



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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MS CHESTER: Good morning, and welcome to the public hearings for the Productivity Commission Inquiry into Australia's Intellectual Property Arrangements. My name is Karen Chester. I am the Deputy Chair of the Commissioner at the Commission, and I am one of the Commissioners on this inquiry. My fellow Commissioner is Jonathan Coppel. This inquiry started with a reference from the Australian Government in August 2015 to have a look at and examine Australia's intellectual property arrangements, including their effect on investment, competition, trade, innovation and consumer welfare.

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We released an Issues Paper in early October 2015, and have talked to a range of organisations and individuals with an interest in the issues. A number of round tables have been held with groups of interested parties to help inform our inquiry and, with the benefit of those consultations and around 150 initial submissions, we released our draft report in late April of this year which included over 20 draft recommendations, draft findings and a number of information requests.

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We have received a large number of submissions in response to our draft report with the total number of submissions now well over 500, and we also held a further two post draft report round tables, one on copyright, in particular fair use, and the other one on patents, and in particular looking at pharmaceutical patents. We are very grateful to all the organisations and individuals that have taken the time to prepare submissions, to meet with us, to attend our round tables, and today to appear at these hearings. The purpose of our public hearings is really to provide an opportunity for interested parties to provide comments and feedback on the draft report; in short to tell us what we got right, what we got wrong and what we might have missed.

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Prior to this hearing today, hearings have been held in Brisbane, Canberra and Sydney where we have already heard from a very diverse range of interested parties - authors, academics, legal practitioners, designers, publishers, collection agencies and other stakeholder groups. A further hearing will be held in Sydney next Monday, and we are also in Melbourne again tomorrow.

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We will then be working towards concluding our final report for Government, having considered all the evidence presented at the hearings and in submissions, as well as other informal discussions. The final report

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will be handed to the Australian Government later this year. Participants and those who have registered their interest in the inquiry will be advised of the final report's release date by Government, which may be up to 25 Parliamentary sitting days after completion.

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Turning to today's public hearings, we try to conduct our hearings in a reasonably informal manner, but I do remind participants that a full transcript is being taken. For this reason, comments from the floor cannot be taken but at the end of today's proceedings we will endeavour, time permitting, to provide an opportunity for anyone who wishes to do so to make a brief presentation.

Now, participants are not required to take an oath but are required under our Act to be truthful in their remarks. The transcript will be made available to participants and will be available on the Commission's website following the hearings, and as many of you will know submissions are also available on our website.

For any media representatives attending today, some general rules do apply, and please see one of our staff for a handout which explains what those rules are. Now, to comply with the requirements of the Commonwealth Occupation Health and Safety legislation, or perhaps just good old common sense, you are advised that in the unlikely event of an emergency requiring the evacuation of this building you should follow the green exit signs to the nearest stairwell. Lifts are not to be used. Please follow the instructions of the floor wardens at all times. If you do require assistance please speak to our inquiry team members here today. Unless otherwise advised, the assembly point for the Commission in Melbourne is at Enterprise Park, situated at the end of William Street on the bank of the Yarra River.

Now, participants are invited to make some brief opening remarks of no more than five minutes. We do really like it if participants can keep their opening remarks to five minutes. It does really give us the opportunity to ask some questions and to have a pretty good discussion. Now, participants are also welcome to comment on the issues raised in the submissions of others.

I would now like to welcome our first participant, Amanda Lawrence. Amanda, if you would like to join us at the table here. Just make yourself comfortable, thanks, and Amanda if you could just state for the transcript your name and the organisation you represent, and then if you would like to make some brief opening remarks, thank you.

MS LAWRENCE: Great, thank you, Karen. Yes, my name is Amanda

Lawrence. I am the Research and Strategy Manager at Australian Policy Online, APO, based at Swinburne University of Technology. Thank you very much for this opportunity to present to the Commission today. I will be representing myself and my colleague, Professor Julian Thomas, who made a submission - together we made a submission on behalf of Australian Policy Online. Australian Policy Online was established in 2002 by researchers at Swinburne Institute for Social Research at Swinburne University of Technology to bring together and make discoverable research and resources on public interest issues, particularly digital grey literature. This was in response to the growing use of the internet by many research centres, interest groups and government to publish material on line, freely accessible but largely difficult to discover.

It is now the largest open access repository for public policy related documents, data, audio, video and other resources from Australia, New Zealand and internationally. National investment in APO amounts to over \$5 million, and I am here today to support a number of key recommendations put forward by the Productivity Commission in its inquiry. Not all of them, particularly recommendations 4.1, 5.3 and 15.1.

So I would really like to initially just put the problem and then why we - hopefully that will make understandable why we have the position that we do. So vast amounts of valuable, non-commercial, public interest and often publicly funded research information is now published online. It has grown exponentially since the earliest days of the internet, however there are also vast amounts of print material that have been produced over the last few centuries. Most of the substantial publications of this type, known as grey literature, are produced by organisations. This includes academic research centres, civil society organisations, interest groups such as associations, charities, advocacy groups and think tanks, government departments and agencies such as the Productivity Commission itself, industry and corporations. As they are not professional commercial publishers, a great deal of these resources are managed in a very ad hoc way. A great deal of it is now missing. It is estimated 30 per cent of online content disappears every year, and a large portion are orphan works.

They are very difficult to find, evaluate and manage effectively as most people engaged in public policy related research will attest, and our own research conducted in conjunction with Professor John Houghton, the National Library of Australia, the Australian Council for Educational Research and the Eidos Institute has also proven, which I would submit in our paper that we reference in the submission, is the evidence. This content is produced and managed in a very different way to professional and commercially published content where publishers have an investment

in continuing to extract value from their products, and therefore it is hoped take precautions to ensure they are preserved and available for future generations.

5 To support access to resources for all of society and ensure knowledge is able to function as a public good, as well as a private one, the organisations in society with the skills, expertise, infrastructure and audience for discovery and access to information have traditionally been libraries. In the digital age they now include digital libraries, institutional
10 and subject repositories, clearing houses, databases and online archives and observatories. Their job is to identify resources of value to the community and make them discoverable now and into the future. This involves evaluating, curating, cataloguing and preserving.

15 Unfortunately, they are not able to effectively carry out this role for digital content due to the limitations of the current copyright law. The current exceptions are so restrictive and convoluted it is very difficult for libraries and collecting services to address the management of online resources. This means a loss to the community of hundreds of millions of
20 dollars' worth of research, not to mention the value of access to those resources for public policy, the commercial and innovation systems.

 In our research we estimate a productivity dividend of \$17 billion per annum should this material be effectively managed and made available to
25 the public. Therefore in the interests of access to knowledge as a public good, APO advocates that draft recommendation 4.1, that the current terms of copyright protection apply to unpublished work, be endorsed. We endorse draft recommendation 5.3, that Australia should replace the current fair dealing exceptions with a broad exception for fair use, and
30 draft recommendation 15.1, which we would suggest be worded as, "All Australian and State and Territory Governments should implement an open access policy for public funded research and resources in any format, not only publications." The policy should provide free access for a stable, long term, open access repository or similar managed digital curation system.
35 system.

MS CHESTER: Thank you very much, Amanda, and thanks for your submission and appearing this morning. You raise an important issue of how the current intellectual property arrangements deal with grey
40 literature, unpublished works, and making sure that others can benefit and readily access them. Perhaps if you could just elaborate a little bit on how the current intellectual property arrangements, so if our recommendations weren't adopted how the current intellectual property arrangements impede the access to what you refer to as grey literature?
45 literature?

MS LAWRENCE: Sure. So it operates on a number of levels. So at the moment if an organisation produces material and makes it publicly available, if they don't make any sort of explicit, creative comment or statement on it then it is automatically all rights reserved. In our experience many organisations still are fairly unaware that they could use creative commons, even though what they are generally intending is for their material to be open and as freely accessible as possible. So their aim is not to make money from it. In our research many of these sorts of organisations, only ten per cent were looking to actually make any income whatsoever. Their interest is in wide dissemination and yet an organisation such as APO or any other library has to get permission, either blanket permission from those organisations or individual permission, for every single item in order to be able to make either a preservation copy or a copy accessible. Usually when we have approached these organisations they readily agree to that, but that is a very time consuming process.

If you are then dealing with something that may be a few years old, there is a lot of churn in this industry, so many academic research centres come and go. There is a grant for a three year period, a centre is established, it closes and who is going to be responsible for making that content available? So if you are only linking to online content you end up with a lot of what is known as link rot. So you have a collection that actually goes nowhere.

In a similar way you have a lot of reference rot. So you have publications that are saying that the evidence lies here, but there is a high chance you will no longer be able to find that report on line any more. So in a society that is aiming for evidence based policy we are sort of undermining that system, and I think it's the effort required by many libraries to be able to manage these materials - it is just a huge cost in time to be able to get permission for every single article.

MS CHESTER: So at the moment two thoughts then. So the way that you described it, this grey literature for libraries or educational institutions that are wanting to access it, there's a level of uncertainty in terms of establishing whether or not the copyright actually exists.

MS LAWRENCE: Yes.

MS CHESTER: Then alternatively we have been hearing evidence around how the statutory licensing arrangements currently work and whether or not they are effectively picking up creative commons or grey literature. Is that something you are able to comment on?

MS LAWRENCE: I am not as much familiar with the statutory licensing

arrangements of universities, but certainly it is the case that should a university library have in its collection a publicly accessible report that then does come under - and it's copied on a photocopier - they are then having to pay a copyright for that material that is actually freely accessible and perhaps even has a creative commons licence on it, but it automatically comes under that copyright regime.

MS CHESTER: Okay, and from the way that you have looked at our recommendations it sounds like they need to be sort of taken up collectively to comprehensively deal with the issue of grey literature, so firstly the treatment of unpublished works. Talk us through moving from there, through to fair use and why is that important or what different role - how would that better facilitate ready access and follow on use of grey literature?

MS LAWRENCE: Well, I think the way I see it - I certainly think that there is a role for copyright and I actually have - in my previous career I was heavily involved in the literary industry so I am very sympathetic to the needs of authors and for people to be able to make an income from copyright of works. I think in this case the advantage of fair use is that it allows us to make clear and broad categories of perhaps an institution or a collection that could be suitable charged to collect a certain type of material that has been deemed to be of value for the community and for research purposes, and so you are able to make, I guess, decisions about the management of resources based not on the copyright of specific items but perhaps on the use case, and the authority of a particular library. So it might not be that every online collection or every website is able to make a copy of an item, but that a reputable research collection is able to be established under the guidelines of fair use. So it would be a much more efficient way of looking at what is a reasonable and useful way of legislating the copying of materials rather than necessarily on an individual item basis.

For me the advantage of fair use is that it doesn't mean that anything can be copied willy nilly, it's about saying for reasonable purposes, for research and public policy purposes, certain organisations can be charged with ensuring that we have ongoing access to certain materials. Other materials where companies want to have copyright and sales of those materials, then the law also covers those things. So I guess the point is that it's flexible, but that doesn't mean inappropriate or completely open.

MR COPPEL: In your submission, Amanda, you give a use value in the order of \$30 to \$40 billion per year on grey literature.

MS LAWRENCE: Yes.

MR COPPEL: Can you explain how you get to that number?

5 **MS LAWRENCE:** Sure. So I was working with my colleagues, Julian Thomas and Professor John Houghton who is an economist and has done a lot of work in this area of valuing public access to - initially journal material and data and also now looking at grey literature. So what we did was we did three online surveys, a survey of users of information and research for policy and practice where we got 1000 respondents across
10 government, education, the NGO, civil society and commercial areas. We also did surveys of producing organisations and collecting organisations. And on the users many people - overall people suggested they were using grey literature at least 60 per cent of the time in their week, so that's a very high proportion of sort of annual salary costs. So we took - where
15 these users told us how much did they use material, how important was it for their work, and so we combined actual calculations of hours of work, average rates of pay, we brought it up to a national population of around 3.5 million professional people. We then reduced the number actually by about a third, presuming that the general level of interest would be a third,
20 two-thirds less than perhaps our community was suggesting.

MR COPPEL: That is just by assumption.

25 **MS LAWRENCE:** Yes, and then we combined that with the contingency valuation, so we asked people to estimate how much grey literature meant to them and how much they would be willing to pay and how much they would be willing to accept in return for not having access to grey literature. So it was a combination of those two methods and I can provide more details if you would like to know more about the whole
30 process.

MR COPPEL: In your opening remarks you mentioned two factors, one is sort of ignorance relating to public documents that are available online and the other linked to various obstacles you explained with respect to the
35 Copyright Act. Are you able to disentangle those two factors in terms of their contribution to more limited use or the value of use associated with these materials?

40 **MS LAWRENCE:** I'm not quite sure - - -

MR COPPEL: You mentioned there were two factors.

MS LAWRENCE: Yes.

45 **MR COPPEL:** One is the general sort of lack of appreciation that many

of these documents are available openly, and you also mentioned that there are factors which limit access due to the copyright laws and provisions. I'm just wondering whether you've got any idea of the relative importance of those two in terms of ability, or in terms of actual access of these sorts of materials?

MS LAWRENCE: Right, well we were able to ask people, for example, how much time they spent trying to find resources. Is that the sort of thing you mean?

MR COPPEL: It's an example, yes.

MS LAWRENCE: Yes. So for example people were estimating that they - I think it's about five or six hours a week on average that people were spending trying to find material that had gone missing. So while we do have Google and a lot of these materials are freely available online, you have the needle in the haystack sort of issue which is why - I mean, an individual can and does take copies of these materials. So even though that is also a breach of copyright, but that is generally - the general sort of behaviour of I think all of us, that we see something online and we take a copy for ourselves. And a collecting organisation is subject to that same copyright and they can't take that copy of that document without permission, and so they can't help those people who are spending hours and hours and hours trying to find the relevant material or something that has gone missing. So I guess that's where the connection is, to me is that we have a lot of resources, they are put online in order to be accessible.

People struggle - even with the material that is still there they struggle to find the relevant material, they struggle to find the high quality especially in the public policy area where I am mainly focussed, but equally it affects technical reports and so on, evaluations - incredibly difficult to find. So that's where then the connection is, our inability to effectively provide solutions to the wild west of online publishing, and that has a direct cost in terms of anybody pretty much engaged in some kind of professional position that requires finding information, especially reputable information, that that's having a cost in terms of time and access. I'm not sure if I've answered your question.

MR COPPEL: Partly, I think. May I just come back to a point that has been submitted to us with respect to fair use, that one of the factors or one of the illustrative uses should be Crown copyright as a fair use, which is not something we have explicitly in the report. Do you have any views on that in terms of providing greater access to what you call grey literature?

MS LAWRENCE: In terms of Government material?

MR COPPEL: Crown copyright, yes.

5 **MS LAWRENCE:** Government material is one of the biggest problems really. So everybody, and certainly engaged in public policy, what we found was all sectors of society are trying to find Government material, including Government itself, and while there have been memorandums to say - up to the Gov 2.0 Task Force that all Government material should be published as creative commons, in our experience at APO still a large
10 amount is not being explicitly published in that way and a large amount is explicitly being published all rights reserved for no explicable reason. So yes, I would certainly endorse - and I guess I was presuming that fair use would also cover that Crown copyright material. I mean, yes so I would certainly say that it's a key issue, is access to that sort of material.

15 **MR COPPEL:** Thank you.

MS CHESTER: An interpretation of various factors might get you there, but using the illustrative examples where we haven't yet identified Crown
20 copyright work may also - so we're looking at the relative merits of something along those lines.

MS LAWRENCE: Yes.

25 **MS CHESTER:** Amanda, you also in your opening remarks and in your submission to us supported draft recommendation 15.1 which is about all levels of Government to adopt open access policies for publicly funded research, but you have suggested some areas or nuances where we should expand upon that recommendation, and in particular you mentioned in
30 your opening remarks about any format.

MS LAWRENCE: Yes.

35 **MS CHESTER:** Are there other areas where our recommendation there is too narrow from your perspective and could you just elaborate on why?

MS LAWRENCE: You mean particularly with 15.1?

40 **MS CHESTER:** Yes.

MS LAWRENCE: Yes. I would support the submission made by the Australian National Data Service as well along these similar lines, and I guess the point is to avoid the problem we currently have which is product and format specific legislation. We know now what kinds of material - I
45 mean, we kind of know now what kinds of material but actually even now

I think we're - I mean, the point of my research is that we're not really cognisant of the range of resources that are now being produced online in so many different formats, and that's just in terms of publications. So we have a tendency to focus on traditional publications of books and journal articles, even though there's this huge other variety, but then there's data, a clearly exceptionally valuable area that is going to grow.

There's also videos, infographics, images, and who knows what might be coming with the creativity that is possible with the internet. So I guess my point would be we have to - in the research area, protocols, depending on what sort of discipline you're in there are all sorts of resources that you might want to make available, particularly with the movement for reproducibility and so on. I don't even know what the range of those materials are, and I think we must make sure that we are open both to the kinds of formats and to the method in which we store them. At the moment we live in a world where repository is the sort of term that's used - that may or may not be the future of digital curation so I would also be careful about how we prescribe the solution for the way in which those things should be stored.

So the principle of the recommendation I thoroughly agree with, it's ensuring we don't limit that again and find ourselves in the same situation in ten years' time saying well, we're not allowed to put these items into this other digital system we have because it says we need a repository, for example.

MS CHESTER: Okay, thank you. Did you have anything else? Amanda, that covers all the questions that we had for you this morning so thank you very much for your submission and for appearing.

MS LAWRENCE: Thank you.

MR COPPEL: Thank you.

MS LAWRENCE: Thank you very much for the opportunity.

MS CHESTER: You're welcome.

MS LAWRENCE: Terrific work.

MS CHESTER: I would like to ask our next participant to join us at the table, Paul Noonan.

MR NOONAN: Good morning.

MS CHESTER: Good morning, Paul. Once you have made yourself comfortable if you wouldn't mind just stating your name, the organisation you represent for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks.

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MR NOONAN: Sure, thank you.

MS CHESTER: And thank you for your submissions.

10 **MR NOONAN:** Thanks. So my name is Paul Noonan. I am on the board of Music Australia and I am appearing in that capacity as a board member. Music Australia, as you said, made a submission and so I'd like to speak around that as much as to it, briefly. So we are grateful that we've got this opportunity to speak to you. Music Australia is the peak
15 music organisation representing the Australian music community. We are Australia's representative to the International Music Council which is based at UNESCO headquarters in Paris. We are a 50 member national umbrella body and our membership and activities cover education in the community and the professional industry. We deliver campaigns,
20 information, resources, sector networking, community engagement, a national school music participation program called Music Count Us In, and demonstration projects and we also engage in advocacy. A number of our members have made separate submissions to this inquiry, both in the initial phase and in response to the draft report.

25

My expertise, and the reason I'm on the board, is that I am a copyright lawyer or intellectual property lawyer and also a professional musician, and was a professional musician for my entire income for a number of years up until the mid-90s when I graduated from Monash with
30 Law. I just mention that because I think that gives me some insights into the issues that you are examining that some other people may not have.

We really welcome this debate. We think it's important and we also want to be clear in acknowledging the role that the Commission and its
35 predecessor has had in developing and shaping the modern Australian economy. But - and there is a but, some significant buts - we've got some deep reservations about a number of the key recommendations that you would have seen from the submission. And I would just like to briefly touch on some of those now.

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The draft finding that the term of copyright should be between 15 and 25 years not surprisingly has caused a lot of agitation in sectors of our membership - I would say within the majority of them. We think we have given some compelling, if anecdotal, examples in our submission that
45 demonstrate that we don't think that the evidence that you considered

supports that sort of radical finding. And although those examples are anecdotal, we think they're easy to replicate and I could give you a personal example of something that has just come up that illustrates that in a personal way, but I won't go into that.

5

What we are concerned about is that although you have sought to clarify that finding, our view is that the rationale behind it demonstrates your philosophical approach to the subject and our view is that that actually is a mistaken view of the nature of copyright. We think you have taken an overly utilitarian approach that treats copyright works as though they're part of some sort of finite commons that needs to be carefully guarded in case someone or a group of rights holders get a corner of the market in a finite number of works, and we don't think that's how copyright works at all. It's the result of intellectual labour and craft, and it's personal property, and there really is no finite number of expressions of ideas. And to the extent that a particular idea can only be expressed in one way, it probably won't or most certainly won't be protected by copyright anyway. So we think this idea that a lot of the proponents of reform have got that there is a crisis because we're running out of expression or we're hampering innovation because people - because of the term of copyright is largely fallacious.

That is not to say that there aren't issues that clearly need to be addressed in the Act, and we have just heard an example of that. And the language of the Act is archaic in some respects. There are inconsistencies even within the current fair dealing and educational exception provisions that we accept should be addressed. But we think, given the nature of the subject matter and the fact that it is personal property, that change should be incremental and evidence based, and we don't think that that is a feature of some of the recommendations you have made.

I could illustrate that with the fair use recommendation. You have largely adopted the recommendation of the Law Reform Commission report and an unremarked feature of that report, which is very clearly stated in the executive summary if I could just quote, is that "around the world the need to quantify the contribution of copyright exceptions to non-core copyright industries, including interdependent and support industries, is under discussion. Stakeholders referred to the need for proper evidence before law reform is introduced, however the available economic evidence is incomplete and contested. The ALRC considers that, given it is unlikely that reliable empirical evidence will become available in the near future, law reform should proceed based on a hypothesis driven approach."

Now, we think that's really important because the exercise that the

ALRC undertook on their own submission is to recognise that they don't have empirical evidence but to come up with a hypothesis about what they think or what they thought was the best approach, and you've adopted that. We don't think that that's appropriate in a situation where copyright is personal property, it underpins business models that are very important in our economy. To introduce a radical change like fair use into a legal system that it is not adapted for we think is overreach. It would be overreaching and that the approach should be to address issues like the speaker before me raised by targeted exceptions to the general rule of the exclusive rights of the copyright owner.

The other benefit that that would have would be to give libraries, cultural institutions and others that we think have demonstrable issues the certainty that they really need that they can go about their business without being threatened with law suits. Which, by the way, is a justifiable concern in theory but practically is not something that really is a feature of our copyright landscape. People aren't being sued for digitising works in cultural institutions. People aren't being sued for forwarding emails despite the press releases being put out by some of the proponents of fair use. I don't know if I am overreaching myself on time here.

MS CHESTER: A tad, but that's okay.

MR NOONAN: Okay. So look, we think the fair use is something that should be approached with a great deal of caution. We don't think that the legal status of fair use in America even is at all settled. I have seen academic articles that have spoken about the different approaches that the different Federal Circuit Courts there are taking to the question. The clear expansion of the concept and scope of fair use over the last 20 years since the Campbell v Acuff decision is of concern, and we think that the way in which Google is taking advantage of fair use - and I think you will have other submissions from rights holders about concerns with Google's treatment of copyright works - we think that that is something that needs to be considered as well. And from a personal perspective I would submit that Google's role in this debate through organisations that it supports is something that you should, if you are not already, approach with some - I'm not sure what the word is - scepticism perhaps.

There are other things that we have dealt with in our submission and that other members of our organisation will deal with. I don't need to go into those in any detail here. If you have got questions that you would like to put to me I would be happy to try and answer them.

MS CHESTER: Thanks very much, Paul, for those opening remarks. I

thought it might be helpful just at the outset, particularly given that we have folk here and we are on transcript, just to make a few points of clarification. As you rightly point out, it was a finding and not a draft recommendation, around copyright term. Indeed we make no recommendation to change the term of copyright. The finding that you refer to is one where, based on ABS analysis and statistics - so this is data from the Australian economy and looking at the commercial life across all forms of copyright - that if you were to have an optimal term of copyright based on the commercial life of those works it would be 15 to 25 years, and that was the purpose of that finding, that observation. The Government asked us to look at the copyright arrangements and the intellectual property arrangements from the perspective of balancing the interests of a vast group of individuals from the creative rights holders through to follow on users and consumers, and that was really the motivation and the purpose there. But I don't think anyone has provided us with any evidence to challenge the methodology or the data underpinning the ABS statistics upon which we formed that view. I think a lot of people, like yourself, will cite outliers where the commercial life extends well beyond the average and that's something that we note in our report as well. There is a distribution around that 15 to 25 years.

MR NOONAN: Can I just say something with respect on that point, because I believe I have seen the section of the ABS report that you are referring to and I found it quite incredible that you could make that finding on the basis of the evidence that is referred to in that report because my understanding is, for example, for the film industry it was a book about making films, that the ABS did not even make any comment about who the author was or the expertise of the author. If that is the ABS information you are referring to then I just don't accept that it is credible evidence on which to base such a radical finding. But if I could also just say that one of the reasons this has caused such concern is that it's seen by rights holders, and particularly by authors, as an assault on something that is very precious to them, particularly in the case of authors. The fact that you say it's a finding and not a recommendation I don't think is something that should be really treated seriously because someone picking up a 600 page report and looking at the headline issues and recommendations and findings is quite entitled to treat that, from a Government body, as a serious thing. And many people would think that a finding by a Government body is actually more potentially binding than a recommendation. And I think that explains a lot of the angst that this is causing. And that, coupled with what I perceive to be a deficiency in the evidence - and I might be wrong about that because I haven't seen all of that ABS evidence - I just feel that you're probably getting a lot of this but I think that as a practitioner myself as well as a lawyer, that's where a lot of this is coming from. And I'm really picking up a lot of it in my

practice as a lawyer and in my position on the board of Music Australia. And I think it's a serious issue for you to consider, if I may say so.

5 **MS CHESTER:** And we have heard that loud and clear since the draft report was released, and it's a shame that a lot of people have relied on media reporting and not actually even looked at the executive summary of our report which made it very clear that, given our treaties and obligations, there is no way we could recommend a change to copyright term. But
10 anyway, let's park that issue because there's a few other issues that we probably need to work through. On the issue of the ABS statistics though, we are yet to receive any evidence of folk that have actually looked in detail at the original ABS work and challenged the methodology, but we would be more than happy to receive that evidence.

15 **MR NOONAN:** Okay.

MS CHESTER: And review that finding in the light of that. On the issue of fair use, we were able to benefit from a lot of the work that had been done by the ALRC, you are correct. Indeed, we have had legal
20 practitioners and academics that were involved in the ALRC work involved in our round tables and they have presented at our public hearings. I think one of the things that they did was bring a legal lens, being the ALRC. What we have tried to do now is look at fair dealing versus their use and bring an economic lens, and in doing so we found that
25 there was a case, using an economic lens, in moving from fair dealing to fair use largely because of the inability of fair dealing, because it's very prescriptive, in dealing with adaptability over time and did we have a substantive evidence base that suggests that as technology has changed that the fair dealing arrangements have not kept up with that pace. Indeed,
30 VCRs came in - by the time the legislation was changed ours was mothballed and in the attic. So you're right in saying though that the empirics have not been done, or where they have been done to date they've been very poorly done, and it's not a very easy area to lend quantitative analysis to. In fact, we need to do a cost benefit analysis.

35 **MR NOONAN:** No.

MS CHESTER: That said, a lot of those previous analyses have been commissioned by parties with particular interests and thus you can get
40 some interesting results. The Department of Communications has actually commissioned a cost benefit analysis and we are hoping that that will be made available to us before we finalise our report. And to some extent that would put us in the fortunate position of having had some form of an empiric analysis or quantitative analysis done and commissioned by an
45 independent party such as the Department of Communications. So we're

hoping that we will have that and be able to draw on that for our final report to Government.

MR NOONAN: Okay.

5

MS CHESTER: So address that issue for you.

MR NOONAN: Sure.

10 **MS CHESTER:** Turning then to the issue of fair use, maybe we could go through a few questions around that. Given we are kind of struggling in the world of trying to inject adaptability, governments have moved to principles based law as, given your legal background, you would be more than familiar with. Particularly a good example would be Australian consumer law. And a lot of folk have suggested to us that moving from fair dealing to fair use would actually increase uncertainty, and then we hear from others who say well actually it would increase predictability because at the moment a lot of the uncertainty with fair dealing comes from the fact that it doesn't deal with the changes in technology or the changes in business models and uses. Can you just sort of explain to us why you feel that fair use would be sort of systemically - would give rise to greater uncertainty than fair dealing, given we are sort of getting conflicting evidence on that?

25 **MR NOONAN:** Look, you're right about the difficulty of finding evidence in this, and I think the only way you can really do it is to go to the cases, and particularly some of the more recent ones in the US. And we have spoken in our submission, I think, about the Prince v Cariou case, the photographer whose work - artistic photographer whose work taking portraits of Rastafarians was appropriated by Richard Prince without consent and without remuneration, and Prince made thousands out of each painting, each appropriation, and the original author made I think royalties totalling \$8,000. We think that that actually encapsulates the uncertainty because there were 30 original photographs in the litigation. The Court at first instance found that the treatment wasn't fair use, and on appeal it was found that 25 of the 30 paintings were fair use and the other five weren't, and the consideration of those was remitted to the Lower Court. And that shows when you've got one appropriation artist dealing with a series of underlying works from the same photographer in the same series of works, the difficulty - what I feel personally, and so I haven't consulted our organisation about this - is that it's always a matter of where the boundary is, and there are always going to be these hard cases. And that really what you're doing is expanding the scope for uncertainty because you're taking away specific exceptions that are there for specific purposes, and opening up the whole field in a way that is bound to increase

uncertainty.

