITH:** My understanding is that it to some extent as evidenced in the conversation at the round table the other day, that the introduction of fair use provisions would add a high level of uncertainty and encourage the view that a number of uses which are currently enjoyed
40 and compensated for by equitable remuneration ought not to be subject to any requirement for remuneration. That equitable remuneration is not judged on a specific use by specific use but rather in an aggregate way and it seems from the evidence of the behaviour of institutions in other jurisdictions and from the extent of conversations that have happened in
45 this area over the last number of years, that it is likely that there would be

a reduction in the preparedness and review about what the quotient of equitable remuneration ought to be.

5 **MR COPPEL:** Supposing there is none and you had coexisting statutory education licence and fair use?

10 **MR GORDON-SMITH:** Were there to be a guarantee that there would be no change to the remuneration from existing users by educational institutions, then I think that if that guarantee were dependable, then I think that it would greatly reduce the level of anxiety on the part of creators and publishers.

15 **MR COPPEL:** I don't think you can give a guarantee as to what would happen going forward under fair use or under fair dealing, but I'm just putting to you when you have coexisting statutory education licence and fair use, there's this question of what - I mean this is essentially the same question - what is currently remunerable that would not be remunerable.

20 **MR GORDON-SMITH:** I think most of the uses under fair use. I think the copying of chunks of the work.

25 **MR COPPEL:** As proposed, based on the fairness factors in the draft report or does it presumably hinge on the fairness factors and the illustrative uses?

30 **MR GORDON-SMITH:** It would be better for the detail of this to seek some details from the copyright agency who are responsible for the collection of data and would be far more familiar with the precision of the specific uses. But broadly speaking, the uses that are now regarded as allowed in return for an overall payment would under a fair-use scheme be regarded as non-remunerable. That's the concern.

35 **MR COPPEL:** I'm just trying to get a sense of the orders of magnitude and I think this is one of the areas where the Ernst & Young report that the Department of Communications have commissioned and hopefully will be in the public domain before the final report is released, because it could be something that we would be able to draw on and use in the context of finalising the draft report.

40 One of the other issues that's been put forward in the context of fair use, and I'm not sure if you're in a position to comment on this, relates to the transition from fair dealing to fair use. It can be the source itself of uncertainty and that this could itself be a factor that may ironically maybe even strengthen the educational licence because it does provide certainty.
45 Payment is made. You've got a good sense that the use of the material

would be legal. Whereas in a new environment of fair use, it'll be uncertainty as to whether it really is fair use or not and in that context you may take a very conservative approach to an assessment as to whether it's fair use of something which requires payment.

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To limit those areas of uncertainty, we've made a number of recommendations within the context of fair use that tries to provide more guidance to reduce that level of uncertainty, or provide greater predictability is probably a better way of putting it. So things like an object clause, a list of illustrative uses and guidance are designed to reduce that transitional uncertainty that may be created from a shift of that kind. I'm interested if you've got any views on those measures and whether you think they would be effective or alternative ways in which a transition could be managed.

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MR GORDON-SMITH: The short answer to that is no. I don't quite understand when you say strengthening the educational licence, whether you are talking - - -

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MR COPPEL: Strengthen the use. I mean it could possibly lead to people - our view is that it will remain statutory education licence and there could be uses of copyright material that are considered fair use. People may just simply opt to say a statutory licence covers this material. We're happy with this. It provides a certainty and will continue.

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MR GORDON-SMITH: As opposed to? What might they do if not that?

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MR COPPEL: As opposed to the concern that you have that with fair use we were paying for these materials. We now think they're fair use and we don't need to pay for them anymore. We're always trying to get the degree to which copyright material that is currently remunerable would no longer be remunerable in an environment of fair use and that will obviously depend on how the fairness factors and the illustrative uses are defined.

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MR GORDON-SMITH: Yes, and it seems to me that if there is no substantial increase in flexibility, then what's the need for the change in the area of education. What's the problem being solved?

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MR COPPEL: The issues with the fair dealing arrangements, or the Copyright Act more broadly speaking, is it's a prescriptive text and it's a sector that has been the subject of great technological innovations and each time there is a technological innovation, the Act needs to be updated to remove - - -

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MR GORDON-SMITH: Can you remove the educational licence?

MR COPPEL: No, I'm talking about - - -

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MR GORDON-SMITH: No, I understand that. So it seems to me that the educational licence is in a sense (indistinct) off, that the big concern or the big worry about the introduction of fair use, apart from concerns about leakage, is the implications of changing the educational licence.

10

MR COPPEL: That's precisely the reason why we say that Canada isn't a good example to look to because we have no material changes to the education licence in the draft report.

15

MR GORDON-SMITH: Except to the extent that it's covered by fair use.

MS CHESTER: You're right.

20

MR COPPEL: Exactly, and you're talking about leakage. What is the leakage?

25

MR GORDON-SMITH: I mean it seems to me that if there is no change then we need no change and the situation at the moment provides all the flexibility that educational institutions require to be able to use materials in the course of their endeavours, compensated for by equitable remuneration.

30

MR COPPEL: No change to what? To the statutory licence?

MR GORDON-SMITH: To that package of that kind of that kind of accommodation.

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MS CHESTER: We're saying that the infrastructure of the statutory licensing arrangements would stay in place but as you rightly pointed out before, Michael, how those negotiations are entered into are informed by the copyright exceptions.

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MR GORDON-SMITH: Yes.

MS CHESTER: Indeed the way statutory licensing works at the moment is equitable remuneration based on fair dealing. It would then be equitable remuneration based on fair use. So the two go hand in hand.

MR GORDON-SMITH: We've probably reached the end of where we can have this conversation. It seems to me that the biggest change, that there is no increase in the amount of flexibility that educational institutions have to use material. The big change is the extent to which
5 there is fairness given to the creators of the material that is being used and the extent to which all of those uses are remunerated through the system of equitable remuneration that exists through the statutory licence.

MS CHESTER: One of the other issues that's become a bit of an emerging theme in our report, Michael, is governance, governance as it relates to the policy settings for intellectual property arrangements more broadly. But separately also the governance arrangements around the collection agencies and that's been an issue that's come up in our submissions and also in some of the public hearings that we've had to
10 date. Given the folk that you represent, and effectively at the end of the day the collection agencies are collecting money to go through to authors, the royalties of the folk that your publishers represent, it would be good to see if there are any issues from a governance perspective around the code of conduct that applies to the collection agencies from the perspective of
15 publishers, given that they are representing the interests of authors ultimately.

MR GORDON-SMITH: We don't have any current issues. You've asked two questions. One is a kind of value question about intellectual property. I guess I have a lingering concern, and it crystallised to some extent by the report, that I think there are some profound differences between the operation of patent law and copyright law, and that perhaps slightly to the detriment of copyright policy, to be seen as a part of an overarching intellectual property regime where there are so many really
20 quite profound differences. But really the machinery of government question, it's not something on which we've got a strong view.

As to the governance arrangements of the collecting societies, I think that at the moment they've got more or less transparent - or to the extent
35 that I'm talking about the copyright agency. Although I did previously serve as a director of what was then called the Audio Visual Copyright Society, so I am passingly familiar with it. I'm not at the moment. We don't have any issues about the way in which those institutions are managed. They are more or less transparent to their members. They put a
40 high level of effort into continued communication with their members about what they're doing and the amount of distributions there are that we appoint. Our association appoints two directors to the board of a copyright agency. There are also members that are elected directly by published members of the copyright agency. I don't have any useful
45 comments for you on the code.

MS CHESTER: Thank you. That's it. Thank you very much, Michael.

MR COPPEL: Thank you.

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MS CHESTER: I'd like to ask our next participant to join us, Terri Winter from top3 by design. Just take a moment to make yourself comfortable there. Is that a designer water bottle?

10 **MS WINTER:** It might be.

MS CHESTER: There's no recording devices allowed.

MS WINTER: Isn't there? Thank you.

15

MR COPPEL: But there will be a transcript.

MS WINTER: I've just printed those just as a visual aid for what we're talking about. I hope that it's come up in previous hearings but I thought it might be nice to you to give an idea of the extent.

20

MS CHESTER: Terri, thanks for joining us this afternoon and thanks for your post-draft report submission to our inquiry. If you wouldn't mind just stating your name and the organisation that you represent, just for the purposes of our transcript recording, and then please feel free to make some brief opening remarks.

25

MS WINTER: Thank you and thank you very much for having me. I appreciate it. My name is Terri Winter. I'm from top3 by design. I'm a retail business trading in authentic original design. Although I am speaking obviously from my own experience at the moment, I have been given a broad amount of experience and case studies from a lot of other retailers in my position. So I think a lot of my references will also be broadly aimed at the retail industry in general.

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Top3 by design, we've been going for 15 years, so I've seen quite a few changes in the industry in working with Australian designers and international designers. We carry up to three products by category and they're the best in the world by a merit of design. So design innovation, authenticity, originality are all really key parts of our criteria of the business. At the moment we currently represent over 237 designers from 260 brands with over 4000 products. At the moment, 68 of those are Australian designers. It's quite pertinent that I meet - there's probably most designers in this country that I've come across at some point. I am also a judge on the Australian International Design Awards and the

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Discover Design Awards in Chicago as well, so I also get to meet designers and other retailers around the world.

5 I believe you've already read the submission so I am not going to go
into all of that; that's fine. My key points I wanted to echo today were:
(1) Designers losing the chance to sell their original work due to the
prevalence of copies and replicas, which we'll cover. (2) Customer
confusion regarding originals and what an original and what a replica is.
10 (3) Fakes and replica are intentionally creating consumer confusion to
their own advantage and the current IP laws allowing and even facilitating
them to do so. (4) The perception that original design is expensive is often
brought up and I'd like to cover that. (5) The notion that cheaper
alternatives are in the interest of consumers is often shown as an argument
for that. (6) Fakes hinder the availability of affordable, original design.

15 These are all things that I'd like to cover. Ultimately, I'd like to
overarchingly discuss why it's become commonplace and culturally a
point of view in Australia that we have a right to a cheap version of
something that exists, so I'd like to cover that off. I don't know that that's
20 something that needs to be addressed as an overarching concern in
general.

The designers are losing their chance to sell their original due to the
prevalence of copies. As a buyer, I have to select products from many,
25 many on the market and globally you've obviously got access to more and
more than we ever did before. I have to make my decisions and my
selections on whatever the stock is based on a series of decisions about
viability. Increasingly over the last few years, it's become more and more
concerning to me that one of those key decisions is whether the product is
30 easily able to be copied or in fact is already copied too heavily in the
market, which would affect its viability for sales. I think it's grossly
unfair that the original designer will be knocked back by retailers because
of the fact that there's a knock off of their product. They don't have the
chance to be able to get their product into the market in the first place
35 because of a risk factor that me as a retailer and other retailers need to
avoid to be financially viable.

I discovered recently that I was the last remaining stockist of actually
three different young brands in Australia and the product had actually
40 performed quite well for me and I was quite surprised. When I raised this
with them, they said that really I was the only remaining retailer because
all the others had decided that it was too hard and that it's too easy for
customers to get fakes and they're frightened they're buying something
else. In fact, several of them were buying the copy. One of the difficult
45 things is that it's really my personal passion for original design that makes

me persevere with that because financially there is an impact and that's an impact not only on my business but the whole chain and the original designers themselves.

5 When an authorised replica is produced, original designers don't receive a single cent so the word "replica" tends to indicate that there's some form of endorsement and I think that that's become one of the difficulties. I am attaching it in my replica a bit later as well because I think that's the key problem here, as well as knock offs. When I talk
10 about "replica" and "knock off", I am talking about unauthorised versions of work and to me they're both the same. In fact, the word "replica" tends to even insinuate endorsement and from a lot of consumer perspectives, I think they believe it is an endorsement, when realistically it's not at all. It almost gives them more rights than a knock off because they utilise the
15 real buyer. They utilise the designers' profiles and photos and things on the website. There are a couple of designers here that have experienced that first hand.

20 I'm going to let the designers probably sum up a lot of their issues mainly with that type of thing because I think they can cover that off themselves. Recently one designer said to me and I thought this was worth quoting, "I design 15 or so new products at a time. I'll spend years and a lot of money on those products at times. Some work, some don't, and then the big brands and now some small individuals too, come along
25 and pick out the ones that they love most and rip them off. They've got a large Instagram following, so it's a double-edged sword for these designers these days. It gives them a lot of exposure but it gives them a lot of exposure, so it's a problem. He said, "I am now just a product tester for large companies; I just don't get paid for it". So it's a huge problem
30 and his product or their products won't ever get a chance.

35 Then there's the whole aspect of the fact that the design and registration won't allow it in the public domain first, so they can't even have a chance to do product testing on a product either because they have to then attempt to register all 15, without then having the opportunity to gain feedback, to do product testing and to make modifications. If they don't register it, they really are letting themselves open to those risks. If they take the time to finesse their product and the time to get it right, the rip off will hit the market before they will. That's where it falls into the
40 problem that me as a buyer already knowing about the product actually before it even existed, through a rip off.

45 There's a customer confusion about originals as well; replica is only part of that. A lot of my customers are very educated in design. A lot of them are architects or interior designers; they're stylists. We've had many

instances where these customers come in and they'll ask for a knock off version of a product. We had a customer come in to our Melbourne store actually - we've got two Melbourne and two Sydney stores, as well as online - they wanted a yellow version of this bottle. They don't make a
5 yellow version of this bottle but there is a rip off that has yellow, pink, blue, green, whatever you like. The customer was adamant that it was a real one. There's actually a couple of pictures of the knock off and real one there in that stuff I gave you. She actually became irate with my staff member, accusing her of not having product knowledge, telling her that
10 she should know her products better. She "expected more from a business like ours", and made her call me to prove to this staff member of mine that she was stupid.

So, of course, they called me. I spoke to the customer and I had to
15 explain that in fact she was looking for a knock off and she was really embarrassed and she was really confused. She was argumentative and upset because she was so embarrassed. I do think a lot of the time that's what happens with the customer confusion. It's not intentional. Then they get scared to ask and now there's this confusion about whether
20 something is original or not and people feel uneducated and they don't want to ask. We have people come into our store now asking if a chair is an original or not, because they have to ask these days. I think that that's what's really distressing for me.

We've had a lot of similar instances on our live chat service and our phone. Just last week actually my customer service girl, Michelle, was verbally abused by a customer on the phone. It was a similar situation. She couldn't find the product she was looking for on the website and the version that she was after and got upset once again that she was told that
30 the product she was looking for was a knock off. She actually hung up the phone. She would have gone and found out later on that we were right, but in the meantime that is creating angst and no one's winning out of that.

I read a blog post actually last night about a very famous Danish chair, which everyone would know, that they didn't know what all the fuss was about because it's really not very comfortable. They sat on that chair in Matt Blatt in a replica store. So they're judging the original piece of furniture based on how uncomfortable the rip off was. That's a genuine
40 consumer comment. Most of our customers can be more educated and people in the design industry are more educated but no one can know everything and the general consumer is not going to know everything. They shouldn't have to be knowledgeable to be able to make those informed choices. It's like replica has become a genre. It's like going to
45 buy vintage. It's not a dirty word to anyone outside the design industry

and I think that that's culturally becoming more and more of a sticking point.

5 I think that's where people in the UK realised as well how damaging that aspect of enabling someone to label something a replica and giving it rights was such a downward economic spiral. If there's no original design left, there's nothing left to copy and I think as an innovative nation of inventors, we're proud of that. I think that it's unfortunate that we're stifling that and confusing customers at the same time. We had a
10 customer come in to one of our stores actually asking for some product designed by Matt Blatt. He's just one of the replicas but he's the replica agent but he's the most renowned and has positioned himself as a name that people refer to as a designer. The perception that original design is expensive and that designers are ripping everyone off is something I
15 commonly hear.

My sister warned me herself before I went over for a dinner party a year or two ago that she'd bought some replica chairs. She thought I'd better know before I turned up for dinner. When I talked to her at length
20 about that, it was about the fact that she had a budget. Her husband particularly said, "You can't spend more than this". She couldn't find any chairs. She found one she liked the look of and then she went to go and look for it but she didn't know what it all meant. She didn't understand the repercussions of buying a replica. Her attitude was, "Well we can't
25 afford it". If the replicas weren't allowed to be so easily found and easily found on search results. They're high on Google search results because they're passing off on the original designers' information and that gives them ranking. They're actually burying the original designs by being able to do that, which means that the original design is around. It's absolutely
30 available but the general consumer just can't find it and there's no access to that because it's being buried beneath all the replica.

Original design is not expensive. In my collection I've got Australian designed \$55 wine rack, an award winning potato masher for \$29.95 and a
35 garlic press for \$45, and a Goodman's trivet for under \$50, when it's €33 in Europe which is completely comparable. There's plenty of affordable design and I think the argument that it's expensive so therefore I've got a right to it, is just a completely invalid one. There's plenty of affordable design.
40

The second part of that is that designers in Australia these days are intentionally designing complex product so that they can't be ripped off. They're using expensive materials and things like that so that they can produce a product that's harder to replicate and if it is replicated it's
45 obvious that it's crap. We've lost the aspect, like a lot of Scandinavian

countries can, to produce simple, easy design because there's no time with the design registration period to be remunerated for the tooling and things that that may involve. There's also too high a risk of being copied.

5 I actually even spoke to Richard from Cult, who I know spoke to you yesterday. We were talking afterwards and he mentioned to me that they actually took Adam's Molloy chair over to China to try and get it copied to see if it could be, to make sure that it can't be. Now that's a valid thing that designers are facing these days and I don't think that designers should
10 be put in that position. They should be free to innovate and then it would bring the pricing down. If there wasn't so much replica in the market, then original design could produce more simple product. I think even if the replica companies had to find something else to do, they're still employing a - I'm not going to call them a designer as such, but a
15 draftsman of some sort, that is producing the rip off. Somebody does it. They could be employing younger emerging designers to be producing them real work. If they had to be put into that position, they will innovate. They'll have to innovate and they could.

20 **MS CHESTER:** Terri, I'm just conscious we might run out of time and there's a bunch of questions that we do actually want to get to, to make sure that we understand your views and your submissions.

MS WINTER: Yes, for sure.
25

MS CHESTER: Have you covered off all the main points?

MS WINTER: Yes, I think so. I think most of those I got to anyway. It's just mainly that folks are generally in fear of product. Designers get
30 to test. Yes, I'm fine. You can give me some questions.

MS CHESTER: I think our questions will get us there.

MS WINTER: Yes, I think so.
35

MS CHESTER: We kind of need to unbundle what the issues are here.

MS WINTER: Yes, please.

40 **MS CHESTER:** I guess the first one is around the term of protection for design rights as they stand at the moment. As we understand it, there's the point of registration and then there's the point of certification. From the point of registration it's the five plus five.

45 **MS WINTER:** Correct.

5 **MS CHESTER:** So that gives you 10 years of protection, but you can only enforce those rights at the point of certification. I guess when you refer to unauthorised copies or replicas, this is not occurring during the period of the design protection?

10 **MS WINTER:** I am talking about living, working designers and one of the main problems that we find is that even if designers are protected, they're still being ripped off because it's expensive to legally follow that through.

15 **MS CHESTER:** That's why I am asking the question. How much of the problem is within the design protection period because then we need to better understand why enforcement of infringement is not working. Then if it's an issue of it being outside the term of protection, it then sort of becomes an issue of consumer awareness, I guess.

MS WINTER: Yes.

20 **MS CHESTER:** That's why I'm trying to sort of unbundle the term.

25 **MR COPPEL:** And if you could elaborate in terms of the cost of enforcement that's associated with the certification of the registered design and then the costs that are associated with the purely legal pursuit.

30 **MS WINTER:** I'm not going to know all the numbers and right at the beginning I don't profess to be an IP lawyer. But I know from several people that have gone through the experience, it's about \$3000, give or take, to register a design. I think a few people here know that. So if they're, for instance, attempting to register 15 or so designs in case one of them is their thing, obviously they're already way on the back foot after all the costs of their original development and things in the first place.

35 One or two of those designs, if the designer is lucky, will be a popular or a hit product and that has to be able to cover over the other ones. It's not like they know which ones are going to be the most successful. So what one of my cost comments often are is that if they design register, is that they can't even recoup their costs before they've even produced one product. They're already behind the eight ball before they start with it.
40 They're had manufacturing. They've had tooling. They've had prototyping, if they haven't gone that far yet.

45 People are able to then sit on social media or probably go to a design fair and then just pick off the one that becomes more clearly popular. Social media has accelerated this problem because it's very easy to tell

which product is getting all the likes and all the feedback from consumers. I think that's why this has suddenly popped up into the forefront so much more now. Things like Instagram are a tool to be able to just go, "Well, what's best?" These people that can rip it off haven't spent that time on
5 15 other products. They've just picked the one they knew worked.

There's the cost there with that that the replica companies are taking the concept without the cost structure behind it, whereas the original designer had to pay not only their time and energy. To be honest, a large
10 amount of the designers I've spoken to are not design registered and that is twofold from what my discussions are; one, the cost of registration; two, some designers aren't the best bookkeepers in the world and that's not part of this discussion because there's nothing we can do about that. Lastly as well, it's the fact that it's complex so far as it being the fact that
15 they need to test products. It's not something that's published and finished. A chair needs to be sat on. A carafe needs to be used and they need consumer feedback. The problem now is that they actually can't get that consumer feedback and then register it, because they can no longer register it if it's in the public domain. The two are the battle that the
20 designers are facing and the two don't go together.