5 It is true that the Copyright Act has never really kept pace with technology, and I don't see that fair use is going to be a magic bullet for that. If the alternative is to have targeted exceptions that need to be adapted over time to deal with technological change, well then I think that's the price we may have to pay because that's how the Copyright Act has always worked and it's an imperfect system, but at least we know what it is and we know what needs to be done to make some of the fair dealing and educational exceptions work more effectively than they do at the moment.

15 I do think it comes back to this question of what your conception of copyright is. Is a copyright work just a widget, or is it something that's - and in some cases they are, and I think your report touched on that division between non-commercial or artistic merit works and those that don't have that merit but it's not really explored further in the draft report. I'm going off on a tangent here so I will - - -

20 **MS CHESTER:** Yes.

MR COPPEL: The report covers all forms of intellectual property and a common element with intellectual property is that there is that period of exclusivity that is granted to recompense the effort and the costs in the development and the creation of a work, whether it's a book or whether it may be a particular variety of plant, or whether it's a technological innovation. And then as a counterpart to that there's an understanding that after that period of exclusivity it would be in the public domain, there would be dissemination of the ideas that lie behind, in the case of a patent, the innovation so that it would have a broader public value. Those terms of exclusivity can range from ten years for a design to the life plus 70 for copyright, 20 for patents, 15 for plant breeder rights. And in your submission you seem to be suggesting that copyright is a bit different from that, that the notion of the property is one that potentially goes into perpetuity. Is that what you are advocating?

MR NOONAN: Our submission isn't that copyright should have a perpetual term. We did mention in passing that in considering the term you were prepared to make the radical finding that the term should be much reduced, but given your remit to conduct a root and branch review you have started at a point where you have just accepted the current approach and we were just pointing that you could have actually, if you wanted to be radical, examined whether or not copyright - whether there's a justification for a perpetual term, given the nature of the material in a lot of cases. We don't have a view on what the term should be. We were

really reacting to the radical - what we regard as a radical suggestion, finding that you made.

5 But just to take your first point, there's always been a distinction between the so-called industrial property rights of patents and designs and trademarks and intellectual property rights, or copyright. So I don't think that's anything new, and there's no reason why that distinction couldn't be explored. And there is a reason why the term of copyright is so much longer and always - well, not always but has in recent times been a lot longer than the other forms of intellectual property.

10 **MS CHESTER:** Paul, your submission also touched on the issue of statutory licensing arrangements, and again this might be an area where a point of clarification might be helpful. So in moving from our draft recommendation to move from fair dealing to fair use system with respect to the handling of copyright exceptions, we do not recommend any changes to the statutory licensing arrangements. We see them still continuing to operate in parallel to the fair use or fair dealing exception regime, dissimilar to the other countries which have been sort of confused with what we're recommending. So Canada, for example, remained with fair dealing but did make changes to educational licensing arrangements. So I guess I'm trying to get a better understanding of what your concerns might be around the licensing arrangements with a move to fair use, given we're not recommending any changes to the licensing arrangements?

25 **MR NOONAN:** That was really just - I think it was directed at the clarification that you have just made really. We didn't have particular concerns about that that we had considered in putting together our submission, it was just something we noted that I think the ALRC report was clearer about. And I suppose to the extent you're adopting the recommendations of that report then maybe we could have seen that.

35 **MS CHESTER:** Well, we do alter the ALRC recommendation slightly, although some have now suggested that sometimes lawyers do get things right and economists don't. So in terms of being able to better leverage off jurisprudence and how things have worked in other jurisdictions, I guess the fundamental issue though is to try to understand the concerns about fair use. Are there examples that you can point to of things that, from the perspective of your association, examples of works that are remunerable today under fair dealing that would not be remunerable under a system of fair use, given we're trying to take the principles of fair dealing and just put them - take the concepts of fair dealing and put them into a principles based system so they can adapt and evolve over time?

45 **MR NOONAN:** I think the example of hip hop music and use of

sampling might be one. There's a healthy hip hop culture in Australia and at one end of that movement there's some very commercially successful work being put out. With any of these things there are grey areas where perhaps remuneration that should be paid isn't being paid, but there is a clear culture of people licensing beats and samples for use by artists, and I understand in most cases that's done, particularly in the commercially successful areas, by the producer of the recording who is pretty much required to make sure that any beats and samples that are used are cleared and remuneration is paid where that is necessary. So I think the expansion - if fair use was introduced I think the tendency would be to regard that as an option that you could pursue, but that the likelihood would be, especially based on the jurisprudence that's coming out of the States, that you would not need to get a licence to use samples. And to the extent that samples are the underpinning of the work, or a recognisable section of a pre-existing work is used, and even if it's transformed, I don't see why the original composer or recording company or publisher shouldn't be remunerated for that.

And I think the concern is that what's happened in Canada in the education sector with the expansion of the fair dealing exceptions there would flow across into other areas if fair use was introduced. And we don't really accept the critique that you made of that PwC report. There's not time to go into that now, but we don't think that you have appropriately considered the experience there, and that some of the logic in that refutation in the breakout box doesn't stand up. I would be happy to follow up with that if you wanted.

MS CHESTER: And we would be happy to get some evidence from PwC to suggest that our challenges to their methodology don't stack up, but we're yet to receive anything that suggests that we have gotten that wrong.

MR NOONAN: Sure, okay.

MS CHESTER: But as I did mention earlier, we will have hopefully the benefit of an independently commissioned cost benefit analysis which - with perhaps some simple robust assumptions and methodology underpinning it.

MR NOONAN: So that's just one example. But could I just say this about fair use? I mean, it's been described - I don't know who by, but I saw recently as a solution in search of a problem. Now, there are clearly issues that need to be addressed with people's ability to access material in the digital realm and so on, but I'm a technology lawyer and I've had three clients base themselves in Silicon Valley and other parts of the US in

- the last couple of years. Not one of them has said we've got to get out of Australia because we don't have fair use. That issue has not even come into the radar. You can look back over the last six months and Fairfax has had a number of articles about innovative entrepreneurs basing themselves in the US. Not one of those people has mentioned copyright or even patents as a reason why they're going to the US. It's all about the market. It's all about access to capital. I really think there's some conflicted sort of concern being generated here by people who want fair use to be introduced for other reasons.
- MS CHESTER:** Fortunately our evidence base goes broader than those people that have issues around business models to sort of use as librarians, archivists, schools.
- MR NOONAN:** Absolutely, absolutely but dare I question whether fair use is the answer? I mean, you're bringing a sledge hammer in where what you probably need is a scalpel to address those people's concerns, because otherwise there's going to be litigation and that's great for me.
- MS CHESTER:** I think those might see it a little bit differently. I didn't have any - did you have any other questions?
- MR COPPEL:** No.
- MS CHESTER:** Paul, thank you very much. I think that covers all the questions we have for you this morning.
- MR NOONAN:** Okay, thank you.
- MS CHESTER:** Thanks very much for joining us.
- MR NOONAN:** And thanks for the opportunity.
- MS CHESTER:** You're welcome. I would like to call our next participant, Professor Andrew Christie, to join us. Good morning, Andrew.
- PROF CHRISTIE:** Good morning.
- MS CHESTER:** If you wouldn't mind just stating your name, the organisation that you represent for the purposes of the transcript recording, and then once you're comfortable if you'd also like to make some opening remarks.
- PROF CHRISTIE:** Thank you. Andrew Christie from Melbourne Law

School, University of Melbourne although I suspect strictly I'm here in my individual capacity. The Law School hasn't given me a mandate to speak on its behalf, nor the university. Look, thank you very much again for the chance to engage with the Commission. I have been privileged to
5 be involved pre issues paper, post issues paper and now post draft report and I'm very grateful for that. I will briefly focus on I think three matters. In principle every aspect of the report is fascinating, fundamentally important, challenging, difficult but unfortunately my day job isn't responding to every aspect so I will focus on three.

10
The first two are the two on which I made brief submissions to your issues paper, and I just want to make some brief observations about where you're at in the draft report. That is institutional arrangements and governance on the one hand, and compliance and enforcement on the
15 other. And then briefly I will turn to a third issue, one that is the subject matter of a submission I made recently to the draft report, which came late so you may not have had a chance to see that. If you haven't I will sketch it for you. If you have seen it I will just talk about that.

20 Firstly, on institutional arrangements and governance I am very encouraged by the Commission's current position. I share the concerns that it has about the lack of a champion, about the lack of separation of policy administration, about the lack of expert independent input - not economic in general - and about the need for oversight of IP Australia. So
25 where you put them up as four possible matters to address, I would suggest you address them all. If I can just use, at the risk of sounding as if I'm trivialising and I don't mean to in any way, but to highlight the significance here that I think you would see but maybe not everyone would - we know that with respect to patents 90 per cent plus are foreign
30 owned. There's nothing inherently wrong with that, but if 90 per cent of our real property in Australia was foreign owned that might be seen as something that required some additional review and oversight.

Now, in real property and investment we have a Foreign Investment
35 Review Board which occasionally seeks to act in the public interest to change the market settings, if I can put it that way. There is absolutely no equivalent in intellectual property. And if intellectual property is the 21st and 22nd and 23rd (inaudible) version of real property, I wonder if we have indeed enough oversight. I'm not suggesting we need a Foreign
40 Investment Review Board for intellectual property, but I am suggesting that we need to think about what are the sorts of additional oversight we would have, given the significance of IP and the fact that, amongst other things, it's incredibly foreign owned. That is not inherently bad, but it does I think cause us concern about whether we're looking at the matter
45 fully.

On the Commission's draft report statement about compliance and enforcement I candidly have to say I am less enthusiastic. Put bluntly, I fear, as the Americans would say, you have drunk the Kool Aid of lawyers. Now, I'm a lawyer and I'm not offering you their Kool Aid. The reality is that lawyers involved in litigation are thoroughly understanding of the system and they know its strengths and weaknesses, and they can recognise that change might be required but unfortunately, and it's a human characteristic, they are unable to break out of the paradigm. Their recommendations for change will be from within. Let's tweak this. Let's have slightly greater expertise. Let's have a national system here. Let's have a this, that and the other. All of which will tweak and assist, with litigation. The trouble is litigation is the problem itself. It's fine if you've got a very high value intellectual property asset that you need to have determination about where the matter is roughly 50/50. Litigation is basically about resolving 50/50 matters. The trouble is the vast majority of intellectual property, either alleged infringements or inappropriately alleged infringements, aren't 50/50 and yet our legal system doesn't easily or at all provide a mechanism for those types of matters to be dealt with.

In essence, what we're told is we have a Rolls Royce system called the Federal Court. You go there. The starting price will be \$200,000 minimum. That's just a fact. It's just an absolute fact. That's just your starting price. Take it from there. \$400,000, and then you might be up for costs of the other side, et cetera, et cetera. It is simply not appropriate. And I have to confess that I saw the draft recommendations which were that it's basically fine, leave it to the Federal Court to keep modifying its procedures. We don't need anything else. I vigorously disagree with it. I have heard those lines and I've been on the Law Council of Australia for a long, long time. I'm a practising lawyer as well as an academic. I've been involved in litigation and still am. I've heard those lines from the Federal Court and others for decades, and we're in a situation that's not vastly different, if at all, from what we were decades ago.

So my exhortation to the Commission is to recognise that some sort of radical circuit breaker is required. I would suggest set up, or recommend that Australia look at how it could set up some alternatives, not take away jurisdiction from any court. Look at alternatives and let the market decide. And if small players decide they want to go to the Federal Court at \$200,000 to \$500,000 plus, let them. If they decide that there is some other better way of having their disputes resolved that has validity and enforceability, let's see that happen.

So my summary is, with respect, I think the Commission has listened

too hard to those who would say the Federal Court is fine, we just need to tweak, and I think something vastly more radical is required. On the matter in which my initial submission didn't address but which my subsequent submission has, that is to say patents and pharmaceutical patents - so this goes to both chapter 9 and chapter 6 - I've had the chance to send you some data which you may or may not find useful. I take it you probably haven't had a chance to look at that, is that the case, in which case I will sketch it for you?

10 **MR COPPEL:** I haven't, no.

PROF CHRISTIE: So one lot of data which is now publicly available, and certainly I made it publicly available to the Commission yesterday, explores how patent examination works in three jurisdictions - Australia, the European Patent Office and the United States, USPTO. Basically we take 500 patents that have identical claim one going into examination. The claim is identical in all three jurisdictions. We observe what change examination makes to that claim. We have a typology classification. You can read the methodology at your leisure. We observe how often the claim is amended as a result of examination. And of course you can't amend a claim to expand its scope. There are only two ways you can amend a claim, to narrow its scope or to fundamentally change it. What we observe in all offices is the court - and not surprisingly the examination does have effect, more often than not the claim that is granted is different from the claim that was sought and most of the time that difference is a narrower claim.

The significance of the study is that we observed that Australia narrows claims upon examination much less than Europe and much less again than the US. And this is statistically significant, so it's observable. The facts are Australia amends 57 per cent of the time, the EPO 68 per cent of the time, USPTO 79 per cent of the time. Statistical tests tell us that's a real difference, not a fanciful one.

Therefore if you take the view, as most commentators do, that if there's a problem with patents being granted it's that they're too wide, not that they're too narrow - and I think you won't find people saying the problem with the patent system is we don't grant patents wide enough - so if the problem is the patents are granted too wide rather than too narrow, and if that is seen as a measure of quality, if your definition of quality includes let's not grant patents that are too wide, then the data clearly suggests that Australia is the laggard here. It is significantly under modifying claims upon examination and hence if you adopt those assumptions I made a moment ago you would conclude that Australia's examination lacks quality. Now, there is plenty of people around who say

that, but I think this data would show it in a rigorous way.

5 It also shows through logic and observation that what's happening here, again not totally surprisingly, is that the prior art grounds are driving change, narrowing of claims in Europe and the US much more than they do in Australia. You focussed, and I will come to this in a moment, on inventive step. I would exhort you to not forget novelty. In fact there is another study which I haven't even made reference to in my submission which will come out in due course, but it looks as though novelty is
10 equally as important in those other jurisdictions in narrowing claims, as is inventive step. So not just focus on inventive step, but think about novelty I think would be the message from that study.

15 And the second study that I have sent you is the second phase to the so-called Evergreen Study. You are familiar, of course, with the first phase. I know that. The second phase looks solely at secondary patents. The first phase looked at all patents. Now we just take the subset of the secondary patents and we use two - we will look at two characteristics. Duration of patent grant, i.e. how often it's renewed. We do that because,
20 and you will be familiar, it can be seen as a proxy for private value. A patentee logically will hold a patent for longer the more private value it has. And we look also at when the secondary patents were sought - timing. Because, as you also know, application for a patent - and these are all granted patents in the end, these aren't spurious applications -
25 application for a patent is a proxy for innovation occurring. People don't apply for a patent unless they think they have innovated.

On duration what we found is - so this is for the same 15 high cost drugs that you are familiar with - that the secondary patents are held for
30 longer, statistically significantly longer, by the API originator than by the other two categories of patent owner, which is the other originator - you can conceive that to be the other big farmer - and non-originator. You can conceive that to be research institute, generic, whomever. Which suggests that the private value of the secondary patents surrounding the high cost
35 drugs is greater to the API originator. Now, that may not be surprising. There's all sorts of potential reasons for that, but it does confirm. So the extent to which you are concerned about secondary patents - brackets, I'm not sure you should be - but to the extent to which you are, you would I think conclude the data shows these secondary patents have higher private
40 value to the API originator. These are the so-called evergreen - that's what other people would call them.

On timing we observed that all categories of patent owner, the API originator, other originator and non-originator, apply for patents at all
45 stages during the life of the API patent. There is absolutely no sense in

which the original patent blocks innovation. It doesn't block because they innovate and they apply for patents. So even non-originators applying for patents well before - the patents that surround the drug well before the original patent on the drug expires. So there's no sense in which there is blocking by the API patent. That's logical, but data now confirms it.

So we looked at timing in terms of API expiration, patents applied for before, at and after expiration of the API patent by all categories of owner. Then we looked at that timing with respect to Therapeutic Goods Administration approval, the ability to bring the API to the market, and what we saw there, probably not surprising, is the API originator applies for its secondary patents at all stages during the life of the drug, including before TGA approval, but the other two categories not surprisingly don't. Why? Because there's no sense in which you're going to have a ready market for your secondary innovation until you know the primary innovation is going to be going on the market. So you might say all of this is intuitive, which I think it is, but the data confirms it.

I think the policy conclusions, or the conclusions of the policy makers about that data are that secondary patents have greater private value to API originators than others. Is that a problem? I don't think so. It seems logical but you would observe that. Secondly, API patents - and this is prior to having a clear experimental use defence in Australian law - does not block innovation. So no sense in which these patents are stopping others innovating. And thirdly, that if you wanted to speed up the bringing of secondary innovations to the market by those other than the API originator, one of the key things you could do is speed up Therapeutic Goods Administration approval, i.e. speed up market approval because once market approval is given that's a signal to others you innovate around and that's what we see. They are my comments.

MS CHESTER: Thanks very much, Andrew. I might start with your second point first, which is around enforcement, and maybe a helpful point of clarification so you don't go away today feeling that we have sucked the Kool Aid of only one stakeholder group. So we did make a finding with respect to enforcement, but there were also a couple of very important information requests in our draft report. Jonathan and I and the team were very mindful that we actually wanted to go and have a look at international jurisdictions, and indeed we have done that since our draft report. So we have gone across the great pond and we've had a look at what's happening with enforcement, particularly in the UK, also in Germany and we were very fortunate to meet with Judge Hacon, who is the judge who is running the IP Enterprise Court in the UK which is sort of the low cost stream of dealing with IP matters. So I just thought I would mention that first.

5 In that regard then, if we were looking at alternative mechanisms
within the Australian court system to, as you say, not the 50/50 cases but
maybe the 70/30 cases or 80/20 cases, to have access to a lower cost
enforcement or litigation outcome, it would be good to get your thoughts
and feedback on transplanting the IP Enterprise Court model in some way,
shape or form to the Australian system, and in particular we're trying to
give some thought as to if we were to do something like that which court
would it best belong in. And this is an area where we're sort of weighing
up pros and cons of you've got a lot of good justices in the Federal Court
that have a lot of detailed and long standing IP expertise but a high cost
DNA. In the Federal Circuit Court perhaps you don't have the immediate
expertise in the justices there but you do have a low cost DNA. So it
would be good to get your thoughts and feedback on that.

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PROF CHRISTIE: I think yes, I certainly do. I had the pleasure and the
privilege of bringing Justice Birss here last year to speak exactly about all
that, and so not only did I hear him speak about it three times when I took
him around Australia but I also spoke with him privately as well, so very
familiar. So the short answer is I think we definitely should be trying to
transplant IPEC to Australia. I can't see any downside. Yes, we're a
smaller market. Yes, the number of cases will be smaller presumably,
although there's always that sense in which - it's a bit like build it and
they will come. If you offer people a chance to resolve their disputes, if
they want litigation to do it - I will come back to it's not always the case -
then at the moment a large number just simply can't take advantage of
that. Presumably there's this below the tip of iceberg litigants, potential
litigants, who would.

30 In which court should it reside? I think the UK experience suggests
that not putting it in the superior court - they had a couple of goes at this,
as you know, two or three times. The third time around they got it right. I
think we can learn from that. Not putting it in the superior court makes
sense, but the problem is it was difficult to attract a high quality calibre of
person. Before Judge Hacon it was Judge Birss, now Justice Birss - and
Justice Birss said publicly and also privately that the only reason he took
the job was because it was made clear to him that the potential for him to
advance up the judicial ladder was not precluded by taking this job. And I
think that would need to be made clear.

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Yes, there's plenty of knowledgeable judges on the Federal Court
who deal with IP matters. There's also plenty who are cutting their teeth,
if I can put it that way, at any one time. Who didn't come to the Bar with
IP in their DNA. But there's plenty of capable people who aren't on any
court at the moment who could, I think, do the excellent job that Justice

Birss and now Justice Hacon are doing. I don't think you should be concerned about Australia having a lack of ability to provide at least one person who could radically reform IP litigation in Australia. I'm sure we could find such a person.

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My related observation is but don't think just about litigation. That solves the litigation side. Many times people have disputes and just want to know, get an outcome, and it doesn't even have to be a binding observation. Litigation is binding. It's great, determinative, final so long as you exhaust all your appeals. It's final eventually. ACIP in its post-grant patent enforcement review suggested some additional mechanisms that could be considered. They included non-binding tribunal determinations. A lot of lawyers said to me, "If it's non-binding why would you go there?" And I said, "Let the disputants decide. Do they need a binding decision or do they just want a decision that they can go wise people have told us this is the position." And with costs enforcement issues if you then decided to ignore that and go to court. We can be creative. There's all sorts of options here.

20 **MR COPPEL:** Is that different from arbitration or mediation?

PROF CHRISTIE: Yes it is, because arbitration is binding.

25 **MR COPPEL:** Mediation is binding?

PROF CHRISTIE: Mediation is non-compulsory but binding. Once you've had a successful mediation you sign a settlement deed. Arbitration is binding because you've gone there under a contract saying that we agree to have this arbitrated and it's binding and enforceable by courts. Don't think arbitration is your solution to litigation. Arbitration is privatised litigation. It can be as long and as expensive as litigation. I know this. I'm involved in this as well. I am exhorting us all to think about additional mechanisms that can be brought to bear. So I'm not saying it's the only set of solutions, but solutions were canvassed and discussed in some detail in the ACIP report, and they are about including non-binding determinations.

They are also about having, if you like, the shop front, the first port of call for the very uninformed disputant, which is IP Australia itself stop saying "nothing to do with us". IP Australia says, "we grant the rights, nothing to do with us whether in fact you can enforce them in any meaningful way." Now, I won't be facetious. Countries that have a relatively decent legal system and rule of law like the United Kingdom have decided that their shop front, their IP office, rightly has to provide assistance with resolving disputes. They have the ability to have internal

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expert determinations made so that potential disputants can see actually yes, I can see what's going on. I'm fine now. I would encourage us all to include that in our deliberations as well.

5 So to summarise, litigation must always be an option and remain there. It's just that we don't have a very attractive version of that for most potential disputants. We want litigation. IPEC provides a very good model. Secondly, we should look at in addition, complementary, other mechanisms for disputants to have their disputes resolved. They can be
10 non-binding, expert determinations that are just determinations. They can be done through IP Australia. They can be separate from IP Australia, facilitated by IP Australia. The UK has this. Singapore has this. Australia seems to think that it doesn't need it. I would disagree.

15 **MS CHESTER:** Thanks Andrew, that's helpful. Turning then to your first issue which is the - and we haven't had a lot of submissions or evidence around this - but I guess from our perspective a lot of people might glaze over when we say governance matters but if we look at what happened with competition policy back in the late '80s and early '90s
20 perhaps the most enduring changes that Government made there were actually getting the governance and policy settings right for competition policy. You have touched on a couple of issues. I guess we might look at it as a bit of a triage. So firstly there's the issue of policy consolidation. So at the moment we have a fragmentation of policy advice across
25 intellectual property matters. We have copyright in Comms. We're meant to have much of the rest of IP arrangements within the Department of Industry, Innovation and Science but we also know that IP Australia is actually pretty much at the forefront of policy advice and policy consultation as well. So firstly on the issue of fragmentation versus
30 consolidation, it would be good to get your thoughts on that?

PROF CHRISTIE: Okay, yes. So I stick by my original submission, brief as it was, for the issues paper which said that I thought that it was not coincidental that we've had in copyright, for example, sub-optimal, to put
35 it politely, policy making given where it rested and in a moribund portfolio that removed all expertise from the matter, taking the view that a generalist can deal with anything. And this is unfortunately, I think, not true with intellectual property. It will be interesting in the Chinese sense of the word to see how it goes now it is wholly in communication and the
40 arts. I observed the submission made by them. It was incredibly light, brief, and I think it reflects their ability to get their head around what responsibilities they actually have. A lot of people didn't even know it had changed, and I think it's the Australian Copyright Council says in its submission something like well, we can't even find out who is dealing
45 with it. I know the Law Council of Australia can't actually work out

which person you would actually call if you wanted to talk with them about copyright. So copyright is a basket case in terms of its policy administration. I don't think I should mince my words about that.

5 My concern about industrial property rights is actually that we don't have a holistic view, so I think it is actually important that there be expertise that is across copyright and industrial property rights. They do overlap. You are concerned about protection for software, for example. That's the traditional example of overlap between copyright and patents.
10 There are many others, that's just the headline one or one of them. It's not about administration as such. It's about policy making. Now, there isn't that much administration required of copyright. It's predominantly policy determination. Yes, we've got collecting societies that need to be regulated, et cetera. So in fact the consolidation needs to be at the policy
15 level, and I think there is no downside to trying to put expertise about IP in one place. At the moment with the greatest respect I think it only resides in one place, and that is IP Australia, and there are challenges there because of the divide, or lack of divide between administration and policy making.

20 The Industry Department itself, I had the pleasure ten years ago of going up to speak to then I think it was a three member team. There's no point in mincing words. I was struck by the fact that they hardly even knew what they were supposed to be doing, let alone be able to tell me.
25 No idea at all. I never bothered going back to the department, go straight to IP Australia if there's anything I need to deal with. That is because the only people who understand it are there. They're not necessarily wanting to accrete all power to themselves as some evil monster, but you do need to understand this stuff and basically that's where the only people are in
30 Canberra who do understand it live.

MR COPPEL: Can you elaborate on - you mentioned there are challenges with IP Australia being both the administrator and the policy adviser? Can you elaborate on those challenges?

35 **PROF CHRISTIE:** I can, but I agree with the way you have sketched it out in your draft report. So have I observed challenges, actual ones? So the theory is there, fine. Look, I think I have because it uses the slightly pejorative, and I don't think it is a pejorative thing I have captured, but IP
40 Australia is very focussed on how you do examination and it's not that focussed on - and yet it needs to be because the policy expertise on this issue doesn't reside elsewhere - is on whether they're examining - and not examining the right way, but whether the things they're being asked to examine are the right things. So to put it crudely, IP Australia is very
45 good at reacting. It's very good at reacting to the High Court's decision in

Myriad and modifying its examination guidelines, okay. What was it doing for the last 20 years on that? Well, of course it was examining under the law as it stood, absolutely. Who was getting the law in Australia sorted out on that? Nobody until Yvonne D'Arcy and Cancer
5 Voices decided to pitch in and do it on behalf of the public. Where was the equivalent of the environmental defender there? Who is the IP defender here? If gene patents are such a problem, and I'm not sure they were that much in practice, but if they are - they certainly generate a lot of heat - who was doing the defending? Nobody. IP Australia certainly
10 couldn't because it was examining exactly the way it thought it had to. That's a real example.

Modified slightly with now the other currently contentious issue in patenting which of course is computer implemented inventions. We have
15 been doing this for at least 25, 30 years the same way we're doing now. This time IP Australia finally thought, actually we've got to do something about this. So it rejected the application then fought the matter through first instance and then Full Court. Now, that's good but a lot of people would say I'm not quite sure the Patent Office should be fighting on
20 matters of legal principle when it struggles - whilst at the same time it has to apply them in an administrative way. So I think we can see with gene patents at least the problem with having the policy expertise reside with the administrator is sometimes the inability to recognise whether what they're administering now needs some policy review, is how I would put it.
25

MS CHESTER: Okay. So that then leaves us as we go through the triage of good policy governance around intellectual property arrangements to where should it belong? Where will we find the right
30 government agency separate to the administrator who will bring the right lens to good policy making for intellectual property arrangements?

PROF CHRISTIE: Well, I don't claim all wisdom here so I don't say look, you must do what I suggest I'm sure it's right. I would simply - I
35 have some casual views about it, if I can put it that way. My casual thinking is that first and foremost what matters is you actually have to have the expertise there. Secondly, to get the expertise you have to resource it. Now, it makes a lot of sense to have the expertise in IP Australia because it generates lots of revenue, a couple of hundred
40 million dollars a year. You can easily fund lots of policy people with that. But you don't need them too close. I know IP Australia are separating it out. My casual observation is along the lines of I suspect the industry portfolio which has a - to which IP Australia is an administrative agency, but in the policy making portfolio. It should be easier to transfer the
45 expertise there and presumably transfer the revenue required to support

the expertise if you're all in the one portfolio. But that's not my area of expertise. I don't claim great wisdom there. That's my casual thought.

5 **MS CHESTER:** The other issue that you have raised around governance that we didn't go into in much detail in our draft report, Andrew, was around who is oversighting the administrator and it's quite a unique arrangement. It's not an independent statutory authority or agency like our other rights administrators, or sorry, our other regulators. So is that an issue that you have given some thought about? Is it the way that we've
10 sort of legally structured IP Australia that has implications for what sort of oversight it's subject to?