I quite distinctly believe that design protection should fall under a normal copyright pretence, where it's about there's been discussion about first to market or first to product. First to market might create a race to
25 throw it to the market and the person spending a lot of time in R & D. So I think that has its issues too. First ownership of a concept and idea and that being registered, I think that the fact that whether it's in the public domain first or not should certainly not be part of that equation because it actually hinders innovation. I think that's probably my big concern with
30 that design registration process.

MS CHESTER: There's two issues there that you raise then. Firstly, there's kind of like this period of grace to allow the product design to settle down after market testing, without jeopardising or the clock starts
35 ticking on the design protection period. That's kind of issue number one.

MS WITNER: Yes.

MS CHESTER: Then the other issue is, I guess, the term of protection. I guess from your experience in the industry, Terri, and I know there'll be
40 a huge range, but within original design space, so looking at those that have been successful and not so successful, what's kind of like the average commercial life? And commercial life in terms of still making a real commercial return on that item?
45

5 **MS WINTER:** I've got several Australian products in my collection that we've had since we started 15 years ago and they're still steady. They obviously have their popularity period originally, but often that resurges when we publish it or do something with it or it gets used in a new context. That can go on and I think that that debate about where it has a commercial life is not necessarily the point. I don't see why anyone has the right to take someone's idea because they don't get the chance of another round of appreciation or resurgence and things like that. My dad's a builder. He built our family home. After 15 years no one's got the right to come and take that from us and keep that value. A designer's stuff is not as tangible. It's not as physical as a house but it's just as real. Just because there's a commercial right, there are other options available to people. I don't see why a timeframe realistically - I know ultimately there probably has to be one, but I don't think the debate of a timeframe of 10 years or 15 years at all is the point here at all. A designer's tangible asset is their IP and yet in another industry that seems to be obvious to everybody, but I think that people seem to miss that point with designers and think that they just draw pretty stuff.

20 **MS CHESTER:** I think what we're trying to do though is we've got to balance the interests of periods of exclusivity to return the creative endeavours of the designer.

25 **MS WINTER:** Yes.

MS CHESTER: But across the whole intellectual property arrangements, terms range from sort of five years through to life plus 70 years. You should have been authors, guys, life plus 70 years for authors under copyright.

30 **MS WINTER:** I do think that there is that aspect of an entire career choice. You're raising a family, you have children, and I don't understand where this isn't that right to be able to pass that value of your work that you've done even to your children, even if it's outdated by that span.

35 **MS CHESTER:** Is there anything kind of unique about the Australian legal or legislative settings that change the dynamic for replicas coming to market here. If we set aside the issue of what's a pure, as I understand it, infringement of a designer's right. If it's during that period of five plus five, then that's an infringement; it's an enforcement issue.

40 **MS WINTER:** Yes.

45 **MS CHESTER:** Beyond the 10 years, is there something peculiar about the Australian legislation that changes the dynamic for replicas?

MS WINTER: Yes, I think it's largely cultural. It's this aspect that we have a right to it, but I think that's also because enforcement has been complex in Australia because of the large grey areas. I think that if there
5 was a really succinct policy in place, the grey areas wouldn't allow people to get away with things. So I think here it's become a cultural aspect of the fact, "Well they can get away with it, so other people can get away with it", and the whole thing has snowballed. Suddenly everyone has gone, "What happened?" We are largely becoming a dumping ground for
10 the world in replica. The rest of the world has seen that this is a bad path to follow and in a moment we're going to be the only place left with it all. It's a hugely disturbing direction. It's not a viable thing to chase.

MS CHESTER: Why is it that Australia's become a dumping ground for replicas if replicas are still considered to be - - -
15

MS WINTER: Because they're allowed.

MS CHESTER: But only outside the design period.
20

MS WINTER: Not entirely.

MS CHESTER: Okay, well we'll come on to that.

MS WINTER: Maybe Richard can touch on that because from the stories I've heard and, as I've said this is all experiential based, there are plenty of designers. In fact, I reckon half of what you've got in that booklet in front of you now, they've been producing in the last year. Now
25 some of them may or may not be under design protection. In fact, I know of several designers that actually couldn't go on the public record as part of this because they're actually in litigation. Realistically, they kind of go with the threat of litigation more than the follow through in most instances because they can't afford the time. They're small practices; they're individual designers. They can't afford that time and that cost to follow
30 through the litigation. So they do hope that the warning letters are enough.
35

The other thing I've seen an increase of and I think this is using the loopholes, is companies actively doing a one-off run of a hot product. So
40 our mainstream retailers are doing it. Our mainstream big department stores are doing it. They'll do a one-off hit of a product and it's a copy and a lot of them are in those pictures. By the time the designer sees it and actions on it and gets to it and contacts them with a letter and things, they say, "Okay, well we won't produce it any more", or "Yes, okay.
45 Well we won't have that in production". They're knowingly doing one-

off runs of product because it is a way of avoiding that follow through, because the enforcement is an issue. Enforcement wouldn't be so complicated if the law itself wasn't so grey.

5 **MS CHESTER:** Maybe one final question on this issue of consumer confusion and I guess for some folk it's pretty obvious that there's original design and then there's replicas and they're very different things.

10 **MS WINTER:** Yes.

10 **MS CHESTER:** One source of reducing that confusion that's been suggested to us is the use of trademarks, that that's one way for consumers to distinguish between an original design or an authorised copy of an original design and a replica or an unauthorised copy. What other
15 mechanisms do you see that the industry might avail themselves of to sort of address that uncertainty or confusion about whether something's - - -

20 **MS WINTER:** Personally I don't believe that the consumer should have to be the one to be educating themselves on whether something's an original design or not. I think that that's our job and the government's job and as a responsible body of designers, that's a job that we should all be doing for the consumer. They can't be versed in every kind of their area of design and just muddying up the term "replica" and allowing replica
25 over short periods of time, so within somebody's lifetime. If we talk about the time period, 10 years does mean that - there are designers in this room that have their first work now out of that 10 year period, regardless of whether they registered or not. They now have the replicas coming out now, while in many cases they're actually just starting their career if they've been lucky enough to do that. Some of those products could have
30 been done very early on in their career and 15 years and 10 years' protection is not very long. It's very easy for 15 years down the track. If anything, if that designer does become well known and established, those early works are definitely prey for the replica industry because of course they are.

35 **MS CHESTER:** You mentioned the industry needs to do something to help consumers with confusion and you also mentioned government. I'm kind of struggling to see what we can do with the intellectual property arrangements to address consumer confusion, given there are design rights
40 and there are trademarks. Is there something else that you've got in mind?

45 **MS WINTER:** I think it's unusual that there's a separate design-rights process at all. I think that people should have ownership of their own ideas regardless. I mean you don't have to design register something that you've built and created and lived in for someone to have the right to

come and take it off you. I think that that's my main point there about that.

5 **MR COPPEL:** Are you arguing there should be no term, that it should be indefinite.

10 **MS WINTER:** No. I think it should fall under automatic copyright. If someone's created something, they own it. I think that that should be extended. I think I've pointed out on several of these things here, I would be very in favour of an expert panel being put together to have a look at the mistakes and the wins that other countries overseas have achieved in this area and to assess moving forward and the next step. I don't think that it should be a series of individuals that are informed in some areas and not others, making that final decision without a roundtable discussion on the pros and cons. In this kind of environment here, I am sure there are many people here that have felt that there are many moments that they could have interjected to either back up or clarify something I've said and they're not able to. So I think an expert panel situation would create a proper way forward. I'm not attempting to even sit here for one moment saying I know what the answer is. But I know that at the moment, the livelihoods of people, they're moving overseas.

20 **MS CHESTER:** One of the advantages of our inquiry process is we can try to gather the threads, even though it's still post draft report, getting evidence through public hearings and post-draft submissions.

MS WINTER: I know and that's exactly my point.

30 **MR COPPEL:** Can I just ask you, you've talked about as one option copyright being the model for registered tool for design. Can I talk about or ask you about the actual registration process as it is? Are there changes there in terms of fees or timing?

35 **MS WINTER:** I think I've covered that already. I am not an industrial designer myself and I haven't registered something personally. I think that the fact that they can't put it into the marketplace first in any way, shape or form I've already covered off. It is the fact that I think that that negates the whole merit of the system in the first place and I think that the timeframe is far too short.

40

MR COPPEL: Okay.

MS CHESTER: Great. Thanks very much, Terri.

45 **MS WINTER:** No problem. Thank you very much for your time.

5 **MS CHESTER:** What do we call the collective for a cluster of designers? I'd like to call three designers to come and join us: Adam Goodrum, Tom Skeeahan and Tom Fereday. Welcome and thanks for joining us this afternoon. We were able to listen to some of your colleagues in Sydney yesterday. If you could each just respectively state your name and who you represent or if there's a firm name behind you, for the purposes of our transcript recording, and then if you'd each like to take a couple of minutes just to make some opening remarks, that would be welcome.

15 **MR GOODRUM:** My name is Adam Goodrum. I am an independent designer based in Sydney. I work with local manufacturers. I also work with international manufacturers and I also work at University of Technology in the design department.

MS CHESTER: Thank you.

20 **MR FEREDAY:** My name is Tom Fereday. I'm an independent designer from Sydney as well and I also develop products for manufacturers distributed in Australia and Asia Pacific and are predominantly made in Australia.

25 **MR SKEEHAN:** My name's Tom Skeeahan. I'm a Canberra-based furniture designer. I also teach here at the University of Canberra and a design studio. I'm focusing on furniture design and distribution in Australia.

30 **MS CHESTER:** Thank you. Did one of you or all three of you want to make any opening remarks about the issues you wanted to bring to our attention?

35 **MR GOODRUM:** Yes. I'm just going to I guess make a bit of a holistic comment about the designer base in Australia and then I think more individually we might have some comments. I'd like to start with a quote from Anne-Maree Sargeant. "There's never been a better or worse time for Design Australia".

40 In 2006 there are approximately 4000 companies listed as furniture manufacturers in Australia. That has declined substantially. Of those left, fewer than 50 are design-led. From my point of view, it doesn't support design to the level that warrants international attention. For many years I trekked off to Milan to find manufacturing deals with companies who put the designer at the forefront of their business model. There are two central figures that most enable design-led companies: the entrepreneur

45

manufacturer and the designer. You cannot have Alessi, Cassina or Herman Miller without the combination.

5 After the financial crisis, my career pivoted back to Australia. My studio is now largely supported by investment from local design entrepreneurs. Companies such as Cult and which Richard Munao, the owner, is here today. He spoke yesterday. Tate, which is a company based in Melbourne and Broached Commissions. A major incentive for local manufacturers to distinguish themselves by investing in new design
10 is the legal protection of that investment of the IP. Without that, it's hard to build a commercial model around the investment in new design.

15 Sydney, along with places like Bilbao and, more recently, Hobart, are cities that know the power of architecture. The Opera House, the Guggenheim and MONA have all transformed the image of the city in which they reside, yet a lot of what gets built in our cities is filled with copied furniture. Australia has for a long time understood its strengths: great outdoors, a relaxed, safe urban life, beautiful fresh food and wines, but we must keep inventing what makes our vision of these experiences
20 distinct. We cannot rest on the existing reputation. Designers update the story of daily life with objects, furniture, indeed entire buildings that come to define the best version of the present.

25 I have recently started working at an Australian company, Cult. Cult is primarily known as a distributor of quality European brands but also a great supporter of Australian design. A few years ago they approached me to design their first in-house collection. It has this month expanded to a 50-page catalogue, which I think you have. We're ready to take orders afterwards.

30 Our products are being placed in buildings and homes throughout Australia. Our timber factory has doubled its staff in a year and a half. We are stimulating local industry. By commissioning local design, we are building our creative industries and encouraging others. Secondly,
35 commissioning local design encourages the pressure on local designers to develop the Australian design vernacular, a sensibility to enhance our culture and something we can sell to the rest of the world.

40 The entrepreneur who invests in new design takes a big risk. They must walk the tightrope between creating what is desired and what is unexpected between the known and the unknown. In doing this successfully, the entrepreneur delivers product that is exciting rather than banal. This is a real skill, one that has elevated the great fashion and furniture houses of Europe, Japan and America. For that risk to be worth
45 it in the investment for me and Cult, it needs to be protected. Without that

legislative protection, fewer entrepreneurs will enter the space. It can take four years for a collection to move from sketch design to the design showroom floor and can take a further three years for the momentum in the market to build. That's a seven-year turnaround and then the
5 legislation only protects the product for another three years.

The 10-year protection is clearly not an accurate representation of the amount of work done to achieve profitability. It does not reward the risk taken. Real innovation takes time. Where is the incentive to invest in
10 expensive, clever technologies and production to bring down the price point of a product, if in 10 years your product can be legally copied? The reward for it needs to be longer than the law currently allows. If the Australian government wants a more profitable manufacturing sector, enabling longer IP protection and creating incentives for investment in
15 design would be a good start.

Making illegal replica furniture will hopefully shift the accepted culture of stealing ideas. Architects and interior designers are now pushing retailers to provide Australian-made options. The persistent
20 strength of the Australian economy gave local entrepreneurs the courage to expand existing or create new locally-made furniture collections. Australians are obsessed with creating new homes with eating out and outdoor activities. These are all experiences that require furnishings. We need to transform the appetite into a much larger competitive market for intelligent design-led manufacturing. We need more of those listed
25 furniture manufacturers to step up to be innovative, design-led manufacturers.

Whilst my career has started to prosper from the activities of a few
30 local entrepreneurs, this will not widen until the IP loopholes are tightened and the parasites are flicked off the back of these genuine innovators. Designers and entrepreneurs can define the future experience of Australia's built environment: sustainable, prosperous and easy-going, but never cliché. Only ongoing investment at every level of the society from
35 government to business to the consumer will allow this to happen.

MS CHESTER: Thank you. Did either of you want to make any other opening remarks?

MR FEREDAY: Yes, I mean maybe I could just put some perspective
40 from my point of view. I'm an independent designer which means I have to invest and develop prototypes and products which involves large capital before I can have any potential of a distributor or a financial return on the product. So I take a very long period of time to develop products. It's
45 generally up to around two years to a product. In that stage, I've got no

5 protection for my designs. Dealing in a tangible industry, I have to get feedback on a design and present it to someone, (a) for them to consider selling it as a distributor, or (b) for someone to actually want to buy it say directly. In both those cases, if my product's not registered then I fall into the line of being copied.

10 So it's a very difficult industry, unlike say the arts industry where you're somewhat presenting a finished product. It takes us what may look to be the same product, even after that development time, many years to refine and get it critical to production. So all of that investment and IP can be what is most commonly just directly copied from a physical sample and we don't have any protection for that or what you call "grace period". For me, that's the critical area as an independent designer. In other countries that exists.

15 The other point is that long term our protection falls short compared to other industries and other countries. So the 10 years, as Adam said, is for myself, I consider myself an emerging designer but I've been in the industry for 10 years and that means that every time a product I could launch, if I run on an operation of getting a royalty basis, I could be constantly chasing my tail where I'd have to continuously launch product to generate, rather than a growth of income over time. So for me it's a really challenging point that isn't covered in this industry. The fact that it is so easy in this country, compared to others, to do a replica and to term it a replica is really challenging for us.

MS CHESTER: Thank you.

30 **MR SKEEHAN:** Yes, and to follow on what Tom said, I'm in a very similar sort of position. My concerns are around that grace period and allowing me to protect a product as an idea early on and get that feedback from industry and consumers and test it. Then that way I can justify the large personal capital investment in getting that product to market.

35 **MR GOODRUM:** In regards a little bit as to what you were asking Terri as well, we're not endeavouring to make trendy products that have a use-by date. We're endeavouring to make timeless products that people want to purchase and will last a really long time. So it's obviously in our best interest not to do a trendy product that will only have a five-year life span but to create products here that have longevity.

40 **MS CHESTER:** Yes, and the challenge that we've got is the way the intellectual property arrangements work and how we're bound by international agreements and such that you don't differentiate with design rules or registration processes and the term of protection, and similarly

with copyright. For us it's trying to understand is the term of protection afforded designers today appropriate. One underlying piece of evidence we try to have a look at is what's the typical commercial life, knowing that we're dealing with a vast spectrum of designs.

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MR GOODRUM: I guess then maybe it's interesting to look at the amazing design houses of the world, such as Denmark, and their most iconic chairs from the 1960s and so forth that are still purchased very strongly, and unfortunately are ripped off so heavily as well.

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MS CHESTER: I guess we have to get the balancing act right between granting a period of exclusivity to reward innovation and to actually getting an appropriate return on it, but not making that period of exclusivity too long such that other following innovations can't occur or people can then - - -

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MR GOODRUM: But why should that stifle more innovation? I think only that encourages innovation because you're trying to innovate for a product that's going to last a long time. I don't understand why.

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MS CHESTER: No. So you're just trying to get that balance right to make sure that the incentives that you face are appropriate to encourage you to keep doing what you're doing but that the period of exclusivity doesn't go too long.

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MR GOODRUM: But what would be the negative side of that? I don't understand. If it's a long time, what's the negative part of that?

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MS CHESTER: Well so a couple of things. So then firstly people can't leverage off your ideas and effectively do unauthorised copies or follow on - - -

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MR GOODRUM: Why should that be? I don't understand. What's the positive side of that?

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MS CHESTER: With a period of exclusivity comes a pricing benefit that you can sort of have control over what comes to market. So it is a balancing act. Maybe if we can come back to better understanding the two or three key issues that you've raised, the first one being around the concept of a grace period or the like. It would be good if you could point us to some examples in international jurisdictions. I know yesterday we touched on some recent policy changes in the UK, but if you can point us to other jurisdictions and practices where you think that the policy has catered better for that.

45

5 **MR GOODRUM:** Sorry, if I could comment. Places that have a culture of design, like Denmark, like Italy, in which there is a component which is a pure copyright thing that once you design something you have ownership of it. I think that has created a culture in which the innovation and designers absolutely inform their business which they've sold to the rest of the world. So it's obviously got to be working in some sense. Then I think that the - - -

10 **MS CHESTER:** So it's become part of the copyright system, as opposed to a separate design right, and that's what addresses this issue of you don't need a period of grace because you've got the right as soon as you've commenced the design.

15 **MR GOODRUM:** That you have some ownership of it and you know someone's not going to take it, yes.

20 **MR COPPEL:** How does that stop someone copying a design which is a UK design, treat it like copyright you say, making a copy and selling it in another jurisdiction?

25 **MR GOODRUM:** That's the whole incredibly challenging thing for people who represent those companies here. That's the challenging part of it for sure and a little bit I think what Terri was touching on. Because it is accepted, it's become this cultural thing that it is okay to do which has sort of integrated into every part of society. So it's got to be that change of mind set for culture that you can't be doing that.

30 **MR FEREDAY:** I'm not opposed to design registration in any way. So as an independent designer, I've done it in the past for other companies and on a very few occasions myself. But what a grace period allows for is a period to test to actually work it if you can actually afford to develop this product. The current fees for design registration I think would be one of the first ports to address. So as an independent designer, the cost is inhibitive and as such it's something I can't afford to do, because you're working on a number of products and projects to cover all of those bases. It wouldn't be possible in the current way that the practices work for myself.

40 **MR COPPEL:** Do you have any ideas on how changes could be made to that design registration process and the fee structure?

45 **MR FEREDAY:** Yes. I think the ACIP acknowledged that the current fees for multiple design registrations is turning people away from offering to do it. Currently each registration is an independent fee per product. If you design register a product which has a variation, say an armchair

versus a lounge, you must register them. My understanding is that the point is is that if you have multiple products, there's no incentive to get a cost reduction to do that. The second thing is there's a very big point of difference between an independent designer and a large supplier. So for
5 an independent artist to be able to register it, perhaps they could look at the differentiation between that.

MR COPPEL: In terms of the level of the fee?

10 **MR FEREDAY:** Potentially, yes.

MS CHESTER: So there's the registration and then there's the certification, as I understand it. It's not until you get to the certification stage that you can then enforce your rights during the design period.

15 **MR FEREDAY:** Yes.

MS CHESTER: What's the cost of the certification?

20 **MR FEREDAY:** There's each stage is done so your initial application fee, depending on how you do it, whether it's by mail or online, starts at around \$250, just to lodge that you're going to do it.

25 **MS CHESTER:** Yes.

MR FEREDAY: There's then an identification fee that they must go and identify that what you're doing is original and that you can do it, another fee of around the same price. You've got then if you do want to enforce that product, I think it's at least around \$420 to have it examined and
30 prove that you can actually protect that. So the whole point as well is it's not just cost. You've got obviously a renewal fee after five years as well, which is around 320 minimum. The whole process also is very time intensive. So for people like us who have very little time as independent designers, the whole process is very convoluted and it's very challenging
35 and so it's a big turnoff to people to actually invest the time to do it. The process is expensive and it's convoluted.

MS CHESTER: I'm just wanting to make sure that we kind of have got it right ourselves in terms of how it works with unauthorised copies versus
40 replicas during the design protection period. I'd understood, and maybe I've got this wrong, but during the design protection period that you have of the 10 years, assuming you've gone to a register and then certified, no one can make unauthorised copies or bring replicas to market, less they're taking a risk of infringing your rights and then you can enforce against
45 them; is that right?