15 **PROF CHRISTIE:** Look, yes given some thought but again I would just insert the caveat I don't claim that this is based on great data or knowledge or expertise. It's casual views, for what it's worth. But I've been in the space for a good couple of decades. Let me answer by saying this. So I was appointed to the Advisory Council on Intellectual Property for a total of eight years and one of the notional responsibilities of ACIP was oversight of IP Australia. Now, it never actually was able to discharge that for structural reasons, which I can explain in a minute. But when I was on ACIP and we were doing all our, I like to think, good work at the micro level I was always thinking about but we are supposed to be oversighting IP Australia more generally, and we weren't. Now, why weren't we? Well, because we were completely resourced by IP
20 Australia. The Secretariat came from IP Australia. All the funding for ACIP came from IP Australia. All the directions from the Minister to ACIP first came from IP Australia to the Minister, down to ACIP. The response went from ACIP to the Minister. The Minister handed it back to IP Australia to draft the Minister's response, back to - it was - it's not a
25 charade. I mean, I have the highest respect for IP Australia. Don't get me wrong, I really do think it's an excellent office. But I'm sitting there thinking I'm not sure if this is right on the oversight bit. So firstly we don't have it. We didn't even have it when we notionally had it, and we certainly don't have it now. And it troubled me, and I think that we
30 should have it.
35

How would you structure that? I am open. I'm not a - on the one hand I'm not a big fan of statutory things because they're very hard to get rid of when they turn out to be wrong or past their use by date, but on the
40 other hand statutory things give you that independence and that extra resource, that ability not to be just an arm of the person you're oversighting. So I think serious thought needs to be given to that. So I don't have the model, but I just have the exhortation because I hear this a lot, "Oh, it will cost." Yes, that's true. It will absolutely cost. It might
45 actually cost quite a bit. But you know what? The cost of not doing it,

not regulating, not oversighting is potentially vastly, vastly greater. And that's my response to people who say that it will cost.

5 **MS CHESTER:** We might turn to patents and your more recent research
looking at patent examination across several jurisdictions which is very
timely for us given we're looking to finalise our report. And here I guess
it would be helpful if we could sort of try to bundle the point that you
make about what happens during the examination process and the
potential to narrow the scope of the patent as a potential measure or a
10 proxy measure of quality. If you're looking at what are then the
characteristics in Australia's jurisdiction that are resulting in that
structural difference in what happens through that examination process -
we can look at the law being applied. You mentioned prior arts and
novelty. I guess we've been focussed very much on the issue of
15 obviousness in terms of whether we depart from the EU threshold for
granting a patent. So there's the issue of the examiner applying the law.
Then there's the examination process itself and the timelines and how
that's resourced, and I guess I'm just trying to work out what
characteristics are there about the Australian system apart from the
20 differential in our patent thresholds legislatively that might be driving
these examination outcomes?

PROF CHRISTIE: Okay, so the paper that I have summarised in the
submission because that paper is not published would say the following.
25 It would say that you're absolutely right, that examination is driving the
difference in outcome. That's all it's driving. It's exactly the same claim
going in, it's exactly the same patentee. It's the examination office that
drives the difference. Logically it can only be two things that are driving
the difference. A difference in the law and then a difference in the
30 practice of the office in examining. The law you're making comments
about in your suggestions for changing inventive step, which largely I am
in agreement with, I would simply add that there's another study which I
haven't even summarised for you in the paper, it's still in progress,
suggests that novelty is as nearly as important as inventive step. It would
35 seem possibly more so.

 Now, that then suggests the other side of the equation from the law is
also the practice, and that has two features. The procedure and also the
rigour, if I can put it that way. The procedure being how do you actually
40 do things in the office. The rigour being with what level of height, if you
like. On procedure, the second work in progress study that I haven't made
reference to in the written submission strongly suggests that searching is
actually the problem here. Now, I know that it's true and IP Australia will
rightly say they have now moved - because this is using data from the
45 mid-2000s, late 2000s - moved to paying attention to other office's

searches, which is absolutely sensible. They benchmark et cetera, et cetera. So I can accept that they have improved, but it was absolutely necessary to do so because the data was suggesting that they weren't even identifying as much prior data as the other offices were. If you don't
5 identify it then of course your novelty and inventive step application is going to be different.

And possibly the rigour, and the rigour does go back to your law point. But you can actually write into the legislation changes, but it has to
10 be applied if that's what you want. And I thought the way you put it in your draft report was quite good, that is to say you were making suggestions about improving inventive step and then you're exhorting the office to make sure it actually follows it. And I think you're absolutely right because there is that bifurcation as well between the law and the
15 application of the law.

So the short answer - the medium answer to your question is I think it's all. It's the actual legislation. It's the procedure within the office, especially searching for prior art, and it is the rigour of application of the
20 procedure and the law within the office.

MR COPPEL: You mentioned that the procedures have since changed from the data that you used and the law has also since changed, the raising the bar act. Do you have any idea as to the impact that the raising the bar
25 act will have on those findings?

PROF CHRISTIE: Thank you, it's an excellent question and I offer the following observation. I have no data. I have only intuition. Where does this intuition come from? It's reading patents, reading decisions, reading
30 examiners' decisions, Hearing Office decisions, reading court cases, teaching this stuff, trying to know it back to front. My intuition is no. My intuition is no, it won't. So no. Why not? Because in some respects I think you're focussing on the wrong thing. I think this obsession with inventive step is somewhat misguided. Think about novelty, as I have
35 exhorted, because the data on examination, albeit on earlier sets of patents, suggested that was equally important for why Australia produces less change, narrows less. But also think about the other levers that you have that aren't prior art based. Utility, for example. Now, raising the bar has changed utility but has it actually changed it in a way that's going to have
40 an effect that those who want narrower patents would want it to have? We see in Canada at the moment that it's going to their highest court, an issue about well does utility bring within it some concept of a promise of what the invention is going to do. That's a social value promise. To be honest I don't think the raising the bar changes to utility will bring any of that
45 whatsoever. Specific, substantial and credible. Nothing about a social

utility promise.

5 So I'm not asking or suggesting you should pull those levers. I'm not sure there's that much wrong with our patent examination other than we seem to do it differently from other offices. But I'm just saying to you as a matter of logic if you want to pull levers don't just focus on inventive step, (a) because I don't think the significance of the change is that great, and (b) it's not the only one, and possibly it's one of the ones that doesn't quite have the focus that you want it to have.

10 **MS CHESTER:** So Andrew, if I am interpreting your commentary you are saying it has a lot to do with the underlying characteristics and the nature of examination in Australia. You mentioned in our draft report we sort of exhort the examiners of IP Australia to implement in their examination process the amendments that we're suggesting to the patent threshold. What else should we be doing to make sure that the examination processes in Australia match those characteristics that you have seen in the other international jurisdictions?

20 **PROF CHRISTIE:** Look, possibly only two things, one of which I am sure does happen well in IP Australia and one of which we have already touched on and I don't think happens at all. So IP Australia I am sure does great internal benchmarking quality control, et cetera. I have no doubt that it is a quality agency. And don't get me wrong, it's not a - I don't doubt that one iota. But the issue of them checking, whether they're checking for the right thing in the right way - they might say yes, we're doing it exactly as we've been exhorted by the policy makers to do it but once you're in there doing it it's so much different from when you're standing back. It's easy for someone like me to stand back and draw observations. That's what I'm supposed to do when I'm not in doing the micro stuff. When I'm doing the micro stuff it's hard for me to get the bigger picture and others have to critique me on that.

35 So I think the short answer is the way you're approaching it, which includes recommending an objective statement in the legislation, putting all of that - making clear to everybody this is solely policy based - sometimes practitioners - I can be guilty of this sometimes myself - forget why we're doing this. We're so caught up in the doing of it, we know the intricacies of patent law and trademarks and copyright so well, all the nuances, we actually forget why we're doing this. It's as though it's a God-given thing that must be done this way and it always has and always shall be. But I think the way you're trying to say to all stakeholders, just remember there's a reason why we're doing this and it isn't necessarily what you think it is - that's a start. Putting in an objective statement in the legislation makes sense. Exhorting in other ways makes sense. And

having oversight of those who are doing it makes sense. So I would add to your list the thing that we've already touched upon about oversight.

5 **MS CHESTER:** Andrew, if I could be cheeky enough to add something to your homework list, given your propensity to be helpful with submissions to us, IP Australia like other Government agencies is now required under the PGPA to have a new sort of performance management framework, and particularly as a pseudo regulator there are some additional requirements there. It would be good to think of, if we're
10 looking at that performance framework going forward in a meaningful sense, what would you want to see in that performance framework to make sure that they're having quality patent examination, contemporary best international practice? Because maybe that's one area we could look at being helpful there.

15 **PROF CHRISTIE:** Okay, I will do my best.

20 **MS CHESTER:** Thank you. Did you have any questions? Andrew, that's all the questions that we have for you this morning and I do appreciate the submissions that you have provided us and the help, the pre-issues paper and in the round tables. Thank you.

PROF CHRISTIE: You're welcome.

25 **MR COPPEL:** Thank you.

MS CHESTER: I would like to call our next participant to join us, Jack Burton, Daniel Jitnah and Paul Foxworthy. Good morning and welcome. Thank you very much for joining us this morning and for your submission
30 to our inquiry. If I could just get each of you to state the name and the organisation that you represent in turn for the purposes of the transcript, and then if one of you would like to make some brief opening remarks that would be great.

35 **MR BURTON:** Sure. My name is Jack Burton. I am the chairman at Open Source Industry Australia, OSIA for short.

MR FOXWORTHY: I am Paul Foxworthy. I am a director of Open Source Industry Australia.
40

MR JITNAH: I am Daniel Jitnah. I am also one of the directors of the Open Source Industry.

45 **MR BURTON:** Thank you. Open Source Industry Australia, or OSIA as I will refer to it, is the industry body for open source software companies

in Australia. We exist to amplify the voice of the Australian open source software industry. I would like to begin today by thanking the Productivity Commission for this further opportunity to engage with the inquiry, and OSIA commends the Commission on what we see as the highly rational approach it has taken to the present inquiry to date, which we note stands in stark contrast to certain other IP reform processes we have seen elsewhere in the past.

By far the most important element of getting IP policy settings right is achieving the correct or the optimal balance, that is to say balancing the public interest in encouraging the creation of more new and useful works and inventions, which some argue calls for more restrictive IP regimes, against the public interest in maximising the dissemination of those new and useful works, which undoubtedly calls for more permissive IP regimes. Now, that message of balance came through loud and clear in the Commission's draft report and it's a message that we very much welcome at OSIA.

Our members' present concerns in relation to IP policy are chiefly in three areas, and those are patents on computer software, technological protection measures, or TPMs, and the negotiation of international treaties. Software patents stifle innovation and discriminate against open source software. The double regulation of computer software via patents and copyright in parallel is particularly inefficient. We support the Commission's desire, as expressed in your draft recommendation 8.1, to remove computer software from the scope of patentable subject matter. And we contend that the most efficient and effective way of doing so is by amending the Patents Act to provide that no copyrightable work may be patented.

In relation to TPMs, we note that prohibitions on the circumvention of TPMs have no possible public policy purpose. Infringement of copyright should, of course, be actionable and indeed already is, but incidental acts such as the circumvention of TPMs should not be prohibited. Not in general terms but especially not when the act of circumvention does not infringe on copyright. We support the Commission's desire as expressed in its draft recommendation 5.1 to ensure that Australians are free to circumvent geoblocking TPMs, but we seek to extend that freedom to the circumvention of all TPMs.

In relation to treaties, Australia's present processes for the negotiation of international treaties are, in our opinion, irretrievably broken. We support the Commission's desire as expressed in your draft finding 16.1 and in the comments leading to your information request 16.3, to see new improved processes for treaty negotiation put in place with a focus on

complete transparency, negotiation in good faith, and the development of model provisions for IP that are in the best interest of Australia's citizens and industry. The Commonwealth Government should not ratify TPP. The Commonwealth Government should never again negotiate in secret
5 nor ever again accept IP or ISDS provisions in what are supposed to be trade treaties, nor ever again, as was the case in TPP, accept a negotiation process that is actively discriminatory against Australian industry in favour of foreign interests.

10 OSIA stands behind everything we said, both in our initial submission to the inquiry back in November and in our final submission of three weeks ago, and Mr Foxworthy, Mr Jitnah and myself are happy to take questions on anything and everything in either of those submissions, or indeed anything else of relevance to the inquiry today.

15 **MS CHESTER:** Okay, thank you very much for those opening remarks. We might turn first to the issue that you first raised in your three points, and that is around patents and software, and it is an area of the report where we have recommended some changes. Your submissions and your
20 opening remarks suggest that perhaps we need to go further than our draft recommendations there. Before I ask you to elaborate on why you think we need to go further it would be good if you could give us some examples of where this overlap between patents and copyright, in particular with respect to software, does become problematic to innovation and follow on innovation?
25

MR BURTON: Okay, well the principal issue there I guess is one of scope. Copyright applies to the specific embodiment, and there are - computer software is a lot like literature in that it's the embodiment that
30 really matters. When we want to enforce copyright it's a matter of not wanting - wanting to prevent third parties from using the material in a way that the original author doesn't approve of. With patents the protection is on the idea itself, which is difficult when it comes to computer software because it stops other parties from innovating around the restriction. With
35 copyright it is always possible to create a cleaner implementation without copying any of the original author's work, without infringing on their copyright if the terms under which they're offering to licence that work are too restrictive to be of use to downstream innovators. That opportunity doesn't exist where there is a patent, and particularly when
40 there is a whole thicket of patents around an idea or set of ideas.

We contend that copyright is a more effective and efficient vehicle for protecting software than patents for that reason. The development of software is very much an iterative one. Pretty much all software
45 development today builds upon software that has been released before.

Not necessarily the actual code, but the ideas behind the code. When we as software developers write programs we're building upon the ideas of other programs that have gone before us, and that's how progress is achieved in the field of software. It is all pretty much iterative. Even in the early days of computer software much of that progress was achieved iteratively, and we feel that patents pose a threat to that sort of iterative development, particularly to those of us in the open source sector. Closed source software developers can take some solace in the fact that there are standards involved that patent holders will be subject to with brand obligations, et cetera so they can negotiate reasonable terms.

When you're a distributor of open source software you don't have the option to enter into brand negotiations because you have an install base of indeterminate size, so you can't calculate a royalty payment on an install base for indeterminate size. And you can't - well, you could go and negotiate a royalty free licence on a one-off payment, but that destroys the advantage, the competitive advantage in the market place that the original author has. There are many ways that open source software companies make the money out of their software, and it's usually not out of selling the software. It's out of selling services around that software. And the company which was the copyright holder, or the company at which the copyright holders work, has a certain competitive advantage in the market place because of the kudos of being the people who originated the software. They're likely to command higher rates in terms of services for that software than other organisations that offer those same services too. And even if the rates are the same they're more likely to be selected by clients because of their specific expertise there.

Now, having to pay royalties on a patent destroys that advantage because the third party organisations who are providing services around that software but who are not publishers or distributors of that software will not be subject to royalty regimes, whereas those who are actually downstream developers adding to progress in the field, adding to the benefit of the software, will be. So that's why we feel that patents, software patents discriminate against the open source sector as opposed to the closed source software sector.

But really the - to us it's most obvious because of the duplication. In principle we do not feel that any class of subject matter should ever be subject to multiple independent forms of IP regulation, and to us copyright is a far better vehicle for protecting the interests of software developers and for promoting the creation and dissemination of more and useful works than patent ever would be. I hope that answers your question.

MS CHESTER: It does. I guess it raises the issue of whether or not any

overlap of intellectual property rights is of benefit or not. Yesterday during public hearings we were speaking to some high end furniture designers who have design right protection but are also looking at using trademarks to distinguish their original works from future use of unauthorised copies and replicas once they're out of the design right period. So we've heard some evidence that there could be some legitimate recourse to using more than one form of intellectual property. Does trademarks enter the equation here with copyrights versus patents for software, and are you suggesting that software should not be eligible for the use of trademark protections?

MR BURTON: I'm not suggesting that at all. First of all I will say I am not going to comment on registered designs because that's outside of my area of expertise. We did comment on trademarks in our submission, and I think the distinction with trademarks - although you're right, there will on occasion be software to which copyright and trademarks both apply - there's a very, very clear distinction there. The trademark is about a word or a phrase. And trademark protection is only about that word or phrase when it's used as a trademark. It's a very clear test that the High Court established in Australia for that, and we think that's a good test. We don't have a problem with trademarks being applied within the context of the strict limits in which the Trademarks Act is interpreted.

The trouble with copyright and patent in parallel is that the overlap is very, very real. With copyright and trademark you are regulating quite different things. Trademark regulation is really about protecting reputation and about preventing fraud. And our members support a fairly restrictive trademark regime at the same time as supporting a fairly permissive patent regime, and ultimately a balanced copyright regime. That's where we sit in the market.

MS CHESTER: Now, that's helpful Jack. So clearly you are differentiating between where a form of IP protection overlaps, i.e. they become sort of substitutes, versus one which is complementary in the case of trademarks.

MR BURTON: Complementary, exactly. Now, if I might just add. The first question you asked about where we went beyond your recommendations, we did do that in some places. I don't think we actually went beyond your recommendations in terms of patents. We support your recommendation to remove business information in software patents from the scope of patentability. We're merely suggesting a different way of implementing that recommendation because of the issues that you raised in your draft report around things like the definition of embedded versus non-embedded software, the definition of trivial versus

non-trivial contributions of software. In order to avoid all of those difficulties we think it would be much more appropriate to use the existing body of law, which is centuries old and very well tested, around what is copyrightable versus what is not copyrightable, in terms of defining the exception, the new exception in the Patents Act. So rather than get tied up in all these knots around defining software, defining embedded, defining trivial, if we simply introduce that exception, the exception that says no copyrightable work may be patented, we think that will provide a means to implement your recommendation in a much more certain and much simpler manner.

MS CHESTER: And Jack, are you aware of any international jurisdictions that you can point to that may have - the method that you're suggesting for removing that overlapping IP rights, have been implemented in that way or is this just an innovative idea that you guys have come up with?

MR BURTON: This is an innovative idea that we have come up with. We're not aware of any jurisdiction that have used that terminology in their drafting. There are, of course, jurisdictions who have removed software from patentability, most notably New Zealand, but it's been done there in a fairly narrow manner, in a similar manner to that being explored in various European jurisdictions. We would suggest that a broader exception in line with what the Commission has recommended should be pursued here. We're not aware of any class of copyrightable work other than computer software that is currently subject to both patent and copyright, and therefore we think the most sensible way in terms of achieving certainty and in terms of ensuring that the exception is not too narrow, is to draft the exception as an exception for all copyrightable works.

MS CHESTER: Okay, thank you. You didn't touch on this in your opening remarks, but it was in your submission with respect to our draft recommendation to move from fair dealing to a system of fair use. It would be good if you could elaborate on what you see might be the potential benefits. We've heard a lot of folk who don't see the potential benefits in moving from fair dealing to fair use, so it would be good to see it from your perspective.

MR BURTON: Thank you, that's a very good question. The principal benefit of fair use as opposed to fair dealing is that it's more adaptable. One of the biggest problems, and we've heard this from several of our speakers earlier today, with the Copyright Act over the years is that it has failed to keep up with technology in a timely manner. It does eventually get amended to keep up with technology to some extent, but that's a very,

very slow process and it is very much a reactive process that happens a long time after the fact. And that tends to have a bit of a retarding impact on progress within Australia, on innovation within Australia and new forms of business models being developed and new technologies proliferating. And we don't think for a moment that's the fault of the Parliament. That's merely the way Parliaments in any democratic system work. Legislative change takes time. It has to because there has to be sufficient public debate, independent review and Parliamentary debate and eventually changes get made.

10 The benefit of having a broadly drafted principles based exception as opposed to a narrowly drafted prescriptive set of exceptions is it allows the judiciary to step in and make those decisions in the High Court, in the Federal Court, in a way that keeps pace with technological changes a little
15 bit more quickly. There is still some lead time in there, but nowhere near as great a lead time as if we wait for legislative change. And yes, many of the other submissions have raised the spectre of massive costs of litigation. Litigation is expensive. We don't dispute that, and the comments we have made around your recommendations on the Federal
20 Court and Federal Circuit Court reforms go to that. But we don't feel there will be an explosion in litigation. We think there will be some cases, and those cases will be necessary and those cases are how the law in Australia will keep up with, or will better keep up with, technological and business change and innovation in the future. But you only need one or
25 two cases on each new technology or new innovation or new business method in order for the issues that arise from it to affect the law in Australia. There are a lot of copyright lawyers in Australia, and I would suggest that most of them keep pretty up to date with the decisions that are made in the courts around interpretation of the existing exceptions and
30 would be even more careful to do so once we had a broad US style fair use exception.

MR COPPEL: Can you point to any examples where the current copyright law has retarded the development of new business models or
35 innovation as you have suggested it does?

MR BURTON: Okay, it's difficult to come up with too many specific examples there but if you look at some of the documented cases of intermediaries - one of the oft cited objections to fair use is the benefit that
40 it will confer on search engine operators, Google and the like. Those organisations sprang up almost universally, at least in the English language sphere, within the United States. We don't think it's any coincidence that the United States was the only English language jurisdiction at the time that had a broad general fair use exception in their
45 copyright act. Now, I can't honestly say that Google would have been in

Australia, happened in Australia first if that was not the case. Nobody can say that. It's completely hypothetical. But it certainly would have been a more conducive environment, regulatory environment, for those sorts of innovations had we had a broader fair use exception in the Act. There
5 may well have been other drivers that were bigger factors. We've heard today about the greater availability of investment capital in the US market. Undoubtedly that has a big effect as well. But it certainly wouldn't have hurt to have a Copyright Act that was more conducive to promoting downstream innovation.

10

MS CHESTER: Did you have anything else?

MR COPPEL: I've just got one other point that relates to fair use and you make in your submission following the draft report, which you call
15 for the ability for a Minister to be able to declare an additional fair use. Can you explain why you think that's necessary and what it would bring in terms of advantages over something which is enshrined in the legislation?

MR BURTON: Okay, the example where this is implemented as the Commission itself pointed out in the draft report is the latest iteration of the Copyright Act in Israel, and that's where we got the idea from and in fact your reference to that. The ability for the Minister to declare an additional fair use - now, we're not talking about prescriptive declarations
25 here. We're talking about adding items to the list of examples. Under your proposal for the fair use there would be a list of illustrative examples in the Act. Presumably the Minister would be able to proclaim in the Gazette additional items to be appended to that list. Now, the advantage of enabling the Minister to do that is that it will short circuit the process. We have then three different ways of the law being able to keep up with progress. The slowest but most certain way is by legislative change. A more rapid but also more expensive manner is through the judicial system. And the fastest method would then be by the Minister simply proclaiming an additional illustrative example of fair use. So that would be one
35 method by which we could reduce the cost of that litigation, or the frequency of that litigation, during the transitional period. And presumably the Minister is only going to declare an additional illustrative example of fair use after that has been endorsed by the Cabinet. I don't think you would see a Minister declaring ridiculous expansions to fair use. He wouldn't remain a Minister for very long if that happened. But it would be a way for the law to adapt very rapidly to changes, much more rapidly than through statutory amendments and more rapidly even than through judicial process, given the delays involved and the multiple tiers of appeal that are likely in cases where there is genuine expansion to the
40 scope of the exception.
45

MR COPPEL: Thank you.

5 **MS CHESTER:** They're all the questions that we were hoping to cover with you this morning so thank you very much for coming along and participating in our public hearings, and thank you also for your submissions.

10 **MR BURTON:** Thank you.

MS CHESTER: As does happen, we're running a tad behind schedule. We're now going to take a little break to stretch our legs and avail ourselves of some caffeine outside, so please do so. I would ask if we could resume at 10 past 11, thank you.

15

ADJOURNED

[10.54 am]

20 **RESUMED**

[11.58 am]

MS CHESTER: We might resume our hearings and I'd like to ask our next participant, Dr Deborah Gleeson, to join us. Good morning, Deborah, and thank you both for your submission and also your involvement in our round table last week. Once you're comfortable, just for the purposes of the transcript recording if you could just state your name and the organisation you represent and then if you'd like to make some opening remarks.

30

DR GLEESON: I'm Dr Deborah Gleeson, I'm a lecturer in the School of Psychology and Public Health at La Trobe University, but I'm here representing myself today.

35 **MS CHESTER:** Thank you. Did you want to make some opening remarks?

DR GLEESON: Thank you. My training is in public health and health policy and my particular area of research expertise is international trade agreements and their impact on health, particularly in the area of pharmaceuticals and access to medicines.

40

My submission to the Productivity Commission, in December last year, focused on the implications of trade agreements for Australia's intellectual property arrangements for pharmaceuticals and particularly on

45

the Trans Pacific Partnership Agreement. I pointed out ways in which the TPP and other trade agreements lock in existing intellectual property settings that are not in Australia's interests.

5 My submission made five recommendations. Firstly, that the Productivity Commission should examine the potential impact of the provisions of the proposed TPP on Australia's intellectual property arrangements and also on developing countries, because it's also an issue that we should be concerned about here in Australia, what effect these
10 provisions are going to have on developing countries in our region.

 I also recommended that an independent impact assessment of the final TPP should be done. I'm certainly not the first person to make that recommendation, there have been a number of bodies that have
15 recommended that. I think quite a big consensus that there's definitely a need for independent scrutiny of these types of agreements and provisions. I also think there need to be changes to the treaty making process, to make the negotiation of bilateral and regional trade and investment agreements more transparent and accountable and to improve opportunities for
20 scrutiny of proposed provisions by experts and the public.

 People like me were very reliant on leaked drafts of the TPP intellectual property chapter to see what the United States and other countries were proposing for the contents of that chapter and if we hadn't
25 had access to those leaked drafts we wouldn't have even known what questions to ask of the Department of Foreign Affairs and Trade. Other chapters where we didn't have leaked drafts we had a great deal of trouble even knowing what issues were under discussion and what we needed to be asking about.

30 I also recommended that the Productivity Commission should consider the scope for implementing the recommendations of the Pharmaceutical Patents Review and I'm very happy to see that the Productivity Commission has really scrutinised those findings and
35 recommendations and has picked up many of those in the draft report. I think the Pharmaceutical Patents Review made some very sound recommendations so it's good to see those having a further life. I think the pharmaceutical industry is attempting, through a number of different means, to lengthen monopolies on pharmaceuticals and particularly to
40 lengthen monopolies on biologic products. Longer monopolies on these products are definitely not in the public interest and efforts to do that should be resisted. So it's good to see the direction of the Productivity Commission's recommendations looking at winding back monopolies in
45 some areas and not extending them any further.

5 I also recommended that the Productivity Commission examine international initiatives to look at different ways of funding pharmaceutical research and development. There's a widespread acknowledgement that intellectual property and patents don't stimulate the innovation that we need to address the major problems that the world's facing at the moment and that we need to not just look at ways to tweak the existing system but also to look at alternatives and to make sure that we leave scope for pursuing alternatives in things like international trade agreements.

10 Overall, I'm very happy with the recommendations that the Productivity Commission has made, in relation to pharmaceuticals, particularly the recommendations around better targeting the extension of term. I think it's a very sensible approach to only include delays that are due to the actions of the regulator and only to allow extensions of term for new active pharmaceutical ingredients. There's certainly scope, within our existing trade commitments and the TPP to change the way that we implement patent term extensions in Australia and I'd like to encourage the Productivity Commission to consider going even further and reducing the length of the extension of term because there's nothing in our trade agreements that actually mandates the five year extension of term.

25 Some industry lobby groups might argue that the time taken for approval by the Pharmaceutical Benefits Advisory Committee, approval should also be taken into account in calculating an extension of term or the term of data protection but I think that doing that would provide a perverse incentive because if it's taking companies a long time to get PBS listing, then it's generally because they're not applying at a price that the Pharmaceutical Benefits Advisory Committee determines is cost effective. So if we allow them an extension of term to compensate for the number of years that it takes them to get a PBS listing, we're actually compensating them - we're actually incentivising them to ask for a high price.

35 I agree with the Productivity Commission conclusion that there's no justification for extending data protection and it's really very obvious that the costs of extending data protection, particularly for biologic products, would be very high. With Ruth Lopert and Hazel Moyer we wrote a submission to the Department of Foreign Affairs and Trade, in 2014, looking at 10 of the most expensive biologics on the Pharmaceutical Benefit Scheme and together just those 10 drugs took up around 14 per cent of the cost of the Pharmaceutical Benefit Scheme in 2013 to 2014. If we'd had biosimilar versions of those drugs available we would have saved over \$205 million in that year. So because these drugs are very expensive and they're taking up an increasing share of the Pharmaceutical Benefit Scheme listings we need to really be very careful about not

extending monopolies on those drugs.

5 I also agree with the direction of the Productivity Commission
recommendations around trade negotiations. I've argued, many times
before, and many non-government organisations in Australia have also
argued that trade negotiations need to be informed by more independent
analysis and treaty text should be released before being signed by Cabinet.
10 There should be health impact assessments done of proposed provisions
before they're adopted and there needs to be a more systematic process for
consultation, other than the ad hoc process at the moment, and real
meaningful consultation about the contents of the text.