- 5 **MR GOODRUM:** I think so, yes. I think as a small player, even with a design registration, I guess this is a bit of a different thing now. So how much value does a registration hold? Quite often against the big person he still just does things and for the small person it's a challenging thing to do. I think it comes back a little bit to that cultural thing that they think they can do it. It exists in the culture of copying the developers and so forth. They copy furniture all the time.
- 10 **MS CHESTER:** Is it something the government's done in terms of how the term "replica" can be used today that's contributed to this cultural issue or confusion? I'm just trying to work out what role the government has here?
- 15 **MR GOODRUM:** I absolutely think so. It's become a genre, as Terri was saying. It's this accepted thing that exists that it's kind of an okay thing to copy other people's furniture. Like the amount of stores that pop up, some of them are unbelievable.
- 20 **MR FEREDAY:** The repercussions for doing this, it's much lower in Australia than what it is say in the UK where there's a potential prison sentence. So the incentive is more encouraging by having less of a repercussion and so that obviously means that there are better potential financial risks to do it.
- 25 **MS CHESTER:** But in the UK it's an infringement of their rights because they're covered by copyright terms, as I understand it, whereas here in Australia during that 10-year period, assuming that you've protected your design rights, you still have enforcement options. But it
- 30 would be good to get an idea as to really how they can be used and are they being used by the industry to sort of protect the design rights during that 10-year period from unauthorised copies or replicas.
- 35 **MR COPPEL:** Passing-off laws, for example. Passing-off laws exist and they could potentially be used to protect a design that is being copied. Trademarks potentially are another way of at least being able to identify an authentic product from a non-authentic product.
- 40 **MR GOODRUM:** It could help.
- MS CHESTER:** We're just trying to work out how much of it is an enforcement problem.
- 45 **MR FEREDAY:** It could make I think one really positive, it would make more of a stigma towards replica furniture and I think the word "replica"

could really be looked at and addressed at. Like in the egg industry, for example, they've changed the way that they're allowed to use terminology for what are cage eggs essentially. That could be done much stronger in the furniture industry to add a stigma to what you're purchasing, especially if it's in the short-term period. As a current designer, the word "copy" to me would be much stronger than the word "replica" or something along those lines.

MR GOODRUM: Or "fake".

MR COPPEL: When it's authorised, do you use the words "authorised copy" or just "authorised".

MR FEREDAY: The term just says "replica".

MR COPPEL: There are producers of designs that are out of the term that are being authorised in some way that are typically of a much higher price. I'm asking what the term is that's used for those products.

MR FEREDAY: An authorised supplier do you mean?

MR COPPEL: Not so much a supplier, like I thought there might be an "authorised copy".

MR GOODRUM: Or "under licence" I think would be the correct term, yes.

MR COPPEL: "Under licence."

MR GOODRUM: If Richard got an opportunity to speak, I think he'd probably be able to enlighten us on some of that.

MS CHESTER: I guess I'm still trying to work out what role for government then?

MR GOODRUM: Definitely the grace period in the time that you've got to register your design would be very, very advantageous. Then that your ownership of the registration, 10 years is definitely too short and that's got to be increased substantially.

MS CHESTER: Apart from the countries that you've mentioned in Europe, are there any other jurisdictions globally that have moved towards changing terms, understanding the need for a grace period?

- 5 **MR GOODRUM:** I think what was brought up yesterday with Anne-Marie, that the UK have had similar laws to us previously and have seen it as a very important thing to address, and originally saying that they were going to address these things we've talked about by 2020 and they've moved it forward and it's already in place. There's a six-month grace period at the moment that they're eliminating replica furniture. I guess England, being the Commonwealth and so forth, it's obviously - from my point of view I think that it's fantastic that they're doing that.
- 10 **MS CHESTER:** I hadn't assumed the Brexit vote. I was still considering them as part of Europe at the moment. So I was just wondering if there was anywhere else globally that you can point to.
- 15 **MR GOODRUM:** Well we obviously have problems with Asia but I think we have to lead by example as the country down here to try and change a bit of that thinking.
- 20 **MS CHESTER:** Is there moves afoot within the industry to try to sort of address the consumer confusion? I'm thinking of examples of when the film - - -
- MR GOODRUM:** I guess this is it now. We're trying to voice our concerns.
- 25 **MR COPPEL:** What is the grace period in the UK?
- MR GOODRUM:** The grace period now, as I understand it, has become two years.
- 30 **MR COPPEL:** Two years?
- MR GOODRUM:** Yes.
- 35 **MR COPPEL:** ACIP had a report on design a little while back and they had a recommendation to introduce a combination of a grace period with a prior-use rule. Do you have any - - -
- MR GOODRUM:** Can you explain that a little bit more?
- 40 **MR COPPEL:** Well it would be having a grace period and I think the prior-use rule is when the period at which the term of protection begins. So if you can sort of demonstrate - - -
- 45 **MR GOODRUM:** That it's been sold?

5 **MR COPPEL:** - - - prior to the original point of registration, that the prior use, I think, then that would be normally then considered as being a legitimate use. But if you combine that with the grace period, then it would sort of bring it back again and therefore it would not be necessarily consistent as a legitimate use of the product. So it was a way that they had come up with to address some of those issues. I'm not sure if you're familiar with that, but if you are - - -

10 **MR GOODRUM:** No, I'm sorry; I'm not familiar with that.

MS CHESTER: It would be great if you could have a look at it and see if it's workable from your perspective.

15 **MR GOODRUM:** Yes, sure.

MS CHESTER: Because I think what they were trying to do is to make sure the grace period actually really tailored to how it was used.

20 **MR COPPEL:** Yes, I think it effectively makes the effective length of term for a registered design, rather than the distinction between the legal length of term and the effective length of term.

25 **MR GOODRUM:** And the first of the public to know. Yes, we could follow up on that. It would be great to try and get a little bit more information.

30 **MS CHESTER:** That would be good because we've been given such a broad terms of reference here to cover all the intellectual property arrangements. We're more than happy to sort of leverage previous work that's been done by people like ACIP and the ALRC. So if we can get your feedback on the workability that would be really helpful, and sooner rather than later, given we've got to report to government in the not too distant future.

35 **MR GOODRUM:** Okay.

MS CHESTER: Did you have any other questions or issues?

40 **MR COPPEL:** No.

MS CHESTER: That's it for our questions. Is there anything else we haven't covered that you did want to cover off this afternoon?

45 **MR GOODRUM:** No, thank you.

MR FEREDAY: Thanks for your time.

MS CHESTER: Great. Thanks for being here this afternoon.

5 **MR COPPEL:** Thank you.

ADJOURNED

[2.57 pm]

10

RESUMED

[3.09 pm]

15 **MS CHESTER:** Okay, folks, we might resume our hearings. I understand we've got our next participant, Tomek Archer on the line; is that right?

MR ARCHER: Yes.

20 **MS CHESTER:** So, I think we met yesterday.

MR ARCHER: Yes, we did.

25 **MS CHESTER:** Terrific. So look, just for the purposes of the transcript, if you could just say your name and the organisation you represent or are associated with?

MR ARCHER: Sure. My name is Tomek Archer and I'm an architect and director of Archer Office.

30

MS CHESTER: Okay. Thanks very much, Tomek. I know that you did give us some initial evidence during our public hearings in Sydney yesterday, but if you'd like to take a couple of minutes now to make some opening remarks, and thank you also for your post-draft submission.

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MR ARCHER: Thank you. I take it you would've read that submission?

MS CHESTER: Yes.

40 **MR ARCHER:** So I'll only provide some commentary around it. Basically, I'm an architect. I'm also a co-founder of NOMI, an Australian online furniture company. My furniture design work has been recognised with various accolades, including Australian Design Mark with the Australian International Design Awards and held – is held in collections
45 including the permanent collection of the Art Gallery of Western

Australia. I've also previously been actively involved in the music industry as a performer and recording artist. So I just provide that as a little bit of background to some of the points that I raised in my submission.

5

I basically put down five points, so I'll just list those briefly. The first is that I'd like to suggest that the design industry should match the music industry model, as well as the model of writing and authorship and other creative industries such as architecture, through free copyright protection, that is intellectual property protections that do not require registration or fees to be payable. The key thing with that is that that protection is provided on creation and for free, notwithstanding the opportunity to upgrade that with various registrations.

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15 The second point I'd like to make, or suggest, is that we should recognise the value of design with protections that match those in the UK and EU. Without being an IP lawyer, necessarily, my understanding is that the protections now afforded in the UK and EU are substantially more resilient and robust than those currently offered in Australia and in a global market. I think it's important that we benchmark our model against others that we trade with, to protect ourselves from our talent moving overseas.

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25 The third point I'd like to make is that due to social media and all kinds of new forms of media, I think it's critical that all media platforms should be held accountable for copyright infringements that are presented on that platform. This is a complex issue that I can't probably fully comprehend, but I think that it should be something that might be considered whereby advertisers shouldn't be able to, or might potentially present guarantees to the platform that the material they're submitting as part of their advertisements are not infringing on anyone's copyright.

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35 My fourth point was related to my personal experience and it outlines a personal experience of mine whereby I had a work of mine that was announced that it would be produced by someone else, unlicensed, and that was announced shortly after the expiry of the design registration. That design I did register at considerable expense for myself when I was 19. I was only 29 when it expired. So it was particularly disappointing, given that it actually took seven years before that piece was acquired into a collection and it actually took three years before it was given awards. I'd just like to outline that it does take quite a long time to get traction with a product, even after it's been shown publicly.

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45 The final point in my submission was related to this conversation around substitutability. I understand it's something that is a requirement in any

free market situation. However, I think it's important to recognise the maturity of the furniture market and, just as in writing there are many ways of telling a story, there are equally many ways of telling – or designing a chair. Anyone who's very literate in design would be able to see the difference between a certain chair that's successful and the multitudes of others on the market.

So this idea that substituting a popular design with a cheaper version of the same design seems to fly in the face of all other copyright conversations that seem to happen. Just because a book isn't copyright doesn't mean you can't sell a similar story and as a result there are many, many, many books on the market as opposed to with chairs. Sometimes we see there are just so many versions of the same chair being sold as copies.

So I'd just like to start on this point about copyright. The Productivity Commission's draft report, at the top of the very first page announces its claim to copyright before listing the required attributions should it be referenced. The Australian government clearly places value on original work. These protections afforded to that document were neither registered, nor was a fee required. To suggest that the copyright protection afforded to this draft document would prevent others from saying similar things in different ways is not correct. Rather, this document makes a contribution that may inspire alternative interpretations and different conclusions that triggered this conversation, by example.

Design is a value commodity in Australia. You only have to look at social media and the volume of design media produced each week. If the Productivity Commission wishes to increase the productivity in this arena, protection of design IP should be automatic on creation so that creators can share their work openly encouraging more discussion and evolution of ideas, in the same way that it encourages the sharing of its own report, without relinquishing its claim on the IP it contains.

The fact that all published writing is protected by copyright and does not place limitations on others to communicate. It simply protects against the unauthorised publishing of someone else's work. Without IP protection the dissemination of all design is reduced to a competition for who has the biggest factory and who has the cheapest labour and if we're talking at the geo-political scale and Australia loses outright under this model.

I'd just like to flag that Anne-Maree Sargeant, who is in the room in Canberra at the moment, has documentation or evidence which she will table. One of those is the Facebook comment stream related to the

5 announcement of the products which I had copied. Another one is an Australian Financial Review document that listed that product as a significant work of design in Australia. There's another document from House and Garden which was published recently talking about the longevity of that design.

10 Then another one is a document from a website announcing the fact that Denmark has banned UK sites that are selling replicas from being available to be seen in Denmark. So that point is around the media platform point that I made, which is that we should also try to place some enforcement on the way that copyright infringements are presented in the media as well. I'd just like to close with a question because – well, perhaps it's better to finish and we can have a conversation afterwards.

15 **MS CHESTER:** Okay.

MR ARCHER: Thank you.

20 **MS CHESTER:** All right. Thanks very much for those opening remarks, Tomek, and for being available again this afternoon for our hearings. I might kick it off with just an initial question, you're suggesting, as have some other designers, that there's merit in rethinking whether or not design right protection in Australia should follow the lead of the European jurisdiction in terms of incorporating it into copyright.

25 I guess, design rights, kind of, covers a very broad church of designs. So I'm just wondering what you have in mind there, is it more, sort of, design rights around items like furniture, high end furniture where that there are substantial some costs up front that might warrant a longer term of protection, or they may have a longer commercial life than some other sort of design rights?

30 **MR ARCHER:** Sure. That's actually around the question I was going to ask you because I'm not an expert in all the differences, but my understanding is that patents protect the way something works or is assembled, and it's typically related to a high investment industrial process. So therefore it makes a lot of sense for that to be applied for at a cost, and it gives it a more ironclad, if you like, protection that might be very clear if it was ever to go to Court. Trade marks protects brands and that, sort of, makes people feel more confident about developing brand awareness in advertising.

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45 At the other end of the spectrum, my understanding is that copyright has generally been used to protect individuals and artistic works, whether it be writing, whether it be musicians that are writing songs, whether it be

architects, whether it be artists. It's not necessarily a printed work, because my understanding is that the recordings are also covered by copyright. So I do have a question about what exactly copyright can protect, but the language used for the UK has been around copyright.

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My understanding of design registrations is that they fall somewhere in between, because they protect the way something looks which is potentially more similar to copyright, but they require – in Australia they require registration and it's a registration that needs to be renewed. I can appreciate that that probably provides more certainty and reduces the risk of infringement. In copyright, because everything is immediately copyright, there's perhaps the potential for many people to make claims over the top of each other or something like that.

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So my question to you is whether you think if, for example, there are so many songs that are able to be created every day in music protected by copyright, why something like that would not be appropriate for design, as a base case, notwithstanding the opportunity to then register to provide more protection?

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MS CHESTER: So I don't have an answer to that question. We're sort of at the stage of gathering evidence and getting a better understanding around the design rights issues that the designers and the industry are raising with us at the moment.

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I guess I was just trying to clarify design rights to cover a broad spectrum from the design of a widget through to a fine piece of furniture and whether or not, in terms of what's occurred at least in Europe, whether the design rights that have carried across to the copyright system there have covered the full plethora of design rights from widgets through to fine furniture. That's something that we can look to get a factual evidence base on ourselves, but I just was enquiring as to what it was that you were proposing be covered. Was it all current design rights or was it just design rights attached to individuals for, sort of, more creative endeavours?

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MR ARCHER: Yes. I suppose, because I'm not a lawyer I can't comment specifically, but from my experience I guess the intent of what I'm trying to say, which is potentially more important than a legal suggestion, is that I think it's better for productivity for people to be able to share their ideas with confidence that they haven't given them away to the public domain. So that happens in many other forms. Just because you show someone something, doesn't necessarily mean that it's theirs. Currently, it seems to me that that is the situation of design in Australia, unless you register something. So I think it is very much worth

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considering some kind of automatic protection, or a grace period, or both. Then, potentially, people can still apply for more serious and expensive and structured registrations.

5 **MS CHESTER:** So I think one of the issues we have with copyright is because there is no automatic registration, it then becomes quite a messy world of finding the copyright owner, and then we enter ourselves into a world of people infringing. So the degree of infringement in the copyright world is, to a large extent, a function of people being able to identify who
10 actually owns the copyright and tracking them down and getting authorisation or a licence. So there are some advantages for the creative rights holder in having a registration system where at least it's very clear who – where that ownership resides.

15 Coming back to the other issue then around, sort of – and I've, sort of, loosely referred to it as a “grace period”, the example, Tomek, that you mentioned from your own experience of by the time you hit 29 you were outside your design right period and then somebody else was able to do what then becomes an authorised copy because it's out of the design right
20 period. It would be just good to get, from your experience, a sense of that period of time. So, not the commercial traction period of time, but the period of time where you, sort of - you'd come up with initial design and you're sort of finessing that design, you're finessing the prototype, you're sort of testing it before you actually go to a commercial production run.
25 It'd just be good to get a sense of what that sort of time period has been like from your experience?

MR ARCHER: Okay. I'll give you that example. Obviously, it's often different, but in that case the first piece was developed for an exhibition.
30 It took a lot of foresight to even consider registering the design at that point and a huge leap of faith. I mean, this was pretty much the first piece of furniture I'd designed, 19 years old, and I was at uni and this was a university subject.

35 So I don't think it should be the case that everyone has to go and spend money on lawyers in that situation. However, I did and it cost several thousand dollars to obtain this registration because of the way that was done. I'm not even sure how ironclad that registration actually would've been anyway because the sketch that I provided was potentially
40 pretty loose. So that's one thing to consider is how easy it is to register something and how clear that – how well that would protect it anyway. Then, it was renewed - I don't recall exactly the mechanics around.

 But so following that exhibition it was published. I felt confident that
45 it was protected. Then I started producing themselves myself. I adjusted

the design a little bit in terms of the mechanics of how it works, but it looked the same. Then it was being sold locally, and then those sales went well. I sold it more broadly and passed on production to a manufacturer who was contract making on my behalf. That continued for
5 a while and over a few years later it received an Australian design market, received a few awards and, kind of, gradually gained traction. Then it was acquired by the Art Gallery of Western Australia. At some time in that period it was renewed, the registration.

10 Then I also licensed that design to a manufacturer in Europe. That manufacturer in Europe didn't request that design registration, but I guess it would've been useless to them anyway because it was only an Australian registration and I don't think it would've been possible at that point to protect it overseas anyway and it would've been hugely costly.
15 But in Europe they have, notwithstanding their legal situation, they seem to be much more respectful of IP and when I spoke to that manufacturer they said that they wouldn't go with a formal registration anyway, possibly because they have some other model which discusses copyright or something, I'm not sure, just as a base protection. That was in 2010
20 that was launched in Milan.

Since then, that protection has lapsed and I saw those copies. Those copies didn't come out, but it was more because it was going to be a marketing disaster for that company. That's the decision that they made
25 rather than because I would've taken to them with lawyers. To be perfectly honest, there were several other cases where questionable products appeared in the market in that – within the design registration period and I couldn't afford to protect myself from them. So, even with that design registration, in addition to that money is required to defend
30 yourself and it would've been better if to find some other way to make that process a little easier.

I know that in my experience in the music industry we have an industry body called APRA who are responsible for representing
35 individual song writers and then they go and collect royalties, but they also act on infringements as well.

MS CHESTER: I'm assuming there's no similar body for design in
40 Australia?

MR ARCHER: Not currently, and I don't know if this is the platform to raise it, but I think it would certainly be beneficial if there was – there are several industry bodies in Australia but I don't think that any of them take
45 it as part of their mandate to look after their members in terms of defending copyright infringements or design registration infringements for

that matter. It's, kind of, left to individuals and companies. I think it's important to recognise that many of the authors of design are individuals as opposed to companies, and many of the companies that are proposing to manufacture unauthorised copies are far bigger organisations. So the prospect of entering into litigation with any of those is daunting.

MR COPPEL: I've got two questions, one drawing on your experience of a design you had that was then copied, did you, following that period, continue to sell your product, the original product, and what was the impact from that point that your product was copied, impact on you?

MR ARCHER: I should say that they decided not to produce it because there was an industry backlash. They made their announced through social media. That stream has been tabled as evidence, or will be tabled as evidence to you. You can see that many people in the Australian design industry reacted to that saying, "This is not a generic design. This is a world recognised design by an Australian designer and it's a real shame if you would decide to produce something like that and claim that it was somehow something that you found overseas".

MR COPPEL: Okay. The second question is, have you heard of The Hague Agreement, which is an agreement from the World Intellectual Property Office which is aimed at harmonising the registration process for design, that's one aspect of it. The idea is if you register in one jurisdiction, it would give you coverage in all signatories to The Hague Agreement, not yet up. The second aspect of it, where the maximum was a period of protection of 15 years for design. I'm interested if you have heard of it, if you've got any views on this proposed Hague Agreement?

MR ARCHER: I only became aware of The Hague Agreement recently and I can't say that I know it very well but, yes, my understanding is that if you register a work it's registered in all the countries that subscribe to that agreement, Australia not being one of them. That sounds like something that would be pretty helpful for anyone that was looking to export their products out of Australia, or export their IP. So I certainly think that from the perspective of a designer, if we're talking about exporting intelligence as opposed to commodities, it sounds like something that we should really look at.

MR COPPEL: Okay. The view that we had in the draft report, and I think it's the same view that ACIP as an advisory body on intellectual property matters was to, sort of, build a case for joining The Hague Agreement. Our position on that was there are gains from streamlining the - sort of, the administrative processes linked with registering the

design, and they should be kept distinct from decisions relating to the length of protection but, essentially, sort of, echoed the ACIP view there.

5 **MR ARCHER:** Sorry. Just was the ACIP's view to join or to not join?

MR COPPEL: They saw merit in joining, but they saw a number of costs associated with it. I think they identified some of the transitional costs that would be linked to changes in the processes that IP Australia would need to engage and because of those costs they had suggested that
10 there would be further work needed to establish whether there was a – you know, a net benefit overall from joining.

MR ARCHER: Just so that I understand, are those costs that are related to administrative government costs, or are they costs that might be borne
15 by individuals working within this industry or companies?

MR COPPEL: Both.

MR ARCHER: It sounds like they might be more government – right,
20 okay.

MR COPPEL: Both.

MR ARCHER: Yes, I - - -
25

MR COPPEL: Companies and consumers and also in terms of the administrative agency, in our case IP Australia.