15 I think in some ways a model agreement for intellectual property, as
the Commission has proposed, is a good idea but I also think there's a
strong rationale for leaving intellectual property negotiations at the multi-
lateral level and not including them at all in bilateral and regional trade
agreements because what we end up with, if we include them in our trade
agreements, is we end up with trade-offs between intellectual property
20 settings and issues in other sectors and we end up with very detailed
prescriptive rules that constrain our flexibility as we move forward, in a
changing field with many very expensive drugs coming onto the market.
Thank you.

MS CHESTER: Deborah, thank you for those opening remarks. I think
25 when we got our terms of reference the government's asking us to revisit
have we got the balancing act right and we look at patents, I think the
public policy dimension, as it relates to health, is probably one of the most
pertinent cases of making sure that we do get that balancing act right,
given the costs that will be imposed if we don't.

30 A lot of your submissions and some of your opening remarks were
really about the way Australia has entered into bilateral and multilateral
trade agreements, and including IP arrangements in those. You've
touched on areas where you think that the governance and transparency
35 and accountability around those negotiations could improve setting aside
whether or not IP arrangements should even enter those realms. One
aspect that you didn't touch on in your opening remarks and would be
good to get your feedback on is we do identify sort of a suite of reforms to
wrap around those negotiations, in terms of greater transparency and
40 accountability. At what point should some sort of net economic benefit
assessment be undertaken and how that would be done, given that
elements of the negotiations would be confidential.

45 We also mentioned the idea of a model chapter for intellectual
property and this is an area where we've gotten some initial feedback.

Some folk, like yourself, think, “Well, there shouldn’t even be an IP chapter in these trade agreements.” Others have suggested, “Well, a model chapter shouldn’t be very prescriptive, it should be about the principles.” So if we sort of take a pragmatic view of we’re in this world of intellectual property arrangements figuring as a chapter in bilateral and multilateral trade agreements or bilateral and plurilateral trade agreements, what are your views on how we might approach it, from the perspective of setting a line in the sand?

DR GLEESON: So if we were to take, as a starting point, that we were going to have a model intellectual property agreement that will be tabled in trade negotiations, I think that the TRIPS agreement is the best model that we have, in terms of setting a basic standard but also allowing a lot of domestic flexibility in how intellectual property settings are actually implemented in different countries. I think that it shouldn’t be prescriptive, it shouldn’t be set at the standard that we currently have, which is arguably too high for the size of our country, the size of our market, the changing context around pharmaceuticals. It also needs to take into account that many of our trade negotiations are with developing countries and so what we might see as an appropriate level of intellectual property protection here, it could well have a very negative effect on a developing country.

An example is, we’re currently engaged in negotiations for the Regional Comprehensive Economic Partnership, which includes some least develop countries and a number of countries that are not currently members of the World Trade Organisation. So the level of intellectual property protection that we have in Australia at the moment is not what we should be going into that negotiation with. We need to be thinking about the needs of these very poor countries and the fact that large proportions of their populations already don’t have access to the drugs that we take for granted here.

MS CHESTER: One of the themes of our report is that, effectively, our terms of reference were very broad in scope but they also made it very clear that we had to be mindful of our obligations in our existing treaties and trade agreements. From the work that you’ve done, where do you see, and I know you’ve looked at it from the perspective of how it might impact public health policy, where do you see the greatest constraints, the binding constraints that have been set that so narrow the window of what we might be able to do to change our intellectual property arrangements, going forward from the perspective of public health and which of the agreements do they tie back to, TPP, Australia/US Free Trade Agreement?

5 **DR GLEESON:** I think the Australia/US Free Trade Agreement really
locked us into a lot of the intellectual property settings that we have.
Things like patent term extensions, data protection, things like that. A lot
of those settings we already had in our domestic law before the
Australia/US Free Trade Agreement was negotiated, but now we have
international commitments to keep those in our patent law. We also
introduced patent linkage for the first time, following the Australia/US
Free Trade Agreement. So I think that that really has, to the extent that
we're locked in to certain provisions, it's largely the result of the
10 Australia/US Free Trade Agreement.

15 The TPP really adds another layer of obligation on top of that. My
analysis is that I can't see any areas where the TPP actually requires us to
change our settings. The one area of real concern for Australia is the
provisions on biologics, because they're so ambiguous, as I set out in my
submission, and there is scope for Australia to not make any changes
because of the ambiguity of those provisions. But the United States is
applying a lot of pressure to other countries to clarify the arrangements
that they're going to make to implement those provisions. Just a few days
20 ago there was an article in the Wall Street Journal quoting Mike Froman,
the US Trade representative, saying that countries have agreed to eight
years' of data protection.

25 So the ambiguity of those provisions, it provides scope for us to
maintain our current settings but, on the other hand, there's a lot of room
there also for the US to pressure other countries. Because this is such a
significant issue in Congress, where a lot of Republicans are saying they
won't pass the TPP unless this issue is addressed, there are real risks for
us there. Have I answered your question?

30 **MS CHESTER:** No. You have, thank you. Your submissions and your
opening remarks also refer to the potential for Australia to pursue, through
multilateral means of negotiation, any changes to intellectual property
arrangements. Indeed, our draft report, perhaps a little optimistically so,
35 suggested that it might be time for us to identify some like-minded
countries who might be able to work with us to, over time, remove some
of those policy flexibility constraints. It would just be good to get your
thoughts on, I guess, firstly, how realistic is it for us to expect that to
happen, given developments with the YPOs and WTOs of the word and
40 then, secondly, what mechanism or what cluster of like-minded countries,
or are there other ways that you think that we could achieve reforms over
time, through multilateral means?

45 **DR GLEESON:** I think that's a very difficult question to answer and I'll
have to give it some thought. I think that there are very powerful political

forces that work against any change at the global level. The pharmaceutical industry is very powerful, particularly in the United States and the European Union, which does make adjusting things very difficult. Then, of course, we have the whole spaghetti bowl or noodle bowl of trade agreements that do kind of tie a country's hands, to a certain degree. But I think that these are really important issues and that we need to be working towards change. There certainly are initiatives to look at how can we do things differently, initiatives at the World Health Organisation, there's a UN high level panel on access to medicines at the moment, looking at the high cost of medicines. Even wealthy countries are really struggling with the cost of some of the new drugs that are coming onto the market.

So there is a lot of momentum to look at ways to do things differently and I think that we need to be involved in that and we need to be very careful not to be moving in the other direction, by accepting more and more prescriptive obligations that lock us in.

MS CHESTER: You mentioned earlier on, when we talked about the idea of perhaps a model chapter on IP in trade agreements, using TRIPS as the benchmark. We learned recently, when we were meeting with some folk in Geneva, that within TRIPS there is an unused or unutilised clause for a review of TRIPS and a little ambiguously worded, unsurprisingly, as to what the scope of that is meant to be and the regularity of it. But if TRIPS is our benchmark could one mechanism be reviewing whether or not that benchmark has remained enduring as an appropriate benchmark for getting the balancing act of intellectual property arrangements right globally?

DR GLEESON: I'll need to have a look at that clause and perhaps I could take that question on notice.

MR COPPEL: It's article 71.

DR GLEESON: Thank you.

MR COPPEL: As far as we can gather it allows for a review after the first two years of it coming into force and then periodically after that. As far as we can tell, it's never been used in that way.

DR GLEESON: Right. Okay, thank you.

MS CHESTER: Moving to patents, Deborah, and you touched on pharmaceutical patents in your opening remarks and certainly in the submission that you've given us and maybe if we look first at the issue of

extension of term and the issue that's been raised with us, certainly, in submissions (inaudible) and roundtable discussions about not limiting the extension of term, that the five years' due to unreasonable delays by the regulator but, I guess, on the other hand, we've received evidence saying that delays by the regulator are incredible costly to pharmaceutical companies and to the government, indeed, so perhaps a role of healthy discipline there. A lot of the pharmaceutical companies are suggesting that the PBAK process also be included there, and you did touch on that. I want to make sure I understand what you were saying, that your understanding of the process is such that because the timeline is also a function of the commercial negotiation over price with the PBS listing, that effectively allowing that to be a basis for extension of term could see the Commonwealth government perversely commercially underwriting that commercial negotiation, on behalf of the pharmaceutical companies. Am I right in sort of that's what you were suggesting?

DR GLEESON: Yes.

MS CHESTER: Okay. So I guess for us to step back then and understand that tension against pharmaceutical companies suggesting that there are delays through the PBAK process, given your understanding of the PBAK process, how much of that negotiation really is a commercial negotiation and that's where the function of the timeline really rests? i.e. how much of it can be really influenced by the pharmaceutical company and how much of it is a regulator process that the pharmaceutical company really has no influence over?

DR GLEESON: I'll need to take that question on notice as well and get back to you on that.

MS CHESTER: That will be helpful. We've asked pharmaceutical companies and their representative organisations to come back to us on that as well, so it would be great to hear it from you too.

DR GLEESON: I don't know if data is available, but I will have a look. Thank you.

MS CHESTER: Great, that would be helpful.

MR COPPEL: Can I just come back to two points you made on international treaties, bilateral treaties as well, where you're calling for more transparent and accountable processes and better consultation methods; do you have any specific mechanisms that you think would be ways in which to achieve those goals?

5 **DR GLEESON:** I think a really important thing is releasing texts that are tabled in the negotiations and composite drafts of texts, at key points in the negotiations. Because, as I mentioned, it's very difficult to engage in consultations in any meaningful way if you don't actually know what's being discussed. When we did have leaked drafts of the text we were able to talk to the negotiators with very specific questions about what was Australia's position on key issues and where were things going in the negotiations, so that we knew what we needed to be looking at more closely.

10 I think we shouldn't have to rely on leaks, we should be able to get this sort of information to inform discussion. I think there needs to be much more systematic consultation as well. I know that DFAT has conducted a lot of consultations on the TPP, but it's been very much driven by people contacting DFAT about particular issues that they're concerned about. With the Regional Comprehensive Economic Partnership, the RCEP, it was only when we got some leaked texts, fairly recently, showing that Japan and South Korea were proposing some of the same sorts of intellectual property settings that the US had been proposing in the TPP that we realised that intellectual property was going to be an issue in RCEP.

20 Now, given that over the last five years I've had many, many conversations with negotiators about intellectual property in the TPP, it seems reasonable to expect that if the same sorts of issues are coming up in another set of trade agreements that there would be some sort of consultation process around that. But it was only fairly recently, when we became aware through the leaks, that these issues were being discussed and asked for consultations that that process started.

30 **MR COPPEL:** It may be put, as a counter argument, that such an approach could compromise the hand of the negotiators, what would you say to that?

35 **DR GLEESON:** I've heard that said many times over the last five years, in relation to the TPP and I think the reality is that the US knew so much more about our negotiating position in the TPP than I did, or any of my colleagues. These are issues that are about the public interest. When trade negotiations were just about market access for agricultural products and things like that I think the rationale for keeping these negotiations secret perhaps made sense back then. But now they span so many issues that touch on so many areas of people's lives, I think that the rationale for keeping things secret just doesn't hold water anymore. These are things that should be matters for democratic decision making and people should know about what's being discussed.

5 **MS CHESTER:** Deborah, the other jurisdictions that take different approach to text transparency, and from your kind of network of public health policy folk globally that might be doing what you're doing, say, in the US or Europe, do they get a different experience in terms of consultation with government around the texts in negotiations?

10 **DR GLEESON:** I haven't had a great deal to do with the Trans-Atlantic Trade and Investment Partnership negotiations, in Europe. I know that the EU has released a lot of the proposals that they have tabled in the negotiations and they have also released some drafts of text. So that's certainly a much higher level of transparency. I don't think that the US has matched that and I think that there are still a lot of issues, there's still a lot of dissatisfaction with the ways some of the health issues are being
15 dealt with, but it's still a lot better than the process in the TPP.

MS CHESTER: Deborah, that covers all the questions that we were hoping to work through with you this morning, so thank you very much for joining us.

20 **DR GLEESON:** Thank you very much.

MS CHESTER: I'd like to call our next participant to come and join us and that's Renee Hindmarsh. Good morning, Renee, thanks for joining us
25 and thank you also for your initial submission and your follow up submission, after our draft report. If I could just get you to state your name and the organisation you represent, for the purposes of the transcript recording. And then if you're comfortable if you'd also like to make some brief opening remarks.

30 **MS HINDMARSH:** My name is Renee Hindmarsh, I'm from the Australian Technology Network of Universities. Thank you to the Committee for the opportunity to speak today. The ATN is a network of five major universities, we have a presence in each mainland state. Here
35 in Melbourne we have RMIT University, there's QUT in Brisbane, University of Technology in Sydney, University of South Australia in Adelaide and Curtin University in Perth. Our members are all young, very highly focused on research and innovation and we have genuine linkages to industry as an inherent part of both our teaching and research.

40 A point that differentiates the ATN, our network of universities is recognised as being industries partner of choice, with more than two-thirds of our research funding coming from industry and end users since 2010. Our ATN members are all highly ranked for young universities as
45 well, which is a great achievement for young universities making a

significant impact on the international stage in a short period of time.

5 It's been well documented that businesses that collaborate on innovation with research organisations are three times more likely to experience productivity growth, improved sales and exporting activities. Yes, despite this, Australia ranks just 29th out of 30 in the OECD in terms of proportion of business collaboration with universities on innovation, a statistic highlighted in our Innovate and Prosper Report that we produced with the Australian Industry Group last year.

10 Australia delivers great research innovations but we recognise that IP is one of the major barriers when commercialising university research and taking it to market. We've learnt, through consultation with our partners, that businesses are often deterred from working with universities with a view that universities will always want to own the IP and that process of negotiating contractual agreements and IP ownership is often seen as too difficult.

20 Having recognised this problem, the ATN has been leading the challenge to improve university/industry collaboration and we're now making it easier for industry to work with our researchers and staff by reducing the barriers to commercialise research. I'm delighted to share with you the ATN National IP Principles with you today. Through these seven key principles we hope to send a strong, clear and proactive message to business that our national network of universities are agile, flexible and open to collaboration. Our Five Universities One Door approach provides industry with one easy entry point to five world class enterprising and dynamic universities.

30 So I'll just quickly run through what they are, if that is okay. So the ATN universities is based on the following principles. We actively encourage students and staff to undertake research that is relevant to challenges faced by society and in partnership with industry, government and community groups.

35 The second one is that as guided by our industry partners we encourage them to own and take the lead in commercialisation of intellectual property generated from industry-funded research, when they're best placed to do so. The third is where access to university owned or jointly owned IP is necessary or beneficial for commercialisation we support access to the IP, based on fair and equitable terms in a timely manner. The fourth, our interactions with industry will be governed by a transparent, flexible and user-friendly system that supports and encourages engagement, using a range of IP models. The fifth, each university will make public our IP policies and standard

commercialisation agreement templates, to provide a simple and transparent framework. The sixth, we encourage and promote an entrepreneurial culture for our staff and students. This includes a system of support to facilitate the creation of new ventures where our staff and students are appropriately involved. Finally, all partnerships and resultant commercial agreements will be developed and negotiated in a prompt manner and in keeping with these core principles.

There are many examples where our universities and industry have worked together to achieve significant outcomes for end users, and I'm more than happy to share some of these examples with you today. Our principles make it clear that our universities do not always take that blanket approach, that we draw on a range of IP models to best suit the given partnership. Our approach is pragmatic and flexible. It will hopefully make it simpler, both for industry to approach ATN universities to solve their problems with new research and for innovations generated by research across our universities to be commercialised by industry. Most importantly, with our shared IP principles, we're committing to work in an agile and efficient way that represents the often tight timeframes and unique requirements of individual businesses. The core to the ATN approach is creating new opportunities and partnerships to generate new innovations and jobs that will increase social and societal wellbeing and secure Australia's future prosperity and economic growth.

We acknowledge that in order to make a lasting impact IP arrangements should be considered within the scope of related innovation policies and the national context. We know that in order to drive through change there needs to be a much-needed cultural shift in behaviour to improve the rate of collaboration between universities and industry and that's what our IP principles set out to do.

MS CHESTER: Thanks very much, Renee, for those opening remarks and for the submissions. In your opening remarks you make a point that kind of resonated with our attempt to approach the broad terms of reference by seeing that the intellectual property arrangements are just a component part of the eco system within which innovation occurs. To some extent, getting the balancing act right does mean that we do need to try to understand to what extent IP arrangements make a difference or what is the materiality in encouraging innovation to occur.

So I guess maybe an opening question would be, if you're looking at it from the perspective of universities licencing and partnering with business and commercialising ideas, what are the major barriers to that occurring today and to what extent do IP arrangements figure in that pecking order of things that get under foot?

MS HINDMARSH: Thank you. It's a really interesting question and obviously it's not just IP that prevents the collaboration between universities and industry. I'll tackle the IP issue first, because I think quite often, as I flagged in our opening statement, there is a perception in the community that dealing with universities is difficult, they're large, opaque organisations and people don't know even where to start sometimes and I think that there is a view, especially in the SMEs, that it's just going to be a difficult conversation and they don't even have that initial contact, because they just think it's going to be too hard.

So by having our standardised approach to IP we wanted to send that clear signal to say, "Actually, it might be easier than you think and please come and talk to us." So there's that. There's also the cultural issues that are very much apparent in the eco system and we certainly tried to flesh those out through our innovate and prosper report. Some of that is around IP but others is around mobility, the disconnect between industry and university, in terms of timeframes. There's a whole raft of reasons, but I do think, in terms of the IP, it is very much a perception issue and that once our universities do have the conversation with industry, recognising that industry often work on much shorter timeframes than universities as well is a really important thing.

MS CHESTER: So that makes it sound like it's more a meeting of cultural minds than a commercial negotiation, than the intellectual property arrangements getting in the way of commercialisation of innovation and ideas funded within our universities.

MS HINDMARSH: Speaking from the ATN universities and I can't, obviously, speak for other universities, but I think that cultural element is really important. IP is a really complex issue and sometimes the negotiations will take longer because there's more complexity to that particular arrangement and negotiation. But it's not just the IP arrangements that are preventing collaboration.

MR COPPEL: You mentioned the OECD indicator measuring collaboration between universities and industry entrepreneurs, which is one that's frequently cited as a metric suggesting that there is this disconnect between the intellectual property that's created in universities and a barrier to commercialising that intellectual property. That's sometimes led to calls for a use it or lose it clause. We're trying to get an idea of the nature of the problem, whether there is a problem and I'd be interested in your points whether that metric that you've cited is an appropriate metric or is it more of a smoke signal than really identifying a problem that needs to be addressed?

5 **MS HINDMARSH:** So in terms of the use it or lose it provisions, I note that that was one of the recommendations of the Watt Review and that it was referred to the Productivity Commission. There's certainly some concerns about whether or not it is too much of a regulatory burden on universities and also I note that in the United States, where they do have the use it or lose it provisions, they haven't been used since 1980. So I think that the use it or lose it provisions are probably adding an additional layer of bureaucracy to address a problem that's overstated somewhat.

10 **MR COPPEL:** Are there other metrics that give a different picture on collaboration between university and industry?

15 **MS HINDMARSH:** Definitely. I'll address the metrics in just one sec, but before I do that I would also make the point that in Australia one of the challenges that we do have is that something like 97 per cent of all businesses in Australia are SMEs and more on the S than the M side. We're dealing with a lot of really small companies and that, in itself, can almost be a barrier to collaboration, just for the reasons that I outlined earlier.

20 In terms of the metrics around collaboration, the Academy of Technological Sciences and Engineering did a significant piece of work around metrics last year and the ATN was involved in that process as it ran through. We also developed our own suite of complementary metrics, with input from our independent research and industry advisor reports, so industry telling us what they looked at, in terms of engaging with universities and how you might measure that. There's also case studies that the ATN has been very active in this policy space for a long time and even in 2012 we did a piece of work with a group of eight universities, looking at case studies that were quite similar to the REF approach in the UK. So, yes, there are lots of different ways that you can measure it and sometimes I think there is a temptation to take a quite simplistic approach to how we are collaborating. Sometimes collaboration doesn't involve any money so if you are using just a purely metrics based approach then I think that that can give you a biased view of what's actually occurring.

35 **MR COPPEL:** It would be helpful to us if you can pass on those alternative metrics and we can take a look at those.

40 **MS HINDMARSH:** Sure.

45 **MR COPPEL:** There have been a number of initiatives that have aimed to, essentially, reduce the transaction costs in licencing between, say, a university and industry, particularly small players. Source IP is one

instance of that. Do you have any views on the efficacy of these sorts of boiler plate type agreements or ways in which to reduce those costs of reaching a commercial agreement?

5 **MS HINDMARSH:** Yes. So the IP toolkit that the Department of
Industry and IP Australia put together was quite effective and we've been
big supporters of that as, I guess, being a really good starting point for the
conversation and kind of reducing some of that regulatory burden and the
open access IP can be quite effective as well. So one of the case studies
10 that we cite in our IP Principles document is around Northcote Innovation,
which is at UTS the university provided, through easy access licencing,
some IP to create a step attachment for wheelchairs so people who are in a
wheelchair can mount curbs without requiring assistance. So, yes, there's
definitely options to do that and I think the government has already been
15 looking at ways to do that quite effectively.

MS CHESTER: Coming back to the IP arrangements just for a moment
than, and again it could be an area of myth busting that we're looking at,
but the motive to publish or perish versus the motive to commercialise and
20 therefore protect IP through patents, some have suggested that that creates
a healthy or an unhealthy tension within universities. It would just be
good to get your perspective on that.

MS HINDMARSH: Sure. I'll put the caveat that I'm not an expert on
25 this but certainly in my experience that publish or perish versus the IP is
not an insurmountable problem and there are examples where there's an
agreement between the two parties that their publication might be delayed
somewhat to allow the company to be first to market with their
innovation. So there certainly are ways around it.

30 I guess there's also the issue that there's that slight tension between
what universities are creating their IP for. So if we are being judged on
metrics about how much we're commercialising compared to whether or
not we're getting it out there and freely using it, there is a little bit of
35 policy tension in that space.

MS CHESTER: Are these issues addressed, you mentioned before the IP
policies within your network which, I guess, clearly articulate the ground
rules for venture capitalists or SMEs looking to partner and commercialise
40 with universities. Do those sorts of issues get addressed in those policy
documents?

MS HINDMARSH: At an individual university level, yes.

- 5 **MR COPPEL:** One of the points you make in your post draft submission concerns the recommendation to exclude from patentability business methods and software and you say that it could compromise the ability for business to work with universities, in partnership. Can you elaborate the reasons for that perspective? I guess a follow up question to that would be, is it necessary to have business method and software patents to address some of those concerns or are there alternative ways in which those concerns could be addressed.
- 10 **MS HINDMARSH:** Sure, and I have just realised that I am having some technical challenges with my new laptop, so I might just need to grab the additional bit. Excuse me a moment. Our concern was, in relation to that particular recommendation, the proposed changes and its potential effect changes the current system. So the current system allows business to own software IP and to file patent applications, on behalf of the university researchers creating the new software. If those patents were abolished then the willingness to partner may be compromised because, as a public institution, we do need to publish but there's no protection then for the Australian market. So we were quite concerned that it would be an unintended consequence for partnership, at the software level. So if there is an ability for companies to protect their investment in software, through patents, then they're more likely to partner with universities that need to publish the research because you're putting it all out there, effectively.
- 20 **MR COPPEL:** Do you have an idea as to whether that ability to patent software is being used by these partners?
- 25 **MS HINDMARSH:** I would have to take that on notice. I don't, I'm sorry, but it certainly was flagged as a concern and we thought it was definitely worth raising and bringing it to the Commission's attention. But I'm happy to take that on notice and follow up with any examples.
- 30 **MS CHESTER:** If you are following that up it would also be handy to know, one of the issues that we're looking to address is the fact that you've got overlapping IP rights occurring between copyright and patents. I mean if you kind of step back and look at it, you could understand where some intellectual property arrangements might be complementary. A good example would be design rights and trademarks, but where patents and copyright are both forming an exclusive period of protection it's then are we dealing with that in an appropriate way, given the technology's advanced, should it just be one form of protection that they get. So it would be good to know of the instances where folks still think that that patent protection is required whether or not they also have copyright protection.
- 40
- 45

MS HINDMARSH: Sure, we can take that on notice.

MS CHESTER: That'd be great, thanks. Renee, that covers all of the questions that we wanted to work through with you this morning, so thank
5 you very much for joining us.

MS HINDMARSH: Thank you for the opportunity.

MS CHESTER: You're welcome. I'd like to ask our next participant,
10 Mark O'Neil, to join us. So we return to the world of copyright, I'm sure. Mark, thanks for joining us this morning. Also thank you for your initial submission and the post draft report submission. If you'd just like to state your name and the organisation you represent, for the purposes of the transcript recording and then if you'd like to make some brief opening
15 remarks, and if you could keep them to under 5 minutes, that would be appreciated.

MR O'NEIL: I will endeavour to do my best. My name is Mark O'Neil and I'm from Cambridge University Press, Australia. Thank you for the
20 opportunity to participate in this public hearing. In support of the written submission that you've already mentioned I'd like to discuss two issues in the draft report. Those are that copyright is a form of censorship and that US style fair use enables user rights.

25 So, firstly, the report asserts that copyright was introduced to prevent the dissemination of ideas. Copyright was not invented to promote censorship and control, in fact it was the opposite. It was invented to enable and promote creation and distribution of content, thus promoting education and the public good. In fact, the blueprint for modern copyright
30 law, enacted in England in 1709, was titled An Act for the Encouragement of Learning.

Copyright is fundamental to furthering innovation and creativity. Without it authors would not have the incentive to write and publishers
35 would not have the incentive to publish. It is therefore important not to take an overly short-term view of what is in the national interest. Copyright was created to guarantee continuity of supply of high quality content. That it has been so successful in that is evidenced by the plethora of high quality, a hundred per cent Australian content. In my industry this
40 means Australian authored content, commissioned and published in Australia to meet unique Australian educational needs.

The draft report asserts that Australian citizens must be able to access this content, without any evidence that they are unable to do so at present.
45 The fact is, they already can and the statutory licence provides a

mechanism for licencing excerpts of this content.

Secondly, I would like to express my belief that US style fair use will not work for Australia. The fair use doctrine in the United States is based on many years of case precedent, starting with the passage of the Copyright Act in 1976, well before the advent of digital publishing. American case law has therefore developed in parallel with publishing technology. To simply drop the doctrine into Australian law would unduly burden Australian courts and would risk over-broad interpretation in today's environment. Additionally, the case of Canada is illustrative. Following the adoption of fair use legislation to replace fair dealing educational institutions stopped paying licence fees, resulting in a loss of \$30 million in revenue to content creators and developers. Australian publishing risks going the same way.

Without this 40 years of case guidance Australian courts would be burdened with developing a new area of law, miring the publishing industry in uncertainty and potential demise. As is the case in the US, the role of lawyers in making content use decisions will become far more prevalent than one suspects Australian educators, learners and creators would find desirable. During the intervening years, as Australian case precedent is developed, authors, publishers and illustrators will be less inclined to produce content because of a lack of confidence that Australian law will fairly protect their creative output. This reluctance is a very real threat to Australian publishing.

A move to a fair use regime, without the benefit of case precedent, has the potential to reduce economic incentives for educational publishers to enter the market and for existing ones to continue to innovate. This will, in turn, lead to a reduction in the number of educational publishers, fewer jobs in the creative industries and fewer educational products produced locally, for local curriculums. What responsible legislators need to consider is what a world looks like where there have been several decades where incentives to produce and disseminate wholly Australian educational content aren't there.

By contrast, a fair dealing regime, where categories of reuse are understood by all parties from the outset, reduces litigation costs, reduces the burdens on courts and brings necessary clarity to creative industries to help to enable them to continue to bring their innovative content to Australian consumers. Thus, consideration of an expansion of fair dealing categories would be a more appropriate and effective solution that will avoid the risk of a hollowing out of an Australian educational publishing industry that already meets the needs of changing curriculums, technological advances and teaching and learning needs of Australian

citizens.

5 Instead of replacing the doctrine entirely we urge the Productivity Commission to recommend changes to existing exceptions. In addition to exceptions for personal research, news reporting, judicial proceedings, print disabilities, and others, new exceptions, for example, for quotation and for text and data mining ought to be considered. These expansions have been implemented in the UK with good results so far.

10 The school resources that my company, and others like it, publish are a hundred per cent Australian. Authored by leading Australian teachers and tailored to meet the needs of required outcomes of state and national curriculums. To put this at risk, in the name of Australian consumers, is to risk future generations being educated from a much more limited, foreign authored, foreign published choice of resources. A future of
15 homogeneity and devoid of Australian innovation. Thank you.

MS CHESTER: Thanks for those opening remarks, Mark. Just before we get into some questions, I thought it might be helpful just to make one
20 point of clarification. In our report we do go to some lengths to talk about the important and critical role of copyright for creative endeavour, indeed, that it's fundamental to creative endeavour. I just wanted to make that clarification point, given some of the comments you made in your opening remarks, that some people may have misconstrued the role that we see for
25 copyright.

Turning, maybe first, to the issue of fair use versus fair dealing, and you've raised a couple of issues in your opening remarks and your submission, firstly, around certainty and jurisprudence, secondly, on the
30 Canada situation and then, thirdly, on whether or not we should follow the UK model. If I turn, first, to the issue of the Canada example, it would be good if you could explain how you think that's a parallel or would provide us with insights to what we're recommending. As stated in our report, Canada didn't move to a system of fair use, they remained with a system
35 of fair dealing, and they moved to make changes to the licencing and statutory licencing arrangements. In our draft report we recommend going to a system of fair use and we don't recommend any changes to statutory licencing, particularly for education. So in our recommendations we would see the current educational licencing arrangements continuing to
40 work in parallel but instead of it being in parallel to fair dealing it would be in parallel to fair use.

MR O'NEIL: If I can take those in reverse order. According to the fact sheets that you released each of these are examples of potential fair use.
45 The first is a teacher copies a chapter of a book for inclusion in a set of

class materials and the second is, a teacher scans pages from textbooks to use in their lessons, via an interactive whiteboard. Both of these are currently allowed by the statutory licence. However, if, particularly the first one there, becomes fair use there's almost nothing left to be covered by the statutory licence. So what we are potentially looking at is a loss of \$100 million to the industry. Regarding the Canadian authorities fair dealing guidelines, they say that fair dealing allows for - - -

MS CHESTER: Sorry, we're talking fair dealing for Canada now?

MR O'NEIL: Yes. So according to the Canadian Education Authorities, what they say their system allows they call a short excerpt means up to 10 per cent of a copyright protected work, or one chapter from a book or a single article from a periodical or an entire artistic work, including paintings, print photographs and that kind of thing. So that seems to me to be in parallel to what, on the fact sheets that I refer to, call fair use.

MS CHESTER: I think if we just go back for a step I guess one of my first questions would be, under the current licencing arrangements the educational institutions, to some extent, are buying a form of insurance. They go into a licencing arrangement knowing then that regardless of what's allowed or disallowed under fair dealing, once they have that licencing arrangement in place they're protected. So there's an element then of perhaps educational institutions paying for materials that might have actually been exempt, under the application of fair dealing. Similarly, when you move to fair use, the statutory licencing arrangements stay in place, educational institutions will have some form of insurance and they'll probably continue to pay for materials that could have otherwise have been exempted under fair use. It's a negotiation. So if we step back for a moment, I guess the key issue we wanted to get an understanding of is what, today, is remunerated under fair dealing and a statutory licence that would not be remunerated under fair use and a statutory licence? To try to get an understanding.

MR O'NEIL: Before I answer that can I say that, yes, it is possible that schools are paying for things that maybe they're not meant to be paying for but, conversely, they're probably not paying for an awful lot that they're copying that they should be paying for. I don't believe there have been any studies done on what those are, but anecdotal evidence suggests to me that the latter would be a far more common case.

MS CHESTER: Do you have some evidence upon which to - - -

MR O'NEIL: No, I'm saying it's totally anecdotal.

MS CHESTER: Are you aware that there's a survey underway in New South Wales to try to get a handle on usage?

MR O'NEIL: No, and we'll welcome the results of that survey.

MS CHESTER: Yes, we do too.

MR O'NEIL: The second part of your question was about whether we think that there would be a difference in licence fees that we might receive. To go back to the point of Canada, in Canada educational institutions have just blanket almost stopped paying licence fees entirely, so there's a \$30 million loss to the industry there.

I think it's really difficult to answer the question, at this point, because until we see legislation it's not clear to us exactly what we'd have certainty around. I think, from Cambridge's point of view, what we are most concerned about is that uncertainty. The uncertainty around whether something can be copied, under a fair use regime, and whether - sorry, I just lost my train of thought there. The issue for us is around that uncertainty and the onus of proof, I suppose. Under US fair use legislation the onus is on the IP holder to prove that unfair use has taken place. So the uncertainty is around how often we would end up in litigation and how much that might cost the industry and the Australian economy.

MS CHESTER: So I guess the way that we look at the issue of uncertainty or what some other people perhaps describe as predictability, because with any form of legislation there's uncertainty, is both from the perspective of the rights holder and the user, both of them are looking to manage that uncertainty because nobody wants to have their rights undermined and nor do people want to infringe copyright as well, given that they could then have enforcement actions brought against them.

What's been suggested to us, though, based on the evidence and submissions that we've received is that because the current fair dealing arrangements are not technologically neutral and they're a prescriptive form of exemptions and exceptions that, in itself, introduces uncertainty as technology and business models and platforms change, in terms of, "Am I in or out? I don't know." The fuzzy area gets larger as things change over time and we know that that law has not been adaptable over time. Indeed, if we just look at one example of the VCR, by the time the law was adapted everybody's VCRs were mothballed in the attic.

Whereas, under a system of fair use, which is a principles based legislation, some have actually suggested to us that it might actually lend

greater predictability. The reason they say that is similar to what we now see in our Australian consumer laws, which are all principle based laws, that guidance is developed over time. Indeed, if we were to take the ALRC recommendations, which closely mirror the US wording around the fair use factors and the fairness factors, we would actually be able to leverage US jurisprudence, we'd be able to leverage the guidance material, the conduct policies that have been developed both by industry and by users. So I guess that's sort of the backdrop of the evidence we're hearing, I'm trying to understand the residual uncertainty that you're talking about and suggesting that there's greater uncertainty under fair use than fair dealing.

MR O'NEIL: Again, I think the uncertainty is around litigation and time spent in courts. There was no mechanism in US law to enable mass digitisation projects, like the Google Books project, for example. That's why the US Copyright Office recommended the introduction of a licencing framework. I think the example of the US is one of uncertainty, that the fair use legislation there, because it puts the onus on IP holders to prove unfair use, if you like, yes, the law has developed, yes, there has been this build up on case law, over the last 40 years or more, but all of those or the vast majority of those changes and those rulings have been made in court, at considerable expense.

MS CHESTER: So how does the move from fair dealing to fair use change the onus of proof? If, under fair dealing, there's an infringement, if under fair use there's an infringement, nothing's changed, in terms of where the onus resides.

MR O'NEIL: I think the big difference is, is the certainty that schools have of what they need to pay for and what they don't need to pay for. Yes, there are things that ought to be cleared up and I agree that if we were to stick with fair dealing there are issues that need renegotiation and that we should be tidying up.

MS CHESTER: So if we're not making any recommendations to change the licencing arrangements, then where does the additional uncertainty come from?

MR O'NEIL: Well, it seems to me that you are making - in the fact sheets it seems to me that you are making changes to the licencing agreements.

MS CHESTER: So they were illustrated examples of what might be in or out, under fair dealing versus fair use. Overlaid over that is the insurance policy of the statutory licences entered into and, as you've

5 rightly said before, at the moment people might be paying for things that would be exempted under fair dealing and we're assuming, going forward, that that will still continue to happen, as part of the insurance policy. Educational institutions might still pay for some materials that might be exempt, under fair use, as part of the licencing arrangement, that's the insurance policy, but fair use will inform those negotiations.

10 **MR O'NEIL:** Well, that's the big question for me. Will there be negotiations or will it be litigation? So in terms of whether, under fair use, the statutory licence stays the same, until we see that legislation then it's really difficult to see how that's going to work.

15 **MR COPPEL:** Almost all of the discussion in our draft report on the fair use recommendation gets into this interplay between the education statutory licence and fair use and how that plays out. Many other users which are being brought to our attention where fair dealing creates uncertainty as to whether it's legal or not, use by libraries, use by archives. We've had other examples in universities developing massive open online courses where to be consistent for their interpretation to be on the good side of the law requires many, many authorisations, sometimes in the hundreds. As a publisher of education materials, I suspect that you may be on the other side of those authorisations, can you talk us through your side of those sorts of relationships between universities and the owners of the copyright, in terms of authorisations and the time that's involved and the questions of certainty that's provided?

25 **MR O'NEIL:** Well, I can't talk you through university massive open resources because we're not part of that market at this point in time. In our publishing in Australia, the vast majority of what we do is for secondary school. We do some higher education publishing, very, very niche, I'd have to say. So unlikely that we'd be in a situation where a university was producing a, it certainly wouldn't be massive, open online course for that kind of content. So, no, I'm not able to comment on that.

35 **MS CHESTER:** Mark, are you able to give us a bit of a handle on of the revenue base that Cambridge University Press has in Australia, what percentage of that revenue base is attributable to the sale of textbooks and what percentage is attributable to the amounts that you get from education licencing arrangements?

40 **MR O'NEIL:** Yes, I can. I think it's going to differ wildly from publisher to publisher. In our case I would say for that piece of our business, which is educational publishing, it would be somewhere around 10 to 15 per cent.

45

MS CHESTER: Sorry, which one is the 10 to 15 per cent?

5 **MR O'NEIL:** Ten to 15 per cent would be from licencing. That's from the statutory licence only. I think it's important to note that we're not just a publisher of books, there has been a massive shift to digital publishing and so in terms of licencing we licence a lot of material on a subscription basis, because that's the way it's been built, and I haven't included that in that number.

10 **MS CHESTER:** Thanks. You mentioned earlier, and it might have been in your opening remarks, that you look to the UK model for the amendments to fair dealing. Jonathan and I were very fortunate in being able to meet, at length, with Professor Hargreaves, who wrote the Hargreaves Report, and it was quite illuminating in understanding why
15 that report, which only had a very short number of recommendations, that didn't make any fundamental changes to their fair dealing arrangements, apart from adding some additional exceptions. And in speaking with Professor Hargreaves it was made clear that it was really because they were constrained by the EU arrangements. So he was working within a
20 very constrained world and therefore there was no prospect of the UK moving from fair dealing to fair use, although who knows, tomorrow that might be a different story. So I think it's important that we acknowledge and recognise that those changes were made within that constrained world and that's not a constrained world within which we operate.

25 **MR O'NEIL:** Yes. I mean I was using the UK as an example and I'm using Canada as an example because I have to find examples somewhere and those are the possibly slightly more obvious ones but, yes, I take your point.

30 **MR COPPEL:** There are other examples of countries that have adopted fair use, Philippines, Singapore, Israel, South Korea and in those jurisdictions the issue of greater uncertainty, associated with that transition hasn't really come to the fore. In fact, in some instances there's
35 been very little litigation to establish whether something is fair use or not fair use.

MR O'NEIL: It will be illuminating to see what legislation looks like if and when it comes. But the biggest example of this, and the example
40 referred to in the Productivity Commission draft report, is the US fair use example, where litigation is how exceptions are made and how case law is built up.

45 **MS CHESTER:** It would be good for you to look at Israel because Israel did a pure transplant model, they took the US system and the

jurisprudence and the guidance notes are literally helicoptered in to their system and arrangements and, as we understand it, their creative industries are alive and well in Israel at the moment.

5 **MR O'NEIL:** I'm not suggesting that the creative industry will die. What I'm saying is I think there'll be a hollowing out of it. I think that, as was the case in Canada, some publishers will pull out, some publishers may not survive and the danger is that the smaller Australian publishers will struggle.

10 **MS CHESTER:** I think we've probably gone to lengths to establish that the Canadian model is not a parallel to ours and, indeed, some of those structural changes within the publishing industry in Canada were underway well before the changes were made to their fair dealing arrangements.

15 **MR COPPEL:** You mentioned that a better approach would be making adjustments to the fair dealing arrangements, I think you mentioned allowing text and data mining. As has been mentioned previously, one of the issues with the fair dealing approach is that it's sort of reactive and sometimes the period to react can be quite lengthy, the case of the VCR being probably one extreme of that. But would you accept that supposing fair dealing is kept up to date with technological innovations that, in essence, it could well approach something very similar to fair use, in terms of the scope of material that can be accessed without remuneration?

20 **MR O'NEIL:** I think, through negotiation, yes. I think the big difference for me is around whether we arrive at that point via litigation and a build-up of case law or whether we negotiate our way to that point.

30 **MS CHESTER:** I think that covers all the questions we had for you this morning, Mark. Thank you very much for joining us in the public hearings.

35 **MR O'NEIL:** Thank you very much for the opportunity.

MS CHESTER: I'd like to call our next participant up to join us, Dr Rebecca Giblin.

40 **DR GIBLIN:** Good afternoon.

MS CHESTER: Good afternoon. Thanks for joining us this afternoon, Rebecca, and for your submission, following our draft report and also your involvement in our round tables, it's been much appreciated. For the purposes of the transcript recording, if you could just state your name,

where you're from professionally, albeit we do know most academics are here in their private capacity.

5 **DR GIBLIN:** Dr Rebecca Giblin, from Monash University, here in my private capacity as an expert in copyright law.

MS CHESTER: Would you like to make some opening remarks, Rebecca?

10 **DR GIBLIN:** So we think there is really growing recognition of the problems that are caused by our existing international treaty obligations in copyright. We've got some prohibitions, elected prohibition on
15 formalities, for example, that was actually enacted the same year the first Model T Ford started rolling off the production line and they don't fit particularly well in the world that we live in now. The reaction to this growing awareness has often been, "Well, perhaps these rules could be changed." The rules about formalities the rules about how long copyright should last, to fix some of these problems that have emerged with orphan works, neglected works and so on.

20
No, they cannot be and I think it's really important that we recognise that. Kim Weatherall and I have done the analysis that's in our submission, in our forthcoming book, that shows in fact we are inexorably locked in, in every possible direction. Because Bern requires unanimous
25 vote to change it, which gives a veto right to some 170 countries with very different interests and development levels, which helps explain why it hasn't been revised for over a century. Also through this link, via the TRIPS agreement, that ties Bern membership to membership of the World Trade Organisation and world markets, which is virtually unamendable as well, and Bern's prohibition in itself against new treaties that could detract
30 from its prohibitions and minimums.

35 So I think it's really important that we recognise these realities now, that we're stuck with them and that in our reform efforts we work as much as we can within the flexibilities we do have, within this international framework, to ameliorate the problems that it causes.

40 The second point I might just mention is about the rationales that we have for awarding copyright, which are really very different to other forms of intellectual property. It's not just about incentives. Of course we do have incentives rationales, we want to incentivise the creation of works in order to promote their dissemination of knowledge and culture. We want to incentivise ongoing investments in work to ensure the continued availability of them but, in addition to that, we are powerfully motivated
45 to recognise and reward the contributions of authors and to recognise the

continuing interests in their creations, both economic and non-economic.

5 So there is this moral entitlement of authors to rewards in excess of
that bare amount necessary to incentivise what we want. This does
permeate Australia's copyright law, as much as it's often painted as being
utilitarian in nature and that's why we've got statutory recognition, for
example, of moral rights, resale royalty rights, performers rights. So
there's lot of literature exploring that but I think perhaps the best practical
demonstration of its validity is the power of author's interest. How
10 consistently and successful they've been used to justify broader and
longer rights and to fight off the kinds of reforms that we are talking about
today.

15 So I think it's incredibly valuable that we're going through this
exercise with you at the Productivity Commission because the way the
debate has often gone so far is people are just talking about who are going
to be the winners and losers but, of course, copyright is non-zero sum and
we need to do more than - the debate's often been stalled about which
interest is going to be worse off but the question, of course, we need to be
20 asking is who loses, how much, in exchange for who gaining what.
Changing how we divide up the rights could potentially result in an
enormous increase of overall utility and that's why all of this evidence
that's been provided to you I think is so important to finally move us past
this impasse and provide a principled means of evaluating the claims.

25 The last point, just before I wrap up. I've talked about the incentives
or the rationales for copyright. We've seen that there's a component that
society pays to incentivise the creation and ongoing availability of the
work and then there's this component that it pays to reward and recognise
30 author's contributions. Logically it doesn't matter who the incentives go
to, whether it's the author, an intermediary, whoever, as long as we get the
work created, but that reward component, well, we're only motivated to
give that to the author. So when we start understanding and disentangling
these competing rationales I think it actually opens up some really
35 interesting possibilities for reform that I'd be very happy to talk through
today.

MS CHESTER: Thanks very much, Rebecca, and we might start where
you finished, given we are living within a constrained world because of
40 treaties and conventions and trade agreements. We've tried, within our
report, to identify what we call the policy wriggle room (inaudible) where
we feel that it may be needed to get the balancing act right.

45 If I understand what you're saying correctly, at the moment, with the
term of copyright, we're trying to satisfy a whole bunch of different

objectives. A little bit of our focus has really been on, “Well, if you’re looking at rewarding that creative endeavour it’s about creating an incentive to do so.” You’re suggesting that there are other objectives that we should be looking at meeting, through the term of copyright, but
5 wouldn’t that then suggest that the way that exclusivity is afforded during that term might change over time, or is that something that we then just address through fair use or fair dealing exceptions?

DR GIBLIN: So there’s a number of ways we can do this. I think the
10 starting point is that at the very minimum we are locked into Bern’s minimum of life of the author plus 50. But you’re absolutely right, that if we start with this incentive rationale all of the economic modelling shows that once you take into account the time value of money with even a conservative discount rate, and rates of cultural depreciation, you can
15 incentivise the creation of even the most expensive block buster thing with a term of about 25 years, absolute maximum. The difference between life plus 50 and 25 years is quite extreme.

Then if we think about the rewards rationales, the intermediaries, the
20 cultural intermediaries that might have needed to be involved at the beginning in order to invest in making that possible, they’ve had everything that they needed to get in that initial 25 years of protection. So there’s no rationale for continuing to give them anything any further. Bern does not require that the copyright stay forever with whoever it’s
25 been transferred to, it just requires that the author have the term of protection of life plus 50. So it could be, for example, that after an initial fixed term of protection that reflects that necessary incentive level that the rights could revert back to authors.

30 Now, that opens up some really interesting possibilities because, first of all, as I’m sure we’re all aware, copyright does a really bad job at actually securing to authors much of the value of their works. There’s lots of money in the copyright industries but when we have a look at the data about how much authors earn, very little of it is trickling to them.

35 If we were to have some kind of reversion system where, after that initial fixed term at the incentive level, it goes back to authors, it would give them another bite at the cherry, if you like. They would have the option, for example, to licence the work back to the original producer or
40 original publisher, perhaps negotiating a higher royalty rate, based on the continuing value of the work. They might licence it to somebody else. Perhaps the work hasn’t been exploited for a while and somebody else sees some value in it so the transfer of rights could then go to those who value it the most.

45

It could be, as well, that once authors start getting a greater share of the rewards that it opens up some greater possibilities for socially valuable collective licencing as well. One of the ideas in this regard could be for something like a digital public library. At the moment one of the big revenue streams for authors comes from the educational lending right and public lending right from libraries. That's a statutory scheme that directs the lion's share of the revenue to authors. So that's one of the biggest revenue streams for Australian authors and well over twice as big as they get from, for example, CAG distributions. It could be something similar where if, after this initial term of protection, that the rights go back to the authors, the authors might be encouraged to make them available to all public libraries to lend, in exchange for some equitable remuneration from that.

MR COPPEL: Why couldn't that be achieved through commercial agreement between an author and a publisher?

DR GIBLIN: At the moment it's completely in the hands of the publishers who are controlling these rights and I've just had ARC, the Australian Research Council, fund a major study we've got investigating this. But very few publishers are willing to licence the books in their control to public libraries for eLending, because eLending is the only form of lending that they do have any veto power over, and when they do do so, they impose some very onerous licencing terms. For example, Harper Collins will permit it to be lent only 26 times before the book is worn out and then the libraries have to buy a new licence. McMillian, I believe, generally requires you can buy the book but only if you buy 499 other books and they have this sort of bundling model. There's lots of other problems that are arising from that, at the moment.

MR COPPEL: I was referring to the example you gave of an author having the copyright returned after a period of 25 years, what would stop an author having an agreement with the publisher, that's limited for a period of 25 years?

DR GIBLIN: At the moment?

MR COPPEL: Yes.

DR GIBLIN: So there's a lot of literature that deals with this, particularly by Ruth Towse, who is an eminent UK academic. The bargaining power between authors and publishers is extremely uneven. The literature identifies a lot of reasons for this, including the fact that creative labour is often more attractive than other forms of labour, which means that authors might be willing to engage in it for fewer rewards than

they are other forms of labour. There's some really interesting research out there seeing how much people would need to be paid to paint a fence compared to how much they're willing to work on a novel for.

5 In fact, this phenomenon is so strong that the Screen Actors' Guild has to actually have something in all of the contracts for their members prohibiting them from working for below the union minimum, because everybody is so tempted to, in order to get the work, that the only way to have the possibility of a living wage for everybody else is to prohibit that
10 and say that you can't work in this industry unless you agree to those rules.

 So there's lots of reasons why authors are not in a position to hold back some of their rights and why they end up having to give it away in a
15 whole big lump. But that's why this current lump based approach, I think, is really inefficient. Just having one bundle of rights that lasts this extraordinarily long time and that continues to subsist, regardless of whether it is, in fact, exploited, regardless of whether there are any investments being made in continuing to keep it available just seems
20 extraordinarily inefficient.

MS CHESTER: This might be a little tangential, but I don't want to forget the thought while it's there. Some of the arrangements that you were just talking about then, that are enshrined in licencing agreements
25 between authors and publishers and publishers and other parties, like libraries and such; one of our recommendations, which is about the repeal of section 51(3) exemption of IP rights, how they're afforded in the licencing arrangements, being subject to Australia's CCA, the Competition and Consumer Act, is that an area that you've given some
30 thought to, in terms of what type of conduct might be occurring within those arrangements and whether or not there'd be benefits and advantages of having them subject to the CCA?

DR GIBLIN: I haven't thought about that specifically. I have done a
35 little bit of work on the issue of contracting out of exceptions and the dangers of that, given how easy it is, particularly with electronic licencing agreements, for that to occur, which I'd be happy to send to you if that might be of assistance.

40 **MS CHESTER:** Okay, thanks. Perhaps one more point, while I think of it, just on when we're talking about the relative bargaining power. Cultural intermediaries don't tend to hold back and ask for just the thing that they need either. It's very common, particularly in contracts in the movie industry and the recording industry, for the rights to cover
45 everything on this planet, but also to exploit any extra-terrestrial markets

that might emerge in the future, anywhere in this universe or any other. So there's really nothing left to chance. It's not that the publishers are taking what they need to incentivise their investment in a work, they are taking everything.

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DR GIBLIN: So territorial rights to infinity and beyond, from what you're saying.

10 **MS CHESTER:** Yes. We might get into the world of fair dealing versus fair use and you'll know from the round table, but also from the public hearings, that we're still getting conflicting evidence and views from parties about which system provides greater certainty or greater predictability and I guess a suggestion by some folk that the fair use is not a fair deal, particularly for rights holders. It would be good if you could elaborate on some of your views around that, Rebecca.

15 **DR GIBLIN:** I think genuinely that that fundamentally misapprehends what fair use is about. This idea that fair use isn't fair is definitionally incorrect. A lot of the examples that I personally come across, the things that we can't do now that we could do, under fair use, might be helpful in explaining this. So I'm involved, at Monash University, as my faculty's copyright officer and on the overall university's copyright committee and we do face these issues all the time. People are always coming up to me and saying, "Can I do this?" and the answer is almost always, "No" or, 20 "That's really complicated, I can't tell you," and send you off to the person who's in charge of dealing specifically with the statutory licence.

25 So let me give a few examples. So we do have one Monash scientist who's been invited to give a presentation at the State Library on a weekend in a couple of weeks. Talk to families and young kids about data science. He wants to use a couple of images to illustrate this, given the audience, in ways that I consider would certainly be fair, taking into account the fairness factors, but they don't fit within any of our pigeon holes, so that's simply not permitted.

35

Another example. Thinking about the narrowness of the pigeon holes, it comes up again and again. I recently saw one of the people I follow on Twitter post their kids homework assignment and that said the children were going to talk about music and the role of music in their families and they were asked to bring in some music on a USB key to play and the child was going to talk about it. Now, I had a debate about this, 40 on Twitter, with some copyright lawyers and it was decided, the classroom use is perfectly permitted under the various licences and exceptions. It's okay for the 6-year-olds to put the music on the USB key but it's not okay for his mum to do it for him. So we just had this

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ridiculous result where rather than focusing on the fairness of the use by focusing on the pigeon hole, things that really don't matter and are not going to cause anybody any harm are just simply not permitted.

5 Back to the university examples, our students very often gather - we ask them to do assignments and sometimes they incorporate copyrighted material in that work that they do, and that's a fair dealing for research or study. But they can't then incorporate those into portfolios to give to future employers or potential employers because that would be an
10 infringement.

 Conference presentations are a big problem for us in academia as well, and public lectures. Just as my earlier example, if we want to use an image it has to be fair. Perfectly appropriate and normal and correct that it
15 has to be fair, but in addition it has to be for parody or satire or a criticism or review or one of those other things. That's okay for the people who are very funny but what if you just want to use it to illustrate a point in another way? We have to recommend against them doing that - - -

20 **MR COPPEL:** Are there any examples where people have done that and been pursued in courts? Those sorts of examples?

DR GIBLIN: Yes. So this is really the problem. What a lot of people say to me when I bring up issues like this is, "Well, it's never litigated so
25 don't worry about it." And it's true, I can't think of any examples where they have been litigated. But these are things that end up just not happening. People end up just not doing these things that are socially valuable and it should be okay to do because universities are risk averse and we tell them not to.

30 So if we come back to that question that I raised earlier about who is losing how much, in exchange for who gaining what, well society in Australia is losing a great deal in exchange for really not much at all. So I think a lot of the uses that I think would be fair, under the new system,
35 that currently would be infringements, under our existing approach, are not things that would result in any lost remuneration at all. What they would save is an enormous amount of administrative overhead. So, for example, it might be, in the US, for example, if you want to reproduce a very simple image in a conference paper, and it is justified, given all of the
40 circumstances, remember, of course, the fairness isn't automatic, just using an image isn't necessarily fair, but taking into account all of those factors.

45 US academics just do that and we have to go off, we have to get legal advice about whether or not it might fit within one of the exceptions. We

often find that it's unclear or it's no, so the university solicitor says, "Don't do it." Then we'll get the academic in question to write off and ask for a licence. The usually one of two things happens. The most common thing is they just don't hear anything back at all, because the publishers just don't care and they're used to fair use so they're, "Why are these people even bothering me with this?" so often you just get no response. The other possibility is the publisher goes, "Hooray, here's an opportunity," and says, "Sure, but that will be \$2800," which is prohibitive and it just can't happen. So either way the uses are just not happening and wouldn't happen on those terms and, as a society we lose.

MS CHESTER: So for them stepping back and looking at what might be the net economic benefits of moving from fair dealing to fair use, the material benefit, from your perspective then, is we avoid this what I call fair use chill, where people aren't doing things for the fear of whether or not it's an infringement or not?

DR GIBLIN: Absolutely. We would feel so much more confident on advising whether we think something is fair than whether it fits within one of the existing pigeon holes now. So just about three days ago a colleague asked me, "Can I upload this video from last year's international moot, to promote the moot to future students?" It has a song playing in the background and I can't say yes, under the current Australian law, but I could have said yes if we had fair use.

MS CHESTER: So that sort of dovetails into the issue of a lot of the focus around moving from fair dealing to fair use is what does that mean for educational licences? From what you're saying, there's going to be a net increase in use but seems that in principle wouldn't have been occurring, under fair dealing, because of the uncertainty or the chill factor. Do you think there is a legitimate concern of the licencing parties that moving from fair dealing to fair use will have a material impact on their licencing fees, or is it just that moving from fair dealing to fair use might change the negotiating parameters a little bit more?

DR GIBLIN: For the education sector particularly I have had a look at the data from the Copyright Advisory Group and their modelling suggests that they would probably pay about \$8-12 million a year less if fair use was introduced, instead of fair dealing. It's really worth breaking down what that money was paid for and how it would have been distributed, so that we understand the economic impact of this. So this is based on their modelling, it's proportional estimate and it's the amount that they've calculated, proportionally, that they're paying for things like orphan works, for which the owners just simply cannot be found, and also for

works that were never intended to be monetised. So, for example, the About Us page on the Commonwealth Bank website.

5 Now, of that money that they're estimating that they'll save, and I'll call it \$10 million, just as a round number in the middle, well, what would have happened to that? I would say virtually all of that would not have been paid out to authors, either because they couldn't be found or because they wouldn't have hit the minimum threshold amount for payment, through the collective licence thing, from CAG. So it would have just gone into the broader pool for distribution. So it wouldn't have gone, at all, to the authors or the owners responsible for bringing it about in the first place but into the broader pool. Then, on CAG's estimates from the publicly available data, it seems that it's just something around 2.4 per cent of that whole pool actually eventually finds its way to author's pockets at all.

20 So I think that there would certainly be some impact on some publishers, through the change for education, but I don't think that that is going to be very much tied to the provision of their own works at all. I think it's more likely to be a loss of revenue that wasn't about anything that they created in the first place.

25 **MR COPPEL:** You mentioned in your introductory remarks that under the international agreements it's not possible to have formalities or at least before 50 years. The US has voluntary formalities after that 50 year period. One of the advantages of formalities is that it identifies the owner of the copyright, particularly when it's a lengthy period that that can be an issue. I'm interested in your views on whether you see value in formalities in the area of copyright, or at least in this period after the first 30 50 years after death?