MR ARCHER: Yes. Look, I understand that the net benefit – the
30 Australian government is responsible for understanding the net benefit and our terms of trade in terms of IP protections. Of course, we import a lot of material and that includes a lot of IP, so looser copyright and looser IP protection mean that Australian companies are able to get into the market easier. But I really think that we should be encouraging the development
35 of new work in Australia that can then be exported. Without something like The Hague Agreement it sounds like exporting new work and encouraging new work out of Australia might be difficult, particularly in the longer term.

40 **MR COPPEL:** Yes.

MS CHESTER: Tomek, we didn't have any other questions for you this afternoon. But thank you for being able to join us again for our hearings. We've got a couple of other participants we need to hear from this
45 afternoon. So we might bid you farewell.

MR ARCHER: Thank you very much for your time.

MS CHESTER: Thank you.

5 **MR COPPEL:** Thank you.

MR ARCHER: Good afternoon. Bye.

10 **MS CHESTER:** Bye.

MR COPPEL: The remaining people are all by phone.

MS CHESTER: Yes.

15 **MR COPPEL:** I think we're on.

(Announcement made over loudspeaker)

20 **MS CHESTER:** Good afternoon. Is that David Trubridge?

MR TRUBRIDGE: Yes, it is.

MS CHESTER: Hello, David. It's Karen Chester, one of the

25 Commissioners at the Productivity Commission. I'm joined by my colleague, Jonathan Coppel.

MR COPPEL: Good afternoon.

30 **MR TRUBRIDGE:** Hello. Good afternoon.

MS CHESTER: David, thanks very much for being available to talk to us this afternoon and thank you also for your post-draft report submission. As you've heard from our colleagues, we are recording a transcript here.

35 So, perhaps, just at the outset you could just state your name and the organisation that you represent, and then if you've like to make some briefing opening remarks?

MR TRUBRIDGE: Yes. My name is David Trubridge. I have my own

40 company, David Trubridge Limited and we design and manufacture designer lighting here in New Zealand.

MS CHESTER: David, we've had the benefit of reading your post-draft report submission, is there anything in addition to that that you wanted to

45 share as part of the hearings this afternoon?

- 5 **MR TRUBRIDGE:** I don't think I put in one of the issues I think I'd like to discuss is the WTO TRIPS Agreement, spelt T-R-I-P-S. If I could add that that would be great?
- MR COPPEL:** Yes. Do you want to explain?
- MS CHESTER:** Sorry, do you want a copy of it?
- 10 **MR TRUBRIDGE:** No, do you want me to explain why I want to add it in?
- MR COPPEL:** Yes.
- 15 **MS CHESTER:** Sorry, I misunderstood what you were saying. So, yes, sorry, please explain what the issue is to do with TRIPS.
- 20 **MR TRUBRIDGE:** Yes. Well one of the problems with registering designs is that it's very hard to know – I mean, I might register – I might create five, six, seven, eight designs in a year. You don't know which ones are going to run. Very often what happens is that you end up, almost inadvertently sometimes, having it published on a website or something and then you can no longer register it under the normal Australian laws. Overseas you do get a grace period, but sometimes you might even miss
- 25 that grace period.
- Now what the TRIPS Agreement says is that if any intellectual property has been seen on – what they call – tangible media, a book or magazine, which is dated, that is effectively all the proof you need to
- 30 identify your ownership of the IP. So we have actually defended breaches of our copyright in Europe and in America purely using the TRIPS Agreement where I did not have registration of design, and that is enough for small young companies, which is a wonderful tool, but it's not any use in Australia.
- 35 **MR COPPEL:** So this is the point that I think has been made by a number of other participants relating to copyright protection in the EU for designs. Is that the point?
- 40 **MR TRUBRIDGE:** It's not just EU. It is actually worldwide. It's a WT - World Trade Organisation ruling that was – I think it came out of a conference America (indistinct) 1994 and all the major countries have signed up to it, including Australia.

MR COPPEL: Yes, I think we have to look into that and - because if we're a member or if we are a signatory to TRIPS, we would be obliged by that agreement. So I think that's something we have to clarify in our work going forward.

5

MR TRUBRIDGE: Yes. What I was told was that Australia has signed it, but local laws override it.

10 **MS CHESTER:** That's not how the TRIPS Treaty is meant to work. So we will look into that, David, and look to address that in our final report. Okay. So, David, just a couple of questions then if we may? One of the key issues that you've raised in your submission to us is around unauthorised copies or replicas undermining the commerciality of your lighting designs. I guess, if we could just get a better understanding of
15 those unauthorised copies and replicas, is this occurring during a period of design protection that you have or is it following a period of design protection?

20 **MR TRUBRIDGE:** The two issues are related. I mean, you can't really have one without the other, but both of them have hurt us. The grace period has hurt us. But probably worse than that, is the issue of being able to sell a replica design. Even if we haven't got design registration, which I haven't had for a number of my designs, my early designs when I was a small company. I wasn't able to spend the money on it. I wasn't sure
25 enough of the - how much we would sell. I started off really small. So it's very difficult when you're small starting up. You have no big companies if you don't allow the small ones to start. But to get through that early stage, is very difficult without having recourse to either the WTO thing or proper IP protection.

30

We employ 20 people in the company here and we deal with 100 different - over 100 different other companies locally. So there's millions of dollars swirling around as a result of our activity, all of which is because we manufacture in New Zealand. If the stuff was made by a third
35 party overseas and imported against our will, all that industry, all that money in our local economy would be lost.

40 **MS CHESTER:** So, I guess, that raises two issues, the first issue being, I guess, awareness amongst young designers of, if you're looking to protect your design rights you do need to go through a process of registration and ultimately certification and, I guess, to the extent, that you still think that that's an issue in the industry.

45 **MR TRUBRIDGE:** Sorry, could you say that last sentence again please?

5 **MS CHESTER:** Sorry. I think there's two issues that you've just, kind of, raised there. Firstly, the awareness amongst young designers of the importance of having some form of design protection in place through design registration and ultimately certification to afford yourself that 10 year window of protection which, obviously from what you've said, you weren't aware of at the time as a young designer. Do you think that's still an issue amongst young designers today of awareness of the need to get design protection through registration?

10 **MR TRUBRIDGE:** No, I think people are probably much more aware of it than I was 15 years ago when I started doing this. I think that awareness is less of an issue. I think the problem is more being able to handle it. Even though I didn't have the design registration protection, in every other country that we challenged it I was able to stop it through the WTO
15 program – ruling. So I think it's not so much awareness, it's just that in Australia there are not the – there isn't sufficient protection for them to be able to defend their IP.

20 **MS CHESTER:** I guess the second issue you raise, which we've discussed to some lengths this afternoon and touched on a bit yesterday, is how well the current term of protection works in a situation for designers of lighting or furnishings where there does need to be a period of initial design, market testing, prototypes, before you finally go to commercial production, and how much of that clock starts ticking within the 10 year
25 period before you actually get to commercial production. From your experience with your lighting designs, David, what sort of, on average, is that sort of initial period of market testing and prototyping before you go from "I've got a design" to "I've got a final design that's ready to go to commercial production"?

30 **MR TRUBRIDGE:** It's several years. I mean, conventionally what we do is we'll have a few new designs which we will show at trade shows in Europe and America to get feedback before we invest any further in them. One of the big hindrances with developing new lights is the cost of
35 certification. It can be tens of thousands of dollars to get your electrical standard certified for the right to be able to sell it into the market legally.

MR COPPEL: How many thousand did you say?

40 **MR TRUBRIDGE:** So we need to be sure that that light is – I'm sorry?

MR COPPEL: How many thousand did you say? You mentioned - - -

45 **MR TRUBRIDGE:** I'm not hearing that very well.

MR COPPEL: You mentioned a figure of, I think, several thousand dollars for – I don't think it's registering the design, but for the – for a lamp?

5 **MR TRUBRIDGE:** No, that's for certification, in order to get it electrically certified so that it's legal to sell it. If it's a whole new sort of light - you can certify families of lights for – if it's a whole new light you have to certify it as a separate typography and that might be \$20,000 to do that. So you have to be sure before you put that onto the market that it's
10 going to sell before you invest in all that. You can't sell it until you have the certification.

So, inevitably, and this is standard amongst big European design houses, they all put rough prototypes up on show in design shows to get
15 market feedback before they go ahead and finalise the prototype. So it is a several year process, two, three, four years to actually get that thing selling in the market when you're confident you're going to make some money out of it.

20 **MS CHESTER:** In terms of dealing with unauthorised copies or replicas during the period in which you have design protection, David, you touched on before the issue of protecting your rights. Are there any, kind of, impediments or the way that the current intellectual property arrangements are structured such that there are impediments or obstacles
25 for you being able to enforce those rights?

MR TRUBRIDGE: Are you specifically talking about Australia?

MS CHESTER: Yes, because that's what we're meant to be looking at.
30 As part of our inquiry, we're focussing on Australia's intellectual property arrangements.

MR TRUBRIDGE: Well, the fact that after 10 years, even if you've gone through the registration and you remember to renew it after five
35 years, then you've no longer got any protection. I mean, now if you've spent 10 or \$20,000 on the certification and more on development, you need to be able to sell it for more than 10 years. In no way is that protecting you enough.

40 **MS CHESTER:** So your primary concern then is really the term of protection that's afforded under current design right arrangements in Australia's IP arrangements?

MR TRUBRIDGE: It's two things, it's the making it easier to protect it
45 in the first place, you have a grace period, you have time to assess, and the

second thing is that time, yes. I'm sure you know, in Britain it's 70 years after the death of the designer. That's an enormous difference, and that's fairly common amongst other countries.

5 **MS CHESTER:** So we've heard some evidence to date that certainly amongst EU countries, design rights have been dovetailed into the copyright system and therefore much extended the term of protection. Are there other international jurisdictions, David, that you're aware of that place design rights into the context of copyright protection?

10

MR TRUBRIDGE: I mean, China is a world of its own. We don't even try to get design rights in China because it – they just laugh at you. But other countries - I cannot say what the figures are, how long you get protection for in the States. I think it's 30 or 40 years, but whatever it is it's an awful lot longer than Australia. There is no other country that we sell in – and we sell in over 50 countries around the world – there's no other country which has such a short protection time as Australia. Most years are out to 30, 40, 50 years.

20 **MS CHESTER:** David, thanks very much. We didn't have any other questions for you this afternoon. Is there anything else that you wanted to add before we move on to our next inquiry participant?

MR TRUBRIDGE: I don't think so. I'll have a quick look through my notes. You've got the message, which I gave you, about the royalties. I mean, this is – designer's income is entirely from royalties. In the design world people come out of design school, they go and – they set up their studios and they basically licence work to other companies and that's their – that's the way they earn their living. Royalties are a good – over time, once you've got the design up and running and the company is selling it, that money keeps on rolling in and it's a really good way of having a good regular income. That's the lifeblood of designers.