35 **DR GIBLIN:** Yes, absolutely. Of course the Bern prohibition is only on formalities as a condition of enjoyment of the copyright and you can still have them. There's a few interesting things that arise from this. For example, when I talked about the possibility of perhaps reverting rights to authors and all of the interesting possibilities that would arise from that, one of them is that we could have, as a condition of reversion, that the author has to claim their interest, in a register. So that could be one way. That's not going to fall foul of the Bern prohibition and it would be a way of starting to allow us to gather information about who owns what, which 40 then also facilitates licensing. I think it also gives us a little bit of - it improves our evidence base for dealing with orphan works as well. So, for example, say a work is not being commercially exploited and the time period occurs when it can be reverted back to the author, under the kind of model that I was talking about just for illustration.

5 If it's not being exploited and the author doesn't claim it back, so you can check the register and you can see that there has been no interest, that could be relevant either to whether the use is a fair use or perhaps to whether there is some kind of complete limitation on remedy or something like that. So it could really help us build an evidence base about not only when a work is orphaned, but help facilitate that licencing when people do want to continue using them.

10 **MS CHESTER:** One area of our report, so as you appreciate we had a very broad terms of reference and we're looking at all forms of intellectual property arrangements. One area that's been subject to some new evidence, by way of submissions and public hearings, has been in the area of design rules and I'm not expecting you to be an expert in the area of
15 design rules but the reason I wanted to raise it with you is that you are an expert in the area of copyright and we've learned that the UK more recently, but some other European countries, have actually flipped design rules into the copyright system. Has that been on your radar screen or anything that you've given thought to?

20 **DR GIBLIN:** No.

MS CHESTER: Okay. Rebecca, that's all the questions we wanted to cover with you this afternoon. Thank you very much and thanks for the
25 submissions and your involvement in the round table to date. Is there anything else that you wanted to cover that you haven't? Because I'm conscious we're actually miraculously running on time, it's unprecedented.

30 **DR GIBLIN:** I think, just in wrapping up, I just want to address this claim that I'm hearing a lot, which is that things haven't really changed since Bern, but fundamentally while we live in a digital world it's all just business as usual. In rebutting that I just want to tell you this story, which is from back in 1906 when Mark Twain was testifying to Congress about
35 why copyright should be extended from what was then a term of 42 years to a term of the author's life plus 50. His claim was based not on the value of those books but on their complete and utter lack of value. He argued that the commercial value of almost every book written in America is extracted after its first few years. He said publically, "I doubt that there's 20 Americans per century whose works are worth reading after
40 that. When copyrights expire," he said, "those few valuable books continue to be published and the valueless ones continue not to be and the only difference is that the profits are diverted to the publishers instead of the authors or their heirs." So, in those circumstances, what Twain was
45 arguing is there's no downside to giving infinite copyright to every single

work because that would, at least, enable the authors to continue to reap the benefits of those few valuable ones and the rest are going to be lost to obscurity regardless.

5 I think this really shows how things have changed and how we are actually operating in a really different environment now. The marginal costs of a copy is now rapidly approaching zero for many, many, many kinds of works and we've got enormous potential here to use copyright to further development, to further education, to make the pie bigger for
10 everybody. I really think that that's something that we should take into account when we're hearing these claims of business as usual. Thank you.

MS CHESTER: Thank you, Rebecca. That brings us to the junction of a break and we'll be looking at resuming our hearings at 1.55 pm. Thank
15 you.

ADJOURNED

[12.58 pm]

20

RESUMED

[1.55 pm]

MR COPPEL: Welcome back, everybody. We'll reconvene the
25 hearings today, in Melbourne, with Matt Wenham. So if you could make your way to the table, when you're comfortable if you could, for the purposes of the transcript, give your name and who you represent and then if you care to give a brief opening statement. Thank you.

30 **DR WENHAM:** Thank you very much for the invitation to talk to you today. My name is Dr Matt Wenham, I'm the Executive Manager of Policy and Projects with the Australian Academy of Technology and Engineering, or ATSE for short. ATSE is the national academy for
35 Australian engineering, applied science and technology so we're an independent organisation, established in legislation, to provide advice to government, primarily, but the nation, more broadly, on issues around technology, engineering and applied science.

40 The structure of the academy is that we have about 800 elected fellows of the academy who come from industry, academia, research institutes and government and they're elected to the academy for their career achievements and excellence in areas of technology and engineering. So the fellows are the resource base that we draw on. We have a small national secretariat based here in Melbourne. I guess
45 ATSE's key interest in the inquiry that the Commission is conducting is

5 primarily around IP protection for technology and innovative products, so generally patents and plant breeders rights, to a certain extent. We haven't made a submission to the inquiry but we did participate in some of the hearings that you held last year or earlier in the year, I can't remember when it was now.

MS CHESTER: I think it was one of our round tables.

10 **DR WENHAM:** It was, that's right. So obviously we see the importance of strong IP protection, in terms of fostering innovation and particularly encouraging entrepreneurship in science and technology. I suppose the key points that we wanted to emphasise for the inquiry, which has been picked up in the draft report, was the importance of the international context and I think there's been a lot commented on in the draft report
15 around treaty obligations and the interaction between Australian IP arrangements and arrangements overseas and particularly being concerned with the triadic group, in terms of patents to the US and EU and Japan.

20 Australia is a fairly small producer of IP in the technology area and a large importer of IP so the need to have consistency between Australian arrangements and those overseas is critically important. ATSE would be a strong supporter of the recommendations or suggestions in the report for Australia to remain engaged with the cooperation for the WTO and the World Intellectual Property Organisation to harmonise those
25 arrangements.

30 In terms of the principles that the IP system is based on, we would suggest that a possible extra principle, in addition to the four that are already there, might be one of fairness. In that sense, what we're thinking of is reward for effort. I know it's a challenge in setting up the regulations to do the right thing and not reward the wrong sort of behaviour, but we're obviously interested in IP protection being offered to innovators and inventors and those who have actually done development work and so that they're fairly recognised for their work. I think there's some ability to
35 perhaps, or a need to make sure that the arrangements recognise parallel development, where you've got two groups, working in isolation, on the same piece of intellectual property, making sure that that effort is recognised and rewarded even though one group may be slightly sooner to file for protection. We're also obviously keen to make sure that the
40 benefit errs on the side of genuine developers, people that are inventing and innovating and want to make use of that IP, rather than those who are wishing to lock it up to protect market share or, in the worst case, patent trolls.

45 I think the comments around efficiency, obviously the time taken to

5 achieve IP protection is important and I know there are concerns the length of time that IP Australia might take to assess patents in Australia, particularly based on those comments around the international context and also the cost is also important in filing. That's particularly true for researchers who are publicly funded in universities or research institutes where the costs for IP protection are essentially coming out of research funds, so trying to minimise those costs as much as possible is important.

10 One possible idea for looking at efficiency might be benchmarking the Australian timelines and costs for IP registration on a market share basis. So people seeking IP protection in the mining sector is a very significant and potentially large pay off area for Australian IP versus some other areas where the market share is much smaller so you might expect that there'd be a difference in those two areas, in terms of costs and timing.

20 We're particularly interested in IP sharing arrangements to facilitate better collaboration between publicly funded researchers and industry, or research end users. Recently ATSE has been a participant in the review of research training that was conducted by the Australian Council of Learned Academies, looking at PhD and Masters by research training in Australia. IP sharing was identified as one of the key barriers to students working more with an industry because of issues around the sharing of IP and working out who owns IP.

25 In a couple of the specific requests, ATSE is generally supportive of the open access principle for publicly funded research but I guess offers a caution that there would need to be some exemption maintained for commercially sensitive material, where there are commercialisation opportunities or also in areas where the government or public funds aren't the sole funder of that researcher. Obviously other funding partners are going to want to have some involvement.

35 Finally, in terms of the exemptions for experimental use, I don't have any specific examples where a lack of that exemption has hindered researchers in universities or institutes, although we have had some anecdotal feedback from fellows and others that that is sometimes a frustration that restricts what researchers feel they're able to do.

40 So, from a research perspective, trying to make it as possible for researchers to do that work is important but obviously that's a fairly fundamental principle of the IP system, as it stands, to give those that develop the IP the first rights to make use of it, so that would have to be very carefully thought through. I'll leave it at that.

45

MR COPPEL: Thank you, Matt. I wanted to pick up on two of the points that you made, one, the framework that's used to assess the intellectual property arrangements and then the other is the issue of collaboration between research institutes and industry and entrepreneurs.

5 You made the point that fairness should be a factor that is taken into consideration in any analytical framework. This is a point that had come up in earlier consultations and our report has four principles that guided process for assessment of the intellectual property arrangements; effectiveness, efficiency, adaptability and accountability. Within the

10 accountability that includes the arrangements should reflect community value, which is a way that we're trying to inject that notion of fairness.

In bringing up that principle of fairness, you raised the point that it could act to limit intellectual property, or ideas or innovations being

15 locked up by intellectual property. I'm wondering if you have any evidence or experience that could shed light on whether that is a phenomena that is significant, in the Australian context?

DR WENHAM: Off the top of my head I can't offer any strong

20 evidence, it's mostly by way of anecdote and some of the other work that we've done in other contexts. I think, thinking about the university sector or a public funded research sector, there is a concern that there's a tendency to lock up IP. Now, that varies widely across the university sector. There are some universities and their technology transfer officers

25 or commercialisation officers that are more open.

I think one of the better known ones is the University of New South Wales, with their open access IP model where they're basically trying to - they do have protection of the IP but it's made fairly freely available for

30 others to use. We've had some interaction with the University of Warwick, in the UK, and the Warwick Manufacturing Group, which has a very open attitude to their IP, in terms of working with industry in that the IP that's developed out of their research is essentially freely available for industry partners to make use of, with a few common sense requirements

35 or guidelines. Their theory around that is, I guess similar to UNSW, (a) that they want the IP to be used, otherwise is of not much value, but they see that as a very important way of fostering collaboration and relationships with companies and industry and they've been very successful in bringing in external funding from industry for their research

40 because they companies have a positive experience that starts from the use of Warwick IP and that then leads to larger and larger projects and more contributions.

So I think there are examples and anecdotes around the place but

45 trying to make sure that the IP is as accessible - I suppose the far end of

that spectrum is the use it or lose it principle. That, in general, I think would be supported to a certain extent but given there are caveats on that as well so I don't think it will be quite as black and white.

5 **MR COPPEL:** I don't think you were here before lunch but we were discussing collaboration between universities and industry and the idea of a use it or lose it mechanism, which was suggested in the inquiry by Ian Watt. They didn't have enough time to fully assess that idea and they've passed it on to the Productivity Commission's ongoing inquiry into
10 intellectual property arrangements and we didn't have enough time to consider it for the draft report, but we will be looking at this more, in finalising the report.

15 One of the things we're trying to get a grip on, I guess, is the fundamental question, is there a problem and how big is that problem? You've noted that universities all have officers that aim to commercialise the intellectual property. There are measures that suggest there is a low level in collaboration but there may be more imperfect measures than a reflection of the reality. I'd be interested in having your perspective of
20 how you see this issue. Is it general or are there really only specific cases where maybe a possible deal fell through because the commercial arrangements didn't favour one party over the other sufficiently to strike that deal.

25 **DR WENHAM:** ATSE's done quite a bit of work on that question of collaboration between research and industry. We're currently doing some work for the Department of Industry, Innovation and Science around reports that have been done on collaboration and looking at this question of why Australia performs so poorly. We've also done work, over the last
30 couple of years, looking at the metrics that drive behaviour of university researchers, and that's a long and complex topic but we've basically developed a series of metrics to try and measure research engagement behaviour of academics working with end users; industry, government and others, and that has now worked its way into the national innovation and
35 science agenda and Department of Education and the Australian Research Council are doing work and we're helping with that, around the metrics and the incentives for researchers.

40 There's been a lot written about the collaboration issue. That's certainly a very diverse one and there's a lot of different reasons for that. I think partly it's the metrics and the incentives, partly it's a cultural issue, partly it's the shape of Australian business and industry and the absorptive capacity of industry to take up research.

45 In this context I think IP is one of the barriers or one of the issues.

5 The feedback that we get from our fellows who are based in industry or
connected to industry is that often universities can be difficult to deal with
on IP issues. Now, again, that varies widely within the sector. There are
some universities and tech transfer officers that are better than others, but
often the complaint is that the starting point is lawyers at 20 paces and
everything will be negotiated to the nth degree before we start any work.
For a business, that's often a barrier that they're not willing, unless it's a
large business that has other reasons to do it, they're not willing to go
over. And certainly for small and medium enterprises that's a deal
stopper. I think the IP issues are certainly one of the barriers that need to
be looked at. It's more around how IP sharing and IP ownership is
negotiated between parties.

15 You'd asked before about the research student training, and I think
that's one of the areas where there is some fairly clear potential to make
progress in those sort of arrangements. The context we were looking at
there, as part of the review of research training, was students who are,
PhD students generally, who are either placed in industry for a portion of
their PhD or conduct part of their project with industry or, at the other
extreme, are doing an internship or a placement, at some point, to help
them interact with industry more. The review recommended that the
default position be that any IP developed out of that lay with the business,
the industry partner, and that be the default and if there needed to be
exemptions or negotiations around that, that would be the starting point.
25 That was based on feedback from businesses and industry groups that
said, "That's the minimum requirement for us to be involved. If we're
going to partner this group, we want to know that we've got access to the
IP."

30 **MR COPPEL:** You mentioned the work on metrics, is that something
that is publicly available? Would we be able to - - -

35 **DR WENHAM:** Yes, so the development work that went into it, to
developing the metrics, is available and then last year we did a pilot study
in Queensland and South Australia, working with the universities in those
states, looking at their data. Those two reports are both available and
we're currently doing development work as part of the NESA(?)
engagement and impact process that will be released once the work has
been done.

40 **MS CHESTER:** In terms of where you have been able to roll out the
metrics in one or two universities, the overall findings, did they line up
with the other metrics that we've seen on the extent to which Australian
public sector funded organisations are commercialising their intellectual
45 property?

DR WENHAM: So those metrics, which we've termed Research Engagement for Australia, REA, which is just to confuse everyone because the other exercise that goes on is ERA, which is Excellence in Research for Australia, which measures traditional academic outputs, publications, citations. So we did some work to look at the alignment of REA, the engagement side, with ERA, the excellence side, and, as you'd expect, there's a fairly good correlation and that suggests that researchers who are doing world-leading research are recognised by industry and that's where they'll go with their funding. But there are outliers where you have researchers who don't perform as strongly on the traditional quality metrics but do bring in a lot of engagement work. We're essentially, with those metrics, measuring external research income, as a proxy for engagement activity.

So we think that it does reflect the other statistics around the rates of commercialisation and I guess the purpose in doing that work was two-fold. One is to drive improvement in the sector, as a whole, to try and improve the national performance but also to recognise those groups who are already doing that work and are the outliers, if you like, who are very engaged with industry or end users who currently don't get recognised in the current suite of metrics that are used to incentivise behaviour for researchers.

MR COPPEL: There are a number of mechanisms that are being developed to facilitate licencing between universities and industry. Things like the IP Tool Kit, there's Source IP, IP Source, they're aimed at essentially streamlining the transactions costs that are involved in striking a deal. Do you have any views on the contribution that they make, in terms of their effectiveness?

DR WENHAM: I think they're important initiatives. Source IP, in particular, I think is a good way of opening up the IP that already exists so that businesses and entrepreneurs can come in and access that IP. The IP Tool Kit I think is a good initiative. I'm not sure how much of an impact that will have on practicing universities. There's a, I'd say, fair amount of inertia in technology transfer officers and they like doing things their own way. I'm sure you would have heard this morning, from Renee Hindmarsh, from the ATN, about their initiatives, as a grouping of universities, to standardise their IP procedures. So things like that I think are a welcome addition. The second part of your - - -

MR COPPEL: I think you've sort of answered it, in terms of their effectiveness, but a follow up would be, are there ways in which those sorts of mechanisms could be improved?

DR WENHAM: I don't know how much it pertains to the work that the Commission is doing, but we, again as part of an ACOLA study with the other academies last year, looked at research translation overseas and we studied 14 countries that were seen as high performers in the translation of research. So they're countries like the US and Israel and Germany and the UK, and took a country-comparison approach and tried to identify what some of the common factors were, both in the programs that they run and the way that their systems are set up. One of the interesting findings from that was the importance of intermediaries or brokerage organisations.

So simply having a database of the IP, well that's a good first step, often doesn't do a lot to allow businesses to - it's a small number of businesses that are going to use that resource, on their own initiative, to find new IP. What has been shown to work in other countries is having dedicated organisations, dedicated people whose role it is to provide the link between the two groups and speak to business and university and say to business, "What are the problems you are trying to address? These are the capabilities that we've got in universities or researchers that can help you address that." And that sort of goes to, "This is the IP that might help you."

So I guess the lesson from that is that it's not just an organic process where you can make the information available or the groups will find each other and they'll join up, there does need to be a bit of matchmaking done and, in some cases, quite intensive work to assess the needs of the business or industry and the capabilities of researchers. I think there's some positive steps in that direction, in Australia, in terms of things like the innovation connections program that the federal Department of Industry runs, which as advisors that try and make those connections. Then the Industry Growth Centres, I would also imagine, will have some role in that direction, of being the broker between the two. So I think the lesson is you can't just have the tool and the database, you've got to have someone that's actively using that to make sure that it's disseminated and getting into private industry.

MR COPPEL: In that world where essentially there's the establishment of a relationship, building trust, an instrument like use it or lose it seems like quite a heavy handed way of dealing with a potential problem of IP that exists but is somehow being locked up and not made accessible. You mentioned there were a number of issues with use it or lose it, I'd be interested in what your views are on that approach and some of those issues that you were referring to.

DR WENHAM: It is a fairly blunt instrument I think. It does create a fairly strong imperative for universities to try and get their IP disseminated and used. That sort of goes to one of the bigger issues around research engagement, and I mentioned it briefly before, around
5 absorbing of capacity and how much ability academics actually have. I mean they obviously can't control whether someone takes up their IP or not, they're only one part of the equation.

Now, we do recognise that there are issues with the way that research
10 funding system is structured so that the incentives aren't there for people to do that work. So having something like use it or lose it would potentially add an incentive for universities to go out and promote that work or have it taken up but they can't control what happens at the other end. They can push it as much as they like but unless someone's there to
15 pick up the demand. Now, that may not be such a bad thing, that's one of the nuances, I suppose, that people need to be aware of, in promoting that sort of system.

MS CHESTER: Matt, it's also been suggested to us that the use it or
20 lose it could also result in an unintended or a perverse incentive. So if you've got a public sector funded research organisation, allocating that public sector of funds is sort of decided, at the moment, on the merit or the potential of the research and that will partially be informed by what can be commercialised and what can't be. If you go for a use it or lose it, that
25 could then start to influence how the public sector funds are allocated to the initial research, in terms of those where commercialisation might be an easier path but commercialisation is not always the best proxy measure of what will impact community wellbeing from that research. So that's been suggested to us, given your experience do you think there's legitimacy
30 around that concern?

DR WENHAM: I think there's legitimacy in those concerns and it applies, more broadly, to the discussion around collaboration and even, more fundamentally, the balance of basicness as applied research. The
35 evidence from all the work that we've done, around the engagement metrics, as I said before, there's quite a strong correlation between research excellence and research engagement and clearly unless you've got a strong basic research foundation you're cutting yourself off at the knees because down the track there won't be the research to
40 commercialise. On top of the aspect of basic research, by its nature, is not directed towards an outcome so there's serendipitous results and things that get developed out of research that couldn't have been predicted.

So it's a legitimate concern but I think the focus has been correct in
45 that by international measures Australia does very well on our research

excellence or our research output, the basic research side of things. The area we don't do as well in is the translation of that research. We've tried to consider that fairly broadly so it's not just about the commercialisation of research into a product or a service, which tends to apply more in the science and technology, the STEM, disciplines, but also thinking about other areas of publicly funded research, particularly in the humanities and social science, where the translation of that research might be into public policy or into business practices.

So we do need to be mindful of maintaining that strong basic research, that sort of curiosity driven research core, because without that the rest won't flow, but I think we do need to think carefully about how we encourage more of the translation piece of it and that's where maybe IP arrangements and commercialisation arrangements are important.

MS CHESTER: There was a second point that you made in your opening remarks around, and correct me if I've gotten this wrong, nearly like a triage or a priority system, in terms of how the IP rights are registered or certified so it would be weighted on the share of GDP that a sector has. I'm just trying to get a better understanding of what sort of problem is underpinning that solution that you're suggesting.

DR WENHAM: So it's a fairly undeveloped idea, it was one of the suggestions that had come up. I think what it was geared towards is the usual comparison that's done is looking at patent filing fees in Australia, versus other countries around the world and saying we're expensive or cheap, compared to others. I think, from my limited understanding, that Australia is relatively inexpensive, compared to some other countries.

Now, that's probably fair if you look at our overall generation of IP in Australia, in terms of being a net importer. I think what that suggestion was getting at was trying to view that with a bit more granularity, in the sense that the IP that's generated in our mining equipment and services sector, the MET sector, is actually quite a large portion of the world's IP in that particular sector, whereas in other sectors of the economy, perhaps in advanced manufacturing or pharmaceuticals, our IP is a much smaller portion.

So if you were to look at the comparative patent filing fees in the MET sector, Australia might be cheaper than it should be because that protection in Australia might actually be worth more, I suppose, than in a sector where it's a much smaller portion. I'm clearly not an economist and don't know the details of how that would work in practice, but I think it was a suggestion just to look at things with a bit more granularity rather than just on a broad based Australia versus other countries approach.

MS CHESTER: So it wasn't in terms of allocating priorities to getting in the IP Australia queue, it was more in terms of a weighting mechanism for assessing patent quality?

5

DR WENHAM: More in terms, I think, of assessing the efficiency of the IP system in Australia to sort of benchmark where we sit, compared to the rest of the world.

10 **MS CHESTER:** Your other opening remark that we've touched on a little bit already, around fairness, when you translated what you were thinking of there you used the words "reward for effort". I guess the way we've approached it, in our report, is reward for effort is a function of two things, it's a function of what exclusive rights you've been afforded by the
15 intellectual property arrangements and then also a function of the commercial success of the innovation or the creative works.

What role, then, for the intellectual property arrangements in rewarding effort? I guess where we kind of landed to, in an indirect way,
20 was saying, say for example with patents, the only way that we could have a proxy measure of the potential value or the potential community wellbeing from an invention is, is it truly inventive? Does it really meet an appropriate inventive step? So I guess if I'm getting your connecting the dots correctly, if fairness view is reward for effort in intellectual
25 property arrangements, the only way we could kind of get our way to that is make sure we've got a quality inventive step in the patent system. So I'm just trying to see, does that address the issue that you're raising or is there something else that we're not covering or is there another mechanism by which - - -

30

DR WENHAM: No. I think that's a good way to approach it. It's quite easy to say that that should be a principle and ultimately we want to reward that effort but doing it in practice is a much more difficult - and making sure that the arrangements are structured in the right way to do
35 that. So I think that inventiveness step is an important one and some of the examples around incremental - I shouldn't use the word "incremental" because that can be important, the sort of scintilla of innovation type notion. It might be worth looking at that requirement to make sure that that is strengthened and supports that sort of work.

40

MS CHESTER: Yes.

DR WENHAM: It's, sort of, the case of it's easy to recognise, in some cases, if you've got two extremes of, well this person is just trying to lock
45 up that IP and prevent others from having the freedom to operate whereas

this is a truly inventive piece of work and you can recognise it in comparison. But trying to structure the system so that the system can recognise it in isolation is a difficult thing to do. But I think you're right that criteria is an important driver of that sort of behaviour.

5

MR COPPEL: Well, that's it. Thank you very much, Matt.

DR WENHAM: Thank you.

10 **MR COPPEL:** Our next participant is Maree Coote from Melbourne Style Books.

MS COOTE: Thank you.

15 **MR COPPEL:** Make yourself. When you're ready if you could, for the purpose of the transcript, give your name and who you represent. Then a brief opening statement. Thank you.

20 **MS COOTE:** Thank you very much for the opportunity to respond. I appreciate it. My name is Maree Coote, and I'm an independent small publisher, Melbourne Style Books. As a writer and designer and publisher, I am both a creator and consumer of intellectual property and although small, I think, my business is emblematic of a lot of small publishers and creator individuals who, together, form an important block
25 in this review. I wonder, I fear maybe, the extent of the number of individuals like me may not have been – may have been underestimated.

Firstly, a comment about productivity. Basically, I am self-employed. I pay my own way. I've never had a grant of funding of any kind. So my
30 books lead the way into topics deemed too small fry often for large publishers. They win awards. They represent Australia in International Book Fairs, as the Face of the Children's Fair for example. They're used as references in schools and businesses and are constantly bought as gifts by – for diplomats, government, corporate.

35

So I'm obviously creating material that's desirable to Victorian Government, Education, Tourism and Commerce. With no assistance, I repeat. I'm generating valuable material. I employ other people. I pay for my own equipment and research, and the costs of creating original
40 work are substantial.

But these proposed IP changes actually threaten my business at its very core. Firstly, I don't believe that the current copyright system hinders innovation at all. It merely acknowledges and compensates
45 originators. I use copyrighted material and when I do so, and historic

material, I pay royalties to our libraries and to our galleries and to other copyright holders. I don't understand why the professor that was mentioned just before lunch couldn't do so in his presentation. I don't understand what held him back from doing that, getting permission or paying.

If I can afford to do the right thing, tiny little me, by copyright holders, why can't Google, other aggregators, big universities, why can't they afford to do the right thing? I can only assume the answer is greed and this scenario feels to me like the greedy uncle at the table leaning over to stab your last potato saying, "You're not eating that are you?" I am eating it. It's kind of in my superannuation. It's my day job. It matters a lot to producers like me. I note a lot of the presentations have been from intermediaries. Well, I'm a core creator, base producer. I don't know how many in the percentage that you're hearing from are actually creators themselves, but I would like to know. If you could help me that percentage that you're hearing from?

I'd just like to make a comment about the term "fair use" because I think fair use exists already, as we know from review (indistinct) et cetera. I think that this unfair use change basically encourages what can only be called really parasitic businesses to use other people's work without payment or permission, one or the other, or both. It doesn't always have to be payment. Your report states that the beneficiaries would be internet intermediaries and content dependent industries. That's content aggregators, regurgitators, universities, Google, et al, we know that. I don't understand why my labours should be redeployed or even sold on by those entities for no – without permission or with no compensation to me.

Your report also says that it's not about protecting rights holders but a benefit to intermediary users and balancing the rights of copyright owners and the rights of others to use their works, which I find really curious. I mean, why should those users who have not contributed to the generation of this material, and it's very expensive to create, have rights over and above people who created that work. I don't understand why that is so. It's not so with other kinds of property.

The changes that are suggested in this intellectual property arrangement, certainly remove risk and uncertainty, but from re-users, not from creators. They shift all risk and uncertainty to the creator because we have no idea if anyone's going to infringe us and whether or not we'll have to chase them through the Courts to do it, or whether we'll even know really. I also note that you have been asking this question, what under fair dealing that is now remunerated would not be so under fair use? I just find the question really curious, possibly unanswerable, because

5 you're basically asking, what current un-stolen property would you be remunerated for under a new system where a law that allows theft without guidelines was introduced and the only recourse was in Court? I mean, it's very hard to quantify a scenario that we can't tell how it will be rolled out and how it will be abused. So I find the question really unfair. It's not quantifiable.

10 I think, multinational content aggregators, like Facebook, Google, Netflix, et cetera, obviously they want free use. It's Dracula blood bank stuff. Obviously they want free use. They can then operate unfettered in any market, unrestrained by paying copyright or tax, as we know. So I don't understand how that's productivity oriented for Australian citizens. I don't see how that creates productivity for we Australians to enable them to behave that way.

15 I just wanted to mention about the legal recourses. Without clear-cut guidelines, because your report states that, sort of, fair use is pretty much the statement, is it fair? Well, it's a very subjective kind of question and the only way that I, in my research, have discovered that, for example in 20 the USA, it's really uneven and expensive to get to the bottom of what is fair, and the cases that I've looked at I don't – I wouldn't be able to tell anyone what I thought was a fair risk or not a fair risk because of what I've seen in the outcomes from the States.

25 But I just want to add a question too on moral rights, because - I won't go through the whole thing - but moral rights basically guarantee an obligation to attribute creators and their way with respect, et cetera, et cetera, and to prevent derogatory uses of the work. This entire, kind of, question has been framed in the context of remuneration and what you're 30 going to lose and what you're going to gain and who's going to lose and who's going to gain. But moral rights are about permission and I think this proposal, kind of, shifts the onus onto the IP owner to discover firstly, misuse and then to legally challenge misuse. So I can't see how it's fair. I really can't.

35 The term of copyright again I actually, personally, think should be increased. I think it should be treated like any other property. Because unlike real estate or mining rights or certain pharmaceutical things which are acquired or discovered, this is actually created and, I think, it should 40 have respect as a genuinely productive endeavour. I don't think that any assertion about the lifetime of IP being less than five years, is correct. I think you can look at Disney and Dylan and God knows what, and the fact that we're still Mark Twain, I referred to early.

Anyway, if it had no value, why would these re-users want to use it? You can't have it both ways. It either has value or it doesn't have value. Even if it has a different value to what the creator created in the beginning, it still has value and permission and payment should be offered to the creator who owns the material. That's my opinion. I think also the notes assert that lots of creative work, apparently, or invented work, is done without any expectation of remuneration. I find that really curious, because that's not the case with me. I suppose, you could say the same about cooking, but that doesn't entitle somebody to come in and eat my beautiful cake after I've made it, does it?

MR COPPEL: That's your statement.

MS COOTE: I think so.

MR COPPEL: Yes, thank you.

MS COOTE: Well, I would like to say we just need to ask for whom these things are productive and, as far as generators of original material in Australia, I really think – and parallel import as well, I have notes on parallel import which I won't hold you up with because I'm happy to chat with you about your questions. But I think that what the Commission should be asking about parallel import, for example, is for whom is it productive because the international publishers will undercut local creators on – by dint of nothing more than scale. Not relevance, not quality, not benefit to local culture, but just scale. That's how they'll damage the local industry.

We need to ask Australians what value to productivity has real origination made here, local Australian culture and how much do consumers really value that? Because Australian intellectual nutrition is key in this so-called innovation nation and it's rooted in locally grown creativity and you don't grow up to write things like Rake, if you've been raised on mass-produced, dumped intellectual junk food, you end up with intellectual diabetes, and I don't want that to happen to Australia.

MR COPPEL: Okay.

MS COOTE: So anyway that's basically where I'm coming from. How can I help?

MR COPPEL: Well, thank you, Maree, and you've posed a couple of questions to us.

MS COOTE: I did.

MR COPPEL: One of those was how many authors are actually participating in the inquiry?

5 **MS COOTE:** Yes. Well, not just authors actually, originators, so artists, designers, because I am an artist and a designer as well.

MR COPPEL: Yes. Well the answer is quite a few. This is the fourth day of hearings.

10 **MS COOTE:** Yes.

MR COPPEL: The first was in Brisbane.

15 **MS COOTE:** Yes.

MR COPPEL: I think it would be fair to say that about half, or more than half were writer in Brisbane.

20 **MS COOTE:** You think 50 per cent?

MR COPPEL: We had a similar proportion in Sydney. That includes writers and also designers – designers of furniture, designers of lamps. We have a writer participating later this afternoon and there will be others tomorrow.

25 **MS COOTE:** I'm hope you have inventors and photographs, and so on, because that's the very base level. There's a lot of discussion between, forgive me, intermediaries. I think it needs to include the original generators, the originators.

30 **MR COPPEL:** I think we have a broad range of participants in the hearings.

35 **MS COOTE:** Good.

MR COPPEL: I think in the time that I've been at the Productivity Commission, this is probably the inquiry with most extensive hearings. We've had a large number of submissions. We've had a couple of round tables. So we're quite pleased that we're about to get the perspective from different parties that are interested in the inquiry. As usual, probably one group that's less represented in the context of copyright, you might call them the readers. I guess, that's sort of understandable. So I just wanted to make that as the first point.

40

45

5 The second relates to the notion of, sort of, intellectual property and other forms of property. This inquiry is looking at all types of intellectual property. There are patents. There are plant breeder rights. There's copyright. There's designer rights. The common element in these forms of intellectual property is that there's a period of exclusivity that is granted that is there to recognise that there are upfront costs associated with the development of a – the expression of an idea or the development of a new technology. That period of exclusivity is there to provide a mechanism for rewarding that effort.

10 It's also recognised that the value to the broader community from that initial investment in research and development, for instance, can be enhanced by the diffusion of the mechanism that lies behind the innovation, with taking the case of a patent. It can also be very constructive in terms of facilitating further innovation. So innovation is an iterative process and one idea can lead to another idea.

MS COOTE: Certainly.

20 **MR COPPEL:** So it's always a balance.

MS COOTE: I'm aware of that. You are looking at the needs of, as I say, your discoverers, miners, inventors, all sorts of people, but I think they should all – and patent holders. I think they should be thought of and considered as distinct from copyright holders and creators and further as distinct from re-users and consumers. Because I think it's very conflated this whole review, and there are many different dynamics that affect certain parts of it in completely different ways that affect other parts. So, I mean, I can't talk to patent law. It's about novelty, is it not, not originality? So, I mean, it's too complex for me.

MR COPPEL: Yes. Okay. I just wanted to continue the point in that that is a principle that lies behind all the forms of intellectual property. The actual terms of exclusivity will vary. Copyright is the longest in terms of that term. We haven't made any recommendation in the draft report that would affect term, and the international obligations that Australia has to adhere to is the reasons why we haven't even considered questions of term.

40 **MS COOTE:** I know. But, I mean, I know what you're saying about term, and I've heard this over and over, but I actually think that fair use actually impacts on term because if fair dealing – basically I'm, kind of, reasonably secure in the knowledge that people can't use my created property without permission. So I figure that I can use it in some sort of

predictability for 50 years or so. But with fair use, if someone deems it's fair they can go for it. So how does that - - -

5 **MR COPPEL:** That would've been my third point. You've mentioned often "fair use" and "free", "fair dealing". These are all relating to the area of copyright that provides an exception for the remuneration of copyrighted work. Those exceptions are, under fair dealing, a prescribed list. Under fair use, it's essentially converting that prescribed list into a set of principles that are able to adapt through time to technological
10 innovations that couldn't have been anticipated when the Act was prescribed. That provides a greater deal of adaptability and flexibility. The notion of fair dealing and fair use both relate to providing an exception so that the use of copyright material can be undertaken in those circumstances that has a broader community value. It's important not to
15 conflate "fair use" with "free use". Under a fair use arrangement, there would still be remunerated material – remuneration for copyright material.

MS COOTE: Well, the cases that I've seen in the States don't – are not as you describe where photographs are used – I can't recall the name of
20 the case. I can look it up for you here in a minute. Her photographs were used and re-purposed, if you like, by having painting made on the surface of them. Now, the Court said it wasn't fair use until the artist appealed and then they said it was fair use. If I was to look at that myself and I was the – if I was the photographer, I would be devastated that a – two dozen
25 photographs of mine had been used and re-purposed, if you like, without my permission. Another case comes to mind where I think what was done to the original was probably fair because there was quite a transformation and in that case they failed. The certainty and predictability is out the window from where I can see. I can't work out – this is very subjective
30 about what is and what is not fair, and very expensive to chase.

MR COPPEL: This whole issue of whether fair use is more uncertain than fair dealing is one of the issues that's probably come over most over the last three days of hearings. It is contested. It will depend on the way
35 in which fair use is framed in the legislation. It will depend on other – the nature of the guidance that comes with the introduction of fair use. There will be Court decisions that will also provide a level of predictability going forward. But it's also been said that under fair dealing, which is the more prescriptive approach, that users can be in a situation where
40 themselves are uncertain as to whether it's legal or not legal and that can act as a dampener because of risk, to avoid making use of the - - -

MS COOTE: I find myself in that situation as a publisher, and you're talking about what this professor couldn't use his image in his presentation
45 and there's a chill on the use. Well I get on the phone and I ring the

people and I ask them do they mind if I use it and if they say, “Yes, I do”, and if they say, “No, I don’t”, and if they say, “For \$100, \$200, \$500 you can” - and that doesn’t matter if I’m talking to the Frida Kahlo Museum or a photographer in Carlton or anywhere. I can do it. So I don’t find a chill
5 factor on asking people do they mind if I use their work in mine. A lot of the time they say, “That’s fine you can go for it”. People ask me, they ring me and say, “Can I use your work in what I’m doing?” I regularly say, “Yes”, to schools, primary schools, “Yes” to local councils, and so on, and sometimes I say, “Well”, to somebody else, “No, you need to give
10 me a fee for what you’re doing”. I mean, I don’t see why the prescriptions are difficult. What I do see is removing them all means I don’t know who has felt something’s fair, and I don’t know who has used it, and then I don’t know how a Court will interpret that because it is so subjective and expensive.

15 **MS CHESTER:** So, Maree, have you had a chance to look at the fairness factors in the illustrative examples in our report which - - -

MS COOTE: I have had a look at some of those.

20 **MS CHESTER:** Which are really trying to take fair dealing, which are the prescriptive exclusions, and turn them into factors and examples which would allow people to, effectively, apply fair dealing in an adaptable and evolving way with technology. So we’ve heard some evidence today
25 around chill. We’ve heard a lot of evidence and received a lot of other submissions of where technology or business models or platforms have changed such that a reading of fair dealing doesn’t give you any guidance as to whether or not something is subject to remuneration under copyright.

30 **MS COOTE:** I know what you mean. Technology’s changed so much.

MS CHESTER: Yes.

35 **MS COOTE:** The applications are all quite complex. Well, personally, I would rather employ the lawyers not helping me in Court chase it, but helping people unravel the application to new technology. We have taken intellectual property through from Gutenberg all the way up, and probably before, I don’t know, to get to this far. I’m sure we can do it. Lawyers would love it. Why could they not spend their efforts there than
40 elsewhere?

MS CHESTER: I guess, what we’re trying to do here is to learn from the other areas of Australian policy. A good example would be Australian consumer law where a previous prescriptive approach was not doing the
45 best for the welfare of Australian consumers with business models

changing and the like. That's moved to a principles based system, and much to the wellbeing of Australian consumers and their rights and their protections care of the ACCC. So what we're doing is the law's evolving to use principles in such a way that it then becomes adaptable.

5

The advantage with fair use is that because it's been operating in the US, we would benefit from the US jurisprudence, the guidelines that have been developed there. So these are things that will help with the transitional uncertainty and moving from fair dealing to fair use. Indeed, several countries, like Israel, have effectively transplanted the fair use system from the US across to their own jurisdiction in such a way to try to manage that sort of uncertainty during the transitional period.

10

MS COOTE: From my research it shows that unravelling all this stuff in the Court like, "The USA University of Chicago Law Review articulates concerns that Judges may be creating fair use privilege largely reserved for the rich and famous". I mean, it can be argued anecdotally either way. The States will make it easy. I look at examples from the States and it can be argued that it's absolutely clear as mud.

15

20

The outcomes and judgments from cases that I can find are baffling. I can't tell you why they were judged fair or unfair. It makes no sense to me, as an artist, and a designer, and as evaluating transformation from one entity into another where I deem it to be quite a transformation, I would say that it was transformed, they disallowed. Where I would say it was not a transformation, because as a creator I can tell they allowed it on appeal. A lot of money. So I have great concerns and I urge the Commission to look at all of the areas of this impact – that this impacts in separate categories from pharmaceutical to mining or whatever it is that your IP applies to.

25

30

I think you'll decimate the local publishing industry. I can't see why any artist, photographer, creator, would bother to write a book or do – or create a film if after – I don't know how long, that's baffling as well if - because someone feels that their use of it is fair, that they can go and exploit it. It's up to the originator – the onus has been shifted incorrectly to the creator to chase down their rights. I think the onus should be on someone who wants to exploit, not produce but exploit – we're talking about productivity. If they want to exploit fine, let them contact the originator and negotiate.

35

40

MS CHESTER: Maree, what is it about the move from fair dealing to fair use that makes you think the onus of proof has changed? It's a set of rules and legislation. It doesn't change any of the underlying principles

that if somebody feels that they've been infringed, they have enforcement remedies available to them.

5 **MS COOTE:** Well, I think if it - - -

MS CHESTER: Why does the onus shift?

10 **MS COOTE:** If it didn't change anything, it wouldn't be being done, that's number one. You're not changing the law and - - -

MS CHESTER: Sorry, I'm not saying why does it change the underlying onus of proof.

15 **MS COOTE:** Yes, I know. I hear you, but I'm just making the point that if there's no difference, then what are we all doing here? But I would say it does change the treatment because it's subjective. It boils down to a sentence and an evaluation of what is fair. The resolution of that question lays in an expensive Court. That's what's different. That once the prescriptions are removed and a broad sentence is there.

20 **MR COPPEL:** I think what goes to Court is typically going to be the tip of an iceberg. It'll be those cases where it's a very fine line between what is fair and what is not fair. The process of going to Court and the decision that's actually reached helped build a better understanding of where those lines are between fair and unfair.

25 **MS COOTE:** I wasn't trying - - -

MR COPPEL: In many instances - - -

30 **MS COOTE:** You mentioned about Court cases today. I'm not sure if it was you at that table or someone else. Talking about, I'm not sure again whether it was Thailand or The Philippines or somewhere where not a lot of cases had been brought.

35 **MR COPPEL:** Yes.

MS COOTE: That doesn't mean it doesn't work, that just means people can't afford Court, doesn't it? I mean, it's not - - -

40 **MR COPPEL:** Well it can mean many things.

MS COOTE: One's not a function of the other necessarily. So you can't measure this new introduction or the adoption – I think the adoption was mentioned that it was dropped into those countries holus-bolus and there

hadn't been too many case problems. Well, that doesn't necessarily follow that there aren't problems.

5 **MR COPPEL:** Yes, I think the point that was being made was that it was following a comment that the adoption of fair use in the United States – or the use of fair use in the United States leads to a large amount of litigation because there's that uncertainty element. The point about the other jurisdictions is that even though there is fair use you don't see that level of litigation. So there could well be other factors.

10 **MS COOTE:** Well, it could be financial or it could be cultural, but it's not necessarily proof that dropping it in there is a great success.

15 **MR COPPEL:** No, that wasn't being suggested.

MS COOTE: Okay.

MR COPPEL: Great. Thank you.

20 **MS CHESTER:** Thank you very much again.

MR COPPEL: Thank you.

25 **MS COOTE:** Okay.

MR COPPEL: Our next participant is Nick Gruen from Lateral Economics. We don't have Nick? Do we have David O'Brien?

30 **MR O'BRIEN:** Yes, you've got me.

MR COPPEL: Good. If you could come forward? So, for the purpose of the transcript, when you're comfortable, if you can give your name and who you represent and then a brief opening?

35 **MR O'BRIEN:** Yes. My name's David O'Brien and I'm a Director of Cengage Learning Australia Pty Ltd, which is an education publishing company. It's partly an education publishing company for primary school, secondary school, tertiary. So we're not trade. We don't do journals. We are purely education for the kiddies from 4 to 24 years old.
40 My particular expertise is in schools. I've been a publisher for 28 years and I've ran publishing companies in schools for the last 18. So I think, hopefully, I've got a little bit to explain on that area. Now it's only a slither of the total area, but it's one of the areas that I wish to say a few things about. Because, I guess, there's – I'm probably going to go off
45 script here a little bit because I just, sort of, figure I've had the advantage

of listening to a lot of the questioning and, I think – I don't want to get caught up in Canada and the UK and whatever else. I just want to go where I think it makes a difference to schools' education.

5 The worry is, literally, the sort of – we feel like collateral damage on this whole argument of, sort of, fair use and fair dealing. That's the area that probably I can talk to anything on the Cengage submission, which also includes parallel importation but I'm guessing you're going to get a bit of a hit of that tomorrow or something with trade publishers. But I'm
10 happy to perhaps respond to any questions that you might frame, rather than me go through that per se. So I want to talk more about the fair use, fair dealing, and the impact on schools' education.

15 Over the course of today, and I think some of the feedback from the Commissioners, it's been very much fair use, fair dealing, statutory licence over the top, what's your problem, in general terms. There's a couple of problems and I'll try and respond in the way that you have raised it with other people. There's a couple of things.

20 First of all, this is fact one for the schools' publishing, nothing developed by Cengage or the publishing industry in the schools' market is incidental in its use. It's for schools. It's for education purposes. It's not used for anything else. Nobody buys the Year 9 Science Book for Western Australia as an impulse buy or puts it in the stocking for the kid
25 at Christmas time, okay. What we do is 100 per cent fit for purpose. It's not incidental (indistinct).

30 As a corollary to that, there is no other market in Australia for our work. Again, do you really want to understand photosynthesis and heat and matter for a 12 year old from New South Wales, or how they've got to work it out? It's only for them. So we get some export in primary, yes. We don't get much export in secondary, nor does the industry, and that's because it's curriculum based. We publish to a curriculum, the Australian curriculum. Nobody else's curriculum. Texas curriculum, not worth a
35 rats. Singapore, GCSE and UK, fantastic, doesn't get used in Australia. We publish for the Australian curriculum.

40 The Australian curriculum has three overarching themes, Aborigines and Torres Strait Islanders Cultures and Histories, Sustainability, and Australia's Engagement with Asia. So the first and the third of that, nobody else's material anywhere else in the world is going to include that. That permeates through every single year level of every single subject area across every State and Territory of Australia. That's what we publish
45 for.

5 The other thing that's particularly important for us is that at any point
in time teaching and learning is generally sequential. So you only need
for this week, for this period, this month, this term, this amount. You
don't need it all. Next term, next period, you need a little bit more. This
idea of being able to, sort of – and the fact sheets, sort of, you know, the
30 – there aren't many grades that have more than 30 kids. So basically,
what you're doing you're saying, "Well, you know what, we'll have an
exemption 100 per cent of our market. That's the way we feel about it and
that's why we worry about it."

10

Yes, there is a statutory licence and fair use, fair dealing. But if that's
one of the exemptions, everything that allows them to be exempted,
irrespective of there being a statutory licence over the top, is a book or a
content sale in digital or book or both forms, lost. That's the way it is.
15 We can't survive just on the statutory licence. That is not the industry. I
would also say that the schools' industry is pretty fragile. It's remarkably
small for what it does. I mean, I'm not here to put pats on the back of
education publishers, but there's 4 million kids at school in Australia
every year. There's 300,000 teachers. Right. There's less than 1000
20 people working in education publishing. There's probably only 150 of
them who are actually publishing materials. The rest are sales and –
admin and customer service, et cetera, et cetera. So it's pretty fragile.

25 When you go across all the different curriculum areas for all the
different States, you lost a bit of revenue. That's it. You no longer
publish for it. The answer is we stop; it's not going to come in from
overseas. It just isn't. It's not going to be there because it is only for
Australian curriculum.

30 So they're the, sort of, facts which I wanted to give you as a bit of a
background and I'll be happy to take, sort of, questions. But so this idea
of fair use, fair dealing, I suppose it is the exemptions for me. I mean, I
should also say whilst I've been a director of the APA for many years I'm
not at the moment so I don't talk for them but I certainly have empathy for
35 their position. But we have to look at it that if we have bigger exemptions
like what's in the – suggested at this point in time is it would be an
example for education publishing in schools, that basically means there's
the legal right to not have to buy any books because we can legally
photocopy these and it's an exemption. Now, with the statutory licence
40 that is there and for schools it's about \$65 million which is \$15, \$16 a kid
or something like that. That's not the total sum of all their materials that
they need. Goodness me. So the net result for us is that if you have this
exemption as the fair uses as it's possibly suggested in the draft, then
we're going to have less book sales.

45

5 The other thing that happens is that – and this is a worry, and I’ll just say it’s just a worry, is that, frankly, the ALRC for the last five years, DEWA(?), the government, they have wanted to kill off or reduce down the statutory licence. That’s a matter of record. I’ve got to plenty of round tables with them as well. If you have a greater level of exemption then even though you’ve got a statutory licence, well there’s going to be a less need. What’s being photocopied that’s not exempted now is a lot less. They’re not going to want to spend \$65 million to schools on that. It’s going to be a lot lower.

10 So there has to be money come out of it and I think that’s probably what, I think, Mark O’Neill from Cambridge was trying to, sort of, say as well. I’m not going to go Canada, I’m not going to go England or anything like that, but just there will be less money. If there’s less money – I’m a commercial for profit organisation. But there’s 4 million kids out there who will get less Australian relevant material as a consequence. So we have to get that bit right. I’m open for questions.

20 **MR COPPEL:** Great. Thank you, David. Can you tell us roughly what proportion of your revenue is coming from textbooks sales and the proportion coming from the rest that - - -

25 **MR O'BRIEN:** Sure. It’s different for primary and secondary. In primary, and we have very good statistical, or information because we – through the APA we pool all of our sales and things like that so we get – and we get fed back the aggregated obviously. In primary, there’s only about five per cent of those who are members of the APA as digital. The rest is print. Predominantly in literacy, although there’s good digital in maths from non-APA members like 3P (inaudible) maths (inaudible) secondary schools – sorry if this is too much – the secondary school (inaudible) most - about 78 per cent of – I’ll call them textbooks.

35 There is virtually very few dollars that are spent on textbooks that are textbooks only. They’re all text, plus an eBook combined as a package. So you get this textbook, yes, and it’s got an E – it’s got a pin in it. You key that pin in (inaudible) so the – then you’ve got the whole eBook or the whole series (inaudible). So you get both (inaudible) it’s probably only about 15 per cent of the secondary school market (inaudible) and it’s a philosophical thing (inaudible) - want any print whatsoever I want to do everything online and digital and the reason that is not – nowhere near as strong as what people have - always think or wish it to be. It is because the infrastructure at schools is very fragmented between remote, regional and metropolitan. The costs are there as well. The need for devices is there as well.

45

Quite frankly, and I'll – as I point in education publishing is that years 11 and 12 at senior and particularly year 12 for most States, there's an end of year exam that really makes the difference between you getting into uni or getting a score and going on. Frankly, that's still pen and paper. It's a very tricky effort to sort of say we're going to do the whole year on digital but by the way – then you go racing off and do a three hour exam in pen and paper that's going to count for probably 50 per cent of your mark. So there's a whole variety of reasons. That was probably more than your question, so.

MR COPPEL: Well, one of the reasons I was asking it is that often when we ask the question of what leakage – I think that's the term that's been used by some in the industry – from shifting from fair dealing to fair use, and specifically they've been focussing on basically, sort of, the statutory licensing income. I sense, from your remarks that you are saying that shifting from fair dealing to fair use would have leakage both on those, sort of, online sales but also on the textbook sales and that's not in - -

MR O'BRIEN: Yes. Very much so on the textbooks sales as well. We've got to realise that – or appreciate and if we don't that – quite frankly the statutory licence is a terrific piece of administration, I have to tell you at this point in time. It works extremely effectively. It's not full compensation for the book sales that we lose, but it is relevant income. So we're philosophical about that at this point in time. If my CAL money goes up I don't sit there and go, "Yay, because I'm sitting there looking at book sales go down.

But teachers at the moment, under the sampling by CAL, and I think we can be fairly certain that when they extrapolate it out it's not under-doing it. I think you can be fairly comfortable that when they tell the certain amount of teachers at a certain amount of schools, "By the way, every time you go to the photocopier you've got to fill in a form", they're probably going to do less rather than more than what they would normally do. So we'll just leave it that, it probably extrapolates to actually more happening.

That's one a half billion at the moment, pages photocopied at schools. Well, that's about 2000 teacher's worth, I reckon. But anyway, so that's like 3 to 400 pages for every child at school from kindergarten through to year 12. It is with their ears pinned back at this point in time and we do not want that to be even more on the basis, now it's exempted so therefore we can go for it even further. Yes, we get a part remuneration and yes it's very valuable. It's hugely valuable. I think at a previous round table I made the – I basically, sort of, said as a matter of point, I said, "Well, I'd

be happy if there was no CAL, provided there was no photocopying,” which, of course, is, it’s that strong.

5 **MR COPPEL:** You didn’t want to mention Canada but, can I mention Canada?

MR O'BRIEN: By all means you can mention it.

10 **MR COPPEL:** Because I think the number came up this morning that, sort of, statutory licensing revenue in Canada, or at least prior to the increase in changes was in the order of about \$30 million. Here we’ve heard the number is about \$100 million. More people, more kids in Canada than here. One of the points that has been made, I guess as the
15 opposite of the one that’ve just made, that there’s probably a lot more material being copied than actually was nominally paid for.

MR O'BRIEN: Hugely.

20 **MR COPPEL:** But the other side of that is there is a lot of material that is being paid for that doesn’t necessarily have a – doesn’t have a value. I’m wondering if you’ve got any, sort of, sense as to whether those differences between Canada and Australia are a reflection of that because you suggest quite a significant difference?

25 **MR O'BRIEN:** There would appear to be a significant difference. I’m not too sure that I’ve got any either anecdotal or gut feeling as to why that is necessarily the same or – sorry, the difference is quite so stark. All I can say is that in Australia - and we can banter around numbers and they start to not reconcile or something, I think CAL receives over \$100
30 million for statutory licences, that’s university and schools. Schools is roughly about 65 million. By the time that splits between – and I’m a publisher. By the time that splits between publishing companies and authors, it’s well less than that. Obviously, it’s roughly half, and then part of that goes to newspapers and quite a few other different smaller
35 organisations that also came up in sampling. So there are those numbers.

I wasn’t sure that I’ve answered your question, but were you alluding to the fact that like, what types of other – where things are being remunerated that probably shouldn’t? I would say that there are some
40 areas in that area. I think that’s easy, relatively easy, to work on. If things are put online by organisations and they’ve been created and they say “Free, please use these”, that’s basically a marketing tool. Please use this. We’re a really good”, I don’t know, “law firm, so this is something really good that might interest you for your year 11 or year 12 legal studies”.
45 What they’re after is to get reputation and, you know, normal marketing. I

say this for myself, I'm quite comfortable that that should be excluded. It's not at the moment, but why shouldn't it be. They've put it up there for no – they've created it fully in the knowledge that it's a piece of marketed information, not to get some CAL because it came up in sampling.

The alternative of that is – and as I mentioned at the top of the speech, if you like, was that nothing that we do is not for use in the classroom to follow a curriculum from go to woe. We cover every outcome that the teacher is required to do under a curriculum. So when we put stuff up, we may well put one or two pages up and that's fine. We may well put a whole chapter up, occasionally, for remote schools because we're late in publishing. So, therefore, we realise and recognise that they're starting the year and we were late in publishing and they haven't got any materials. So we say, "Look, here it is electronically", or something like that, "download it", we give them a code and away they go. That's a different story. But, yes, if stuff is up there for marketing, I think that should be excluded. That's my view.

MS CHESTER: David, are there any statistics that can tell us internationally the incidents of textbook consumption by students of primary and secondary school?

MR O'BRIEN: Okay. Can I reverse it with secondary first, because it's a lot easier? In secondary, there are 1.9 million children in Australia enrolled in secondary across, obviously, six year levels, seven to 12. On average they do five to seven subjects depending on year 7 up to year 12 subjects. Of that they probably buy anywhere up to – if it's booklists, and sorry I'm not going to go into too many complications here, but if it's - the onus is on the students/the parents to buy the materials, then they probably average about three books a year and the other two or three would be second-hand, which is just part of the makeup of the way the model works and we don't get the dosh for it, but that's the way it works. Schools make more money than we do on second-hand.

In primary it's a bit different because except for some what's known as "consumable textbooks", like a maths writing book or a spelling book or something like that which may or may not appear on a stationery list for the parent to buy, essentially the schools buy all the books and most of those are literacy readers. They may have subscriptions to some online materials like Mathletics but - yes, so.

MS CHESTER: Yes.

MR O'BRIEN: Sorry, I'm not too sure that - - -

5 **MS CHESTER:** No. So the reason I asked the question is you're suggesting that there'll be a material change in demand for your textbooks if their use is introduced, albeit working alongside statutory licensing arrangements.

MR O'BRIEN: Yes.

10 **MS CHESTER:** I'm just trying to work out, do kids in the US not have textbooks in high school?

15 **MR O'BRIEN:** They do and it's nearly all – well, it's predominantly what's known as “class set” or purchased by the school or by the parents and communities or the – or even – there's adoption States and there's open market States. But it's not as often where the parent actually gets a booklist and has to buy the materials for their students.

20 **MS CHESTER:** But at the end of the day there's still - the textbooks get to kids.

MR O'BRIEN: Yes, yes.

25 **MS CHESTER:** So if under a fair use system in the US high school kids are still getting textbooks and someone's buying them from the publisher, why do you think that that would change then if fair use were rolled out in Australia, particularly given we're leaving in place the statutory licensing arrangements?

30 **MR O'BRIEN:** It's more the exemptions. I'm not going to get too het up on all fair use, fair dealing and stuff like that. It's more what those exemptions are. At the moment under the potential fact sheets, it's like, this thing about 30 copies or something. What I'm suggesting is that 30 copies is all the teacher needs for their school, 30 copies for that teacher. For every school in Australia it's all the whole – we sell into a honeycomb. We don't sell 15,000 copies or 10,000 copies to the New
35 South Wales government. We sell 50 copies of that text into Paramatta High School and we sell 47 copies to Nedlands North High School or something like that for one particular subject.

40 As I read it, under the potential exemptions, if they were to work that way, is that – and they only need it for the first copy of weeks or something, “No, we'll just need chapter 1. That's all we're going to deal with for the next four weeks. I'll just photocopy 30 copies of chapter 1. Done. Here it is. Next month I'll copy chapter 2 when I need it and so
45 forth”. So the net result is that they get into a state where legally it's

exempted. So what worries me is that in that case they go “Well I don’t need to buy them. I only need to buy one copy of the book. In fact, I only need to copy the” – “get the digital one and I’ll just zap it off my high speed printer and binder”, and it’s all apparently legal now. So everything
5 has to be – if it’s more copying, there will be less books sold.

MS CHESTER: So you’re saying there’s more copying in the US, but still some textbooks being sold?

10 **MR O'BRIEN:** Massive, yes. It’s just that it’s a 10, 15 times bigger market for – get the volumes.