35 If you're not getting the royalties, if you're not able to commission your stuff, because other people are taking those designs and having them for free without paying a royalty, without paying a commission, then that's going to pull the rug out of your – under the feet of designers within Australia. That's the critical difference between Australian markets and the rest of the world where this commissioning royalty situation is the standard, the norm, and the rules protect the designer so this has – it's possible to work. In Australia, that can't happen the way the rules are at the moment.

40 **MS CHESTER:** All right. Well, David, thanks very much for being able to join us this afternoon and providing us with some more evidence as part

of our public hearings on the IP arrangements as they affect design rights.
Thank you.

MR COPPEL: Thank you.

5

MR TRUBRIDGE: Thank you very much for giving me the opportunity.

MS CHESTER: You're welcome. Bye-bye.

10

MR TRUBRIDGE: Thank you. Bye-bye.

MS CHESTER: Okay. We have one final inquiry participant.

15

(Announcement made over loudspeaker)

MS CHESTER: Good afternoon. Is that Chris?

MR SNOW: Yes, it is.

20

MS CHESTER: Hello, Chris. It's Karen Chester here and I'm joined by my colleague, Jonathan Coppel. We're the two Commissioners on the Inquiry.

25

MR SNOW: Sorry, immediately I'm having a bit of trouble. I can hear you, but it's a little indistinct.

30

MS CHESTER: Sorry. I'll try again. I have to keep remembering the microphone for our call is up in the ceiling and I'm vertically challenged. So, it's Karen Chester and Jonathan Coppel, the two Commissioners on the Inquiry. Good afternoon.

MR SNOW: Good afternoon.

35

MS CHESTER: Is that better, Chris?

MR SNOW: It's okay. It's very distant. You're sounding very distant, that's the only problem.

40

MS CHESTER: Okey-doke. We might just see if we can get IT to dial up the volume a bit and I'll try to project my voice a little better. So, Chris, first of all thanks very much for both your initial submission to our report. If you could just, sort of, state your full name and the organisation that you represent for the purposes of the transcript and then if you'd like

to make some opening remarks of a few minutes, three or four minutes, that would be most welcome.

5 **MR SNOW:** Okay. Right. Yes. My name is Chris Snow. I am a journalist, a public relations practitioner, and a social and market researcher. I'm also a trained political sociologist and, as I said, a trained survey researcher, social and market researcher.

10 I put in a submission, particularly as a journalist and my principle issue that I wanted to raise was that of aggregation. I'll say initially that in the past few years I've been heavily involved in consumer advocacy in a number of areas, particularly legal regulations, residential tenancies. Currently, I'm involved in – participating in the Open Government Partnership Project, which is being run by the Department of Prime Minister and Cabinet.

20 One of my great concerns is the lack of the participation available to members of the public. You probably have a chance to read the submission I put in yesterday, would that be correct?

MS CHESTER: No, I haven't, but I've had a quick briefing from our team who have had a chance to read it.

25 **MR SNOW:** Yes. Okay. Well in that I did make the point that I am becoming increasingly concerned at the lack of public participation. It just seems to me, in what I've been able to read of the report, that there seems – doesn't seem to have been great public participation. As in many inquiries it is really the public interest groups, if I can put it that way, private sector interest groups, that get the running. I am just concerned that the public have not really been involved in this. As I say, it's not peculiar to this particular inquiry. I think it's general and it's something that I just suggest that you might like to take a look at.

35 **MS CHESTER:** Okay. Well, Chris, maybe if I could address your second point first, if that's okay? So as you're aware with our inquiry processes, we do make sure that there is a broader knowledge via website and media of our inquiries as they come to us. We put out issue papers. We hold round tables. We accept submissions, pre-draft report submissions, post-draft report. Then we also do media when we release our draft report.

45 I think the Intellectual Property Arrangements Inquiry is a good example of where we conducted quite a wide media program to ensure that the broadest group of stakeholders who would have an interest in this would avail themselves of getting involved in our processes, if they

wanted to, such that we're now in receipt of over 500 submissions from a very broad range of stakeholders. We've held several round tables.

5 Having now gotten through day 2 of public hearings, I think you can rest assured that we're hearing from folk that weren't involved in the early stages of our inquiry and that's largely to thank the media for the coverage that they've provided of our draft report. So I'm not quite sure what else we could've feasibly done to ensure public participation in our inquiry process.

10 **MR COPPEL:** Could I put it to you because, I mean, this is an issue that is a challenging one. We often think about ways in which we can get a broader reach. Part of our Act requires us to, in our thinking about the Terms of Reference that come to us, look at it from a community wide perspective. So if you have any ideas on how to engage those that typically are not representing a particular, sort of, industry perspective, that would be helpful?

15 **MR SNOW:** Sorry, I am still having – I'm picking up the gist of what you're saying, but that last point I - - -

MR COPPEL: I was asking you whether you have any specific ideas that we could use to better engage the broader community in our inquiry processes, consultation processes?

25 **MR SNOW:** I'm glad you asked. I have, for some time and I've certainly been pushing this with the Open Government Partnership movement, and I'm not alone in this, in advocating that there should be a public interest advocacy council that would be responsible for gathering public opinion about specific issues in government activities and semi-government activities. That's it in a nutshell.

35 That arose from a similar idea, in terms of – when I was dealing with legal regulation, where there was absolutely no public participation whatsoever, no client participation whatsoever. It's a (indistinct) monopoly and I proposed the same thing there. I do think that that concept does have – it is worth exploring and I'm certainly pushing it through the Open Government Partnership movement.

40 **MS CHESTER:** So, Chris, if you were to have a public interest advocacy council, what sort of folk would be on it, and how – what things would they be doing? So one of the things that we're very keen to do, given as Jonathan mentioned the obligations under our Act, is to make sure that we do hear the unheard voices. So we tend to go through particular social advocacy groups, those that represent consumers like the

45

choices of the world. What do you see this council doing in addition to that, and who would be on it?

5 **MR SNOW:** I think there would need to be a very – a council would be selected from a fairly wide range of occupations and industry. For starters, simply, you could do random probability sampling to locate particular people. But then you'd be looking at – excuse me, sorry. You'd be looking, I think, at people like you, economists, accountants, philosophers, ethicists.

10 I mean, you'd cover the whole gamut of society and try to pick a high level panel that would be able to direct – and I'm looking at – obviously it would have to be a staffed organisation and it would be able to detect issues that are worthy of public participation and then seeking those
15 organisations and those people who do have a specific interest in it, but then simultaneously going out to the general public, those people who are not involved in specific interest groups. So, in essence, I guess, it'd be a high level panel.

20 **MS CHESTER:** Okay. Thanks, Chris. Chris, I just have one other question on your submission and it was a little unclear when you talked about the role of aggregators when it comes to media, whether or not you felt that they were breaching current copyright arrangements. As I'd understood it, the aggregators enter into licensing arrangements with the
25 media agencies and, indeed, the way that they, sort of, reformat and represent on a tailored basis - - -

MR SNOW: Sorry?

30 **MS CHESTER:** Sorry. And the way that they represent and reformat on a tailored basis actually creates greater demand for media content.

MR SNOW: Yes. Look, sorry, I couldn't pick up any of that.

35 **MS CHESTER:** Okay. So my first question was, it was a little unclear around the issues that you raised with media aggregators whether or not you felt that they were breaching current copyright laws, that was the first question.

40 **MR SNOW:** I don't think they are, from my little knowledge of copyright law. They're not breaching the law according to the common law that has been determined principally, I think, by the Federal Court. That has ruled that a single line of text is too short to be copyrighted and therefore that enables aggregators to post those – to post headlines and
45 then a lot of them also do post summaries of the stories on – in their

newsletters. They can do that quite legitimately. I call it legitimised plagiarism. It's a bit of an oxymoron, but I guess that's what it's - - -

5 **MS CHESTER:** But as I understand it those aggregators, in doing that, then link you through to the underlying media content, and to get to the underlying media content if you don't then have a subscription you don't have access. So I'm not - - -

10 **MR SNOW:** Sorry, could you - - -

MS CHESTER: The feedback that we've had on aggregators were that they – the way that they formatted either through linking through to the underlying media source, media content, or by providing an excerpt, a full excerpt from the media content, were actually creating greater demand for media content.

MR SNOW: Yes. Look, I'm sorry, Commissioner, I really couldn't pick that up.

20 **MS CHESTER:** Okay. So look, Chris, I'm conscious of time and obviously it's not a great line. We've done a couple of other calls today, so I suspect it might be something to do with the line at your end. If it's okay with you, we might close the public hearings now, but we might give you a call after today and hopefully we'll have a better line. I'm just
25 conscious we've got transcription services happening here. Perhaps we can get a better line and we can have a bit more of a chat with you about your concerns on the aggregators. Is that okay with you?

MR SNOW: Yes. That's fine. Because the other issues, I think, the fair use and length, duration of copyright, they've been covered off by other people pretty well, I think, and – so I don't have anything to say about – anything more to say about those.

MS CHESTER: Great. Thanks very much, Chris, and we'll be in touch with you shortly.

MR SNOW: Yes, okay. Apologies about the line if it was this end.

40 **MR COPPEL:** Thank you.

MS CHESTER: Okay. So, ladies and gentlemen, that now concludes today's schedule proceedings. But for the record, I am meant to ask if there's anybody else in the room who'd like to be heard? Speak now or forever hold thou peace. Okay, I've got - - -

45

5 **MS SARGEANT:** (Indistinct) myself (indistinct) Terri Winter has got – myself, I’ve got some comments to follow on that will fill in a few gaps from the phone calls today. Richard and I have got a couple of points he might like to cover off and Terri Winter would like to speak on The Hague Convention, just two points.

10 **MS CHESTER:** Okay. So this is a chance for people that haven’t had a chance to speak to the Commission to speak. We kind of allow five minutes for anyone else to come from the floor. If there are follow up issues you want to raise with us, we’re more than happy to hear from them, but I am kind of also conscious of time and we’ve got public hearings starting again tomorrow. We’ve got to jump on a plane. So if it’s okay with you two options - - -

15 (Announcement made over loudspeaker)

20 **MS CHESTER:** - - - two options, so there is no one else who hasn’t been heard today or yesterday who would like to be heard, so on that basis we’ll close the hearings, but happy to chat and also to see if we can accommodate some other way to get the additional information you’d like to share with us, if that’s okay?

MS SARGEANT: Thank you.

25 **MS CHESTER:** All right. Great. On that note, folks, we’ll close today’s hearings. Thank you. We resume tomorrow in wet Melbourne. Thank you.

30 **MATTER ADJOURNED AT 4.05 PM
UNTIL THURSDAY, 23 JUNE 2016**