MS CHESTER: An important point that you’ve drawn out in your opening statement, and in your submission, is about effectively the tale of
15 local content in the books that you publish for kids in Australian schools which, kind of, then segues into – you didn’t touch on it in your opening remarks, but certainly in your submission – concerns around changes to the parallel import restrictions.

20 **MR O'BRIEN:** Sure, yes.

MS CHESTER: I guess I’m, kind of, trying to work out what the concern is around parallel import restrictions for your business model, given it’s so heavily tailored to the Australian market and the decision on
25 what the content should be is in the hands of the education departments and not the consumer.

MR O'BRIEN: Yes. No, it’s a – that’s why I said it was a lot easier for you to question me than me to make a dissertation, or read a slab of text.
30 For primary, parallel importation, I don’t think it’ll have much – has much impact. In secondary, modest impact, not much impact, for the reasons that you just said because it’s tailored so much to the Australian curriculum.

35 **MS CHESTER:** Yes.

MR O'BRIEN: That doesn’t mean that that’s 100 per cent. There are some subjects that we just can’t – I’ve only got 500 kids in the cohort. They’re doing some specialist American history or something like that
40 and so, therefore, we’ll bring in somebody else’s books. So there is a little bit of that. In tertiary it’s different. So there is a lot of Australian content but it’s – my understanding, and I’m not the expert on tertiary but I’m certainly aware of my company, it’s roughly 50/50 or something like, 50 per cent is Australian content or Australian adaptations of American content and 50 -per cent is American content. So American content, what
45

happens is that if you want to go to Thailand it'll be a hell of a lot cheaper because that's just the way it is with different countries, with different price points. If you want to sell anything you have to sell it there.

5 The issue with the parallel importation, in the tertiary markets, faces all of a sudden those things coming back into Australia at – and suddenly not being just one or two but suddenly becoming a significant leeching a product back in which reduces our sales. The way that that'll get – well, the way that it is likely to get sorted out, if that becomes a bigger issue, is that it becomes like one world pricing and that's it. So our company will go, “Right, if you're in Thailand it still costs you \$US70 for the book even though before it was only \$25. We're not going to sell it to you for \$25 and then you buy thousands of them and send them into Australia and sell them for \$50 which is still \$20 cheaper”.

15 **MS CHESTER:** Okay. So I can understand from the perspective of your company you'd rather have those sales. I guess, from the perspective of being a parent of a university student, would that not then result in lower costs of textbooks for university students if we allowed the removal of parallel import restrictions?

20 **MR O'BRIEN:** There may well be. They'll only be cheaper provided all the major publishers don't go to one world pricing. The other thing that will – is likely is to happen is, and this is probably over time, is that it will start to facilitate the speed to which print is reduced and digital is increased because it's a lot easier to then rent, if you like, the materials for a 12 month period and put them through the cloud, they can't print them off and things like that.

25 So therefore, yes, you can bring in the book but if you can't use the digital – at the moment there are – there's a whole series of laws and requirements around – certainly around assessment currently that makes that difficult to charge separately for. But that's what would look – what I think it would like look. But I'm really not the expert on tertiary. But in secondary I don't think it's a huge issue. I don't want to say no issue, but it's not a huge issue.

30 **MS CHESTER:** Would we - - -

35 **MR O'BRIEN:** Parallel importation.

40 **MS CHESTER:** Are there, sort of, a rule of thumb around the disparity of pricing that, I guess, the Thailand price versus the Australian price for these sort of textbooks?

45

5 **MR O'BRIEN:** Massive, yes. Yes, and there's been Court cases and I know our company, about three or – yes, I think it was the Kirtsaeng one with – it was Thailand sending them back into America. So that was it, they said, "That's it. All one world pricing". So our prices just went up as a consequence. So we pushed harder onto creating local adaptations so that we could control it because it was better content and more local, so. Probably bigger issues in cultures and things like that and Australian identity in trade, I know, is a big issue. I would say that that's still an issue for us in primary, whilst we don't get the – it is a massive issue for us. Sorry, I hope there's nobody American here, but we really don't want the American standards in our education.

MR COPPEL: Great. Thank you very much.

15 **MR O'BRIEN:** Thank you.

MS CHESTER: Thanks, David.

20 **MR COPPEL:** Now, we've heard from Nick Gruen that he's actually not available today, so we will move on to our next participant who is David Webber.

MR WEBBER: Thank you.

25 **MR COPPEL:** So make yourself comfortable.

MR WEBBER: I will.

30 **MR COPPEL:** Then for the purpose of the transcript, if you could give - -

MR WEBBER: Is there preferred chairs?

35 **MS CHESTER:** Whichever you like.

MR COPPEL: So when you're ready, if you could for the transcript give your name, who you represent, and then a brief opening statement. Thank you.

40 **MR WEBBER:** Good afternoon. Thank you for having me. My name is David Webber. I am here in a private capacity. I'll give you some of my background. I'm actually an electronics engineer, also computer scientist. Then, as my uncle who teaches computer science would say, I then went to the dark side and undertook a law degree and became a lawyer and then
45 subsequently a – and also a patent attorney.

5 So whilst I'm here in a private capacity, and normally I would leave
some of the issues in this draft report to my clients to deal with and they
do deal with them, it – there was certainly one section of the report – and
whilst my submission focusses on a number of different sections, there
was one chapter in the report, chapter 8, I felt that certainly on the urgings
of a number of my colleagues and the clients I represent, that I did need to
come here and hopefully give you a bit of a hand and help you avoid
making a mistake that, I guess, Europe and some others have done. That
mistake being, of course, the draft recommendation 8.1 which is to amend
our Patents Act to exclude business methods and software from patent
eligibility.

15 So whilst I'm here in a private capacity, I'm really here to represent
those creators who I've seen over a long, long period of time, probably
some 30 years of practise who those – particularly those Australians who
come into my office with stars in their eyes and wishing to create a new
business and have a new product and wish to attract investors and start a
new business and hire staff and, of course, obtain some protection for it.

20 The actual chapter 8, unfortunately, and the recommendation to
exclude business methods and software has a couple of issues with it
which are outlined in my submission. But largely, unfortunately, the
evidence that's in there in the analysis -and you'll probably hear this from
others – it doesn't distinguish between business methods and software. It,
sort of, wraps them up together. They really are two completely different
things.

30 Particularly to an electronics engineer, software and hardware are
effectively interchangeable. Certainly in the days of the 70s there was
more hardware control and software really didn't do too much, it was
really looking after the operands. Over time the hardware has become
more quantised and, of course, we're relying more and more on software
control. Things like controlling vehicles, running medical devices. I
bought a new oven the other day and it's much like operating an iPad
controlling that. So software is certainly much more powerful and diverse
than it has been in the past.

40 Business methods, to some extent, is an area that, regrettably I guess,
in 1999 there was a bit of an expansion in the US that saw some sorts of
patents protected for business innovations. But over time, effectively, our
Courts and Courts in every jurisdiction, have said – and particularly the
Australian Courts have now said, "No, you can't protect business
innovations but you can protect technical innovations". So anything
technical is fine, anything that's a business innovation is not. Essentially

the way our law works - and, I guess you'd probably understand this a little bit now, but the way our law works is it doesn't have – like the US, it doesn't have a hard definition of what is patentable and what is not. It essentially says – it refers back to a statute of monopolies 1623 and most,
5 I guess, reports or analyses when they look at this go, “Why are we referring back to the 1623 statute?”

The reason for that is largely because it bears some case law, particularly a High Court decision of the 50s in Australia which – and this
10 has been followed in the US and elsewhere – which essentially said, “Look you should not have a fixed definition of what you want to patent and what you shouldn't patent because we cannot predict the future”. In other words, “we don't know what technology is coming around in the future. You should leave this more or less principles based. Let us, the
15 Courts, decide as we go along where we're going to draw the line”.

Of course, there are other criteria associated with patents, and a number of hurdles and barriers that clients and those creators have to jump through. Those are the cost of getting patents, you've got to apply for
20 them. There's inventive step requirements, which are focussed on in the report, which is really the area to probably focus on. Their inventions can't be obvious to the skilled addressee. They can't be obvious to their peers.

So any creator who comes in the first question I ask them, I say, “Well, look, would this be obvious to the guys you work with and you develop software with?” They go, “Hang on. Well, I'll have to go and ask them”, or they might say, “No, no, this has never been done before. No one's thought about this. This is truly terrific”. Then you say, “Are
30 you sure?” You might do some searching. That's a fairly significant hurdle. So there's a lot of cost barriers in the way to actually get a patent in any event. Even when they've got one, they still have to pay renewal fees on an ongoing basis and you've mentioned that in draft report, and that's a good area to focus on.

But also even if someone does take their development, they have to enforce it. It's not a right to call the federal police and get the federal police to chase down the infringer. They still have to enforce it. Even
40 despite that, they still have to deal with taxation issues, labour market issues, capital raising issues. So, I think, any encouragement we can give them, the better it is.

You mentioned in the report other areas of protection for software. Unfortunately, software is one of those things that, unless you actually,
45 sort of, write code and compile and use it in machines, it's becoming a

little bit hard to understand. Lawyers, for example, never studied engineering or computer science. I remember one lawyer saying to me, “It looks just like a sonnet to me. You just write it down”, you know, “It’s like a written bit of expression”. But, of course, that’s not its purpose. Its purpose is to reside in the machine and undertake a specific task and a specific technical function.

To some extent, that’s where copyright protection came about. They decided that, “We should give copyright protection to the software. That will be good and that would be fine”. Now, the sole reason clients, like mine, try to get patent protection is because all copyright protection protects is that expression. It doesn’t protect what the code does. It doesn’t protect how the machine operates. The other thing is to prove copying you have to actually show that someone had access to the code and copied it or made an adaptation. A lot of cases when a competing product comes out they might’ve actually watched the code run or heard about how it operates, heard about the features. Then they’ll go off and build their own version. That is where clients have to step in and try and stop them.

The other thing is if you take away the patent protection for software developers, they will turn to the other thing, which I’ve seen people turn to, and that is secrecy. They’ll keep everything a secret. That’s what they’ll do. They’ll try and keep it a secret as best they can. What that does is it just stops any collaboration between the industry and stops things being released and getting out, whereas if they can rely on their patent protection, their patents get published 18 months in.

Now, whether they get their patent or not, they’re published. So the minute they file they think, “Well, I’m protected. I’ve got rights. Everything’s good”. All the details get published because that’s the quid pro quo, the government says “I’ll give you a monopoly if you publish all the details and secrets of your product. So all that information is out there. It’s published. People can release papers. The creator might get their patent, they might not. But at least the information is out there. It’s much better than keeping it secret. Where there is any doubt, I’ve had clients say to me, “Look, I’m not going to go to Europe and try and franchise and licence my product”, or “I’m not going to try and licence someone else to use my product. I’ll just keep it secret and keep it here”, if they can’t get their – they don’t think they can get patent protection.

So patent protection does encourage collaboration. It’s part of an ecosystem with the entrepreneurs and innovators understand. Software particularly, it doesn’t make sense to me to say that you can patent hardware but you can’t patent software. Software, in particular, it’s the

one area of an industry where Australia is not hampered by the tyranny of distance, all right. It's the one area where we can actually release products here. Clients get their patent applications filed. They release their products. They test them here. They can then move them off
5 overseas very, very quickly. They can enter the overseas markets. They're not constrained by the fact that we're at the bottom end of the Southern Hemisphere.

The other thing is, a recommendation, like the one that's in there, does – I mean, unfortunately, it does damage – I mean, even the draft
10 report itself has – in having that recommendation it's done some damage. I'll give you an illustration. I was in the US recently for a series of meetings and I had an Asian company approach me and say, "Look we're very concerned about the fact that we can't get protection for our software
15 in Australia".

I said to them, "Hang on, that's not true. You can get patent protection for software in Australia". They said, "No, no, we understand a report has been released by the Australian Government saying we can't.
20 We're really concerned about this. We're not going to invest, setting up" - basically what they wanted to do was set up with some more R & D in Australia and actually sell their products here. It was a telecommunications product. They said, "We're not going to do that if there's no protection, patent protection that we can obtain in Australia
25 whereas we can get patent protection in Singapore". Anyway, it took me some effort to explain to them that this was just the draft report and you don't need to worry so much, that it's not a final recommendation. I even had Australian clients ringing up very, very concerned that the government was going to take away their existing Australian patents and I
30 did have to tell them, "No, no, this is just a draft recommendation. The government has to make its decision".

So there's no other country, no other jurisdiction that has tried to implement an exclusion in the way of the wording – the recommendation
35 – the one that was put. No country has done that. If you give a contrast – I mean, certainly Singapore, the US and China would not try and introduce a negative exclusion like this. Those jurisdictions, at the moment, are trying to encourage more patents, not less patents. That's what they're trying to do, encourage innovators. The only thing that comes close is Europe. Europe introduced an exclusion to computer
40 programs in 1977 at a time when they said, "Defence departments and large academic institutions when they pay \$1.5 million for their computer, they shouldn't be constrained by any programs they want to put into their \$1.5 million machine". So it was a completely different ballgame when
45 they put that exclusion in.

They caused enormous pain with the industry for probably the last – over 30 years before it was finally settled in about 2010. It got to a point where in 2000 actually held a (indistinct) conference of all the European patent commission members - there were a number of countries there - where they all tried to actually remove the exclusion. Sorry, not all of them, a number of countries tried to remove the exclusion. It can be exceedingly difficult to get one government to agree, or members of a government to agree. This was a number of countries that had agreed and were trying to remove it. In the end, it didn't succeed for various reasons. So, I guess, that is, in a nutshell, I'm trying to implore you, I guess, to rethink that recommendation, 8.1. I do have some other comments on the other recommendations but they're fairly brief. I'm happy to answer any questions.

MR COPPEL: Thank you, David. In relation to this part of the report, we've had, sort of, opposing views and one view that was put was that it's very difficult to separate business methods from software. The business methods themselves are, sort of, embodied in the software. You're suggesting that it is possible. How would you counter that argument?

MR WEBBER: Yes. Look, I understand that's an argument that runs along the lines of well if you've got a business method and you stick it in the computer – I'll give you an example, in 1999 when the US Court in Signature and State Street started this, a Judge says "There's no exclusion in US patent law for business methods". Now that was a time, if you turn your mind back, when the internet was just blossoming. So everyone got extremely excited and started filing patents for things like reverse option systems, a lot of things that had done in – already been done in business around a table or in offline matter. Started applying patents for things, just sticking them on the internet, right, and arguing that, "Well, no one's done this on the internet. This is very inventive".

It was a time when the US patent office was besieged, didn't really apply probably as much rigour as it should've. There is some evidence that it actually fuelled a patenting frenzy that actually led, partly, to the dot com boom. That led that boom right through to 2000. For various reasons, those valuations were overinflated. There was a crash. In fact, I remember the day of the crash well because I was up at Port Douglas on holidays and I spent the whole day taking phone calls from clients saying, "That's my patent", "That's my patent", or "That's my application. I'm not going to proceed because all the funding had dried out".

To answer your question, you can separate. I'll give you a classic case, a business method that doesn't involve a computer. There's been a

couple of cases, like Grant, in Australia where there was a lawyer had a method for protecting assets to avoid bankruptcy. The Court said, “Well, hang on, this is just a bare methods scheme” and struck it out immediately. In the US there was a case for hedging, commodities
5 hedging which involved – it involved some computer system. The Supreme Court in Bilski, that was in Bilski, said, “That’s just ridiculous. It’s just a business method, nothing more. You’ve only contributed a business method”.

10 The way Courts deal with this now, the Courts have actually come in even harder, particularly the Alice Corporation decision in the US. It has come in quite hard. Our own Federal Courts have come in quite hard on RPL Central where they had said, “Look, if all you brought to the table is
15 a business scheme, in other words, you don’t bring any technical cleverness, any advance in science, any improvement in the machine, any great new technology that makes everything run better, and all you’ve done is come up with some method of auctioning houses or a new technique for selling gold, then we’re not going to give you a patent for that because you haven’t given us any technical contribution”. That’s
20 where they throw it out.

They can then go to the next step of looking at it and say, “Well, what’s the invention that’s contributed here”. They’ll say, “Well, this just looks” – to some extent what Europe does. Europe actually looks at an
25 inventive step and says, “What have you invented here?” If in Europe they think all you’ve invented is a business method, or some scheme, they say, “That’s not good enough. Your invention has to be technical”.

30 So these days, in Australia at least, it hinges on technical contribution. That’s what it hinges on. In the US, they’re still sorting it out to some extent. They haven’t realised yet that the Alice Corporation decision, effectively, introduces the same sort of technical requirements. The Courts over there make it pretty clear if all you’ve got is an idea or a scheme that is businessy, you’re toast, effectively.
35

It does annoy patent attorneys a bit because our skill is in drafting patent claims. What the Courts are doing, or what the examiners are doing is saying, “Well, okay, this is what your claim says, but we’re going to look to see what you’ve actually brought to the table. What you’ve
40 contributed here”. That’s how business methods are distinguished from true technical inventions, which is why, effectively, the Courts have done the job for you, to some extent on business methods.

MS CHESTER: David, you mentioned earlier that nowhere in the world,
45 or any other jurisdictions, our recommendation is replicated so we’re

going beyond the envelope created by anybody else. I guess a question that I put to you is, is our system as it currently stands with regard to business methods and software, if you look at holistically in terms of the legislative provisions and the rights that are afforded through both patents and copyright, the patent threshold and the – well, the application of that threshold by examiners and the breadth of the examination, i.e., is there narrowing through the examination process and how the Courts are interpreting it here, is our current system replicated anywhere else in the world?

10

MR WEBBER: It has, yes.

MS CHESTER: Which jurisdictions are they?

15

MR WEBBER: Beg your pardon?

MS CHESTER: Which jurisdictions are they?

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MR WEBBER: I'm sorry, I can't hear you, Karen?

MS CHESTER: Which jurisdictions do – is that that our current arrangements, looked at holistically, replicated?

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MR WEBBER: It's quite interesting, with a – I mean, this is the beauty of a flexible raised test that we have for a line of patentable subject matter, in that essentially what the – what our Courts are allowed to do is to look at other jurisdictions when they make decisions. The patent office as well can rely on Court decisions of other jurisdictions. So the latest decision in the RPL decision in the Full Federal Court, what they did there was they looked at everything that occurred in the US. Our Courts tend to do this because they – for patent law they try and have harmonisation, so they look at decisions in the US but they also look to the decisions in the UK and how Europe approached it. At RPL they, sort of, adopted a mixed amount of that, effectively.

35

MS CHESTER: Okay. I think you may have misunderstood my question, and maybe that was down to my poor wording. You're suggesting that our recommendation takes us where nobody else has gone.

40

MR WEBBER: Correct, yes.

MS CHESTER: What I'm trying to ask is are there other jurisdictions internationally that replicate our current arrangements for BMS?

MR WEBBER: Yes, the US. So the US, Canada. The world largely falls into two camps. It largely falls into the US-based jurisprudence where there's a broad definition of "invention", or there's an exclusion like in Europe, right. So some countries have adopted the exclusion. But
5 by and large it's – it's US-based broad patentability test. So, yes, look, our law largely follows – essentially at the moment on patentable subject matter, and this is not - - -

MS CHESTER: Sorry, I'm just focussing purely on business methods
10 and software that being - - -

MR WEBBER: Yes.

MS CHESTER: So you're saying what we've got here in Australia at the
15 moment, looking at it holistically including in terms of the behaviour of the examiners and the Court interpretation, i.e., the Alice case, the equivalence of what we have here is replicated in the US and Canada?

MR WEBBER: What we've got at the moment is fairly similar to the US
20 and Europe, right, very, very similar. Probably more similar to the US, but it's not too far away – not too far removed from Europe. Now, the minute you start playing with the wording, like you're advocating, that puts you in a different position, which is your own position, right. That's where the danger lies, that's where real danger lies.
25

That's the problem New Zealand found, right. I mean, if Europe had their time again, they wouldn't have the exclusions in there, I'm pretty sure. But that's where New Zealand found itself because New Zealand was on a path – and you mention New Zealand in the report. New
30 Zealand was on a path of having no patentable subject matter test at all. They just had an invention and then they were going to rely on novelty and inventive step. For years that's their draft patent bill, that's how it was.

The stories I heard was that just before it went to parliament, the select committee – the chairwoman or someone had lunch with a member of the open source community and they changed their mind. Then they decided to just, effectively, they were going to do what you've advocated, to some extent. It was largely just software, I think. Of course, all hell
40 broke loose when it got into parliament. Then the government actually wanted to pull back on the position, but it had already entered into parliament and it had been announced. It wasn't until the rest of the industry and the community got wind of it that the government then had to pull its position back to something more like Europe. So what they've got
45 in the New Zealand Act is a bit of a bastardisation or the position in

Europe and they don't really know what it means at the moment. They're still trying to test that out.

5 So I don't think you should try and go down that path. No one else
has gone down that path. Every other country, you know, US, Singapore,
China, they're all trying to encourage innovators, and China particularly.
They're giving subsidies to their innovators to actually file more and more
patents to get more of a leg up, effectively. UK has a patent box. A lot of
10 European countries have a patent box to encourage those things to be
filed. So now is not the time, I don't think, to say no to software
developers.

MR COPPEL: Great.

15 **MR WEBBER:** Thanks.

MR COPPEL: Thank you very much, David. We're now going to take
a short break, stretch our legs, have a cup of coffee. It's almost 10 to 4, I
think we'll reconvene at 4 o'clock. Thank you.

20

ADJOURNED **[3.49 pm]**

25 **RESUMED** **[4.02 pm]**

MR COPPEL: We will reconvene. Thank you, very much. Our next
participant is the Australian Design Alliance. You're already at the table
30 so I invite you for the purpose of the transcript to each give your name and
who you represent and I invite you to give a brief opening statement.
Thank you.

MS KELLOCK: My name is Jo-Ann Kellock and I am Executive
35 Director of the Australian Design Alliance. That's an alliance of 14 peak
bodies with a stake in design.

MR McKECHNIE: I am Malcolm McKechnie, I'm COO of Knog,
we're a bicycle accessories brand based in Melbourne, we produce a range
40 of bicycle accessories, particular lights and locks is our speciality. I don't
know how much of an introduction to - I'm happy to keep going. We are
an award winning company, we have probably at the moment about 350
products in SQs in our range, we sell into about 50 countries across the
globe. We've been around for about 13 years. We have multiple
45 registered designs and patents and trademarks in the business. And we

have, I guess, over the 13 years we've become a bit of leader in our industry. So we're constantly being looked at and followed and copied. And I guess that's a good reason to be here today, is to put forward some of the issues that we're faced with as a leading edge design driven accessories brand.

MR HOOGENDOORN: I'm John Hoogendoorn, I'm the Creative Design Manager for Phoenix Tapware. We're a tapware, showers and accessories company located here in Melbourne. Like Mal, we are an award winning design and manufacturing company. We work hard to make sure that we're always at the leading edge. We now lead the field and like Mal we're very excited to be here so that we can maybe tell you about some of the issues that we're having at the coalface.

MS KELLOCK: I would also like to say that I've also got a submission from Steve Martinuzzo, who was due to come but was called away at the last moment, from Managing Director from Cobalt Design, an award winning Australian based creative product development group operating locally and in Asia, Europe and North America.

MR COPPEL: So are you interested in giving an opening statement?

MS KELLOCK: Yes. Thank you. Having waded our way through the document, and in particular chapter 10, the Registered Design section, for our members the key point that stood out for us and indeed has driven our activity over the last six weeks, has been the summary around the lack of evidence to support any changes to the existing regime. That concerned us greatly. And to that end we have organised, along with a number of other groups, in particular state based activities to rally the industry and get the message out there that, hey, particularly in the industrial design furniture low ticket item goods, you need to be putting your hand up and talking about and passing on examples of where you've had difficulties with the current regime.

We believe that the current regime actually contributes to a poor cultural issue within Australia where design and designers are not valued as they are in other parts of the world. And we think the intellectual property regime has a role in that. And so what we would like to see, the main message that we would like to give today, is that we ask you in your recommendations also add in that last point where it states, "There is a lack of evidence to support the case for extending the scope of design protection to virtual and partial designs". That you also add another point after that, that you recommend that further research be undertaken. So I think that's all I'd like to say at the moment and I'd just like to draw your attention to a table where we've put together the prime areas where the

intellectual property regime impacts our members, so whether it's copyright, designs, patents, Acts, or trademarks, and I've submitted that.

MR COPPEL: Thanks, very much.

5

MR HOOGENDOORN: I guess I would like to give you some concrete examples of where IP laws and their restrictions cause us some issues. So as I said before, Phoenix Tapware has been around since 1989. Nothing really happened with our company until about 11 years ago when a new
10 management was put in place. Since then we've grown from a \$4 million company to a \$50 million company this year. We see this growth continuing for the foreseeable future and intend the company to be a \$70 million in three years. We're growing incredibly fast. We manufacture in four countries.

15

Strangely enough, we only sell our products in Australia at the moment. All of our growth, and especially margin growth which is the stuff that you put in the bank, comes from new products and our profits are very strong because we provide a desirable designer product for every
20 price point. Like Mal, we have won major international product design awards. And we don't do that because it makes us feel good, we then use these to effectively market our products. And it's not cheap what we do. We employ 60 people in Bayswater here in Melbourne, and of those seven work in my design department. We spend around \$650,000 a year just on
25 R&D, just on new design, just on patentable stuff that we can sell around the world. And last financial year we spent in excess of \$150,000 to protect our intellectual property.

Just to give you some details of concrete case studies of where we
30 come unstuck, our products are regularly copied by others here in this country and overseas, our strategy has been - well our products are a little bit unusual in that we don't sell a single product, we sell a range of products. So you can imagine if we sell a new range it includes a basin mixer for your bathroom, it will include a shower mixer and a kitchen sink
35 mixer, vessel mixers, and so on. So it's a whole range and then accessories with that as well.

For us to be able to protect each one of those designs would be prohibitively expensive. It was prohibitively expensive when we started
40 out, it still is, we're now a much larger company, 10 years later, but it is still one of these issues that when you consider that in the next six months we're going to be releasing 14 new ranges of products, it adds up very, very quickly. So our strategy was at the start we would take the basin mixer and the shower mixer, which represented about 70 per cent of all
45 sales for a certain range, and we would protect those. The idea being that

if you protect these items there's no commercially viable reason to copy the rest of the range because you would miss out on the rest of those sales. And we did this to minimise the cost of IP protection.

5 Unfortunately, what we found was that companies would copy our entire range verbatim and wait for us to send out a cease and desist letter. Last year especially this happened a lot. They would then marginally change the designs of the two protected items and leave the rest of the range alone. This then means to this day there's other companies that sell
10 identical product to ours with complete abandon. So the issue that we have is that providing a mechanism for us to protect the entire ranges economically is unquestionably necessary and this will substantially reduce our IP costs. Not only at the application stage but also at the enforcement stage, you can imagine that if everything was protected as a
15 range then enforcement becomes an awful lot easier for us as well.

 We're not backwards in coming forward when we see someone protecting our - copying our products, the extension of this for us is ultimately to provide not only us but the Australian companies in general
20 adequate legislative protection. We need these products to be stopped when they arrive in the country. There is still a large cost and man hours involving chasing down copied products when we find them, mainly my time and my designers' time and then our lawyers. Once we do it would be desirable for us to provide Australian customers with the name of the
25 company, and we have both the distributors and the company in China copying the product, and then for Australian Customs to stop those shipments, or future shipments. As they do currently with copyright and trademark products. And that's basically my - - -

30 **MS KELLOCK:** Do you want to just - how long it takes you to develop a product?

MR HOOGENDOORN: Sure. So as I said, we're in the next six months I've got a timeline for all of our products, product ranges, so we're
35 looking at probably releasing 200 products in the six months. Those products will have been in gestation in the R&D department for between six and 18 months. So you can imagine that I have seven of the most fabulously talented people, as does Mal with his company, and multiply that out by the amount of money that that costs, there's a significant
40 investment that immediately gets diluted when someone is able to copy our products.

MR COPPEL: So John, how long does a product stay on the market before you bring out a new model?

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MR HOOGENDOORN: So in general it takes about 18 months for a product to start taking off. So you can usually see an increase from zero to a stable position in 18 months. You then after that get about four or five years where it just steadily increases, depending on market acceptance, after which you then see it fall off slightly. So we usually work on a timeline of about seven years after which any profits is just bonus. But we expect a range to last seven years. We will already have not in five years' time but in two years' time will already be looking at a replacement for that. So it's to get this sort of 30 per cent year on year growth we have to stay on top of it. But we're comfortable with products not lasting more than seven years.

MR COPPEL: Right, okay. So it sounds like the issue is more infringement of the product once it's on the market. And you mentioned that your approach is to register sort of the key items and don't register the remaining items that sort of sit around it, and you said that what is happening is that a company that is making a replica will make changes to the registered items and that it would be vastly preferable if it were possible to register across the range, but wouldn't that just simply lead to one or two changes to each of the items across the range and still lead to an issue with - I mean, is it an enforcement issue or is it really something that can be fixed through sort of the registration process, I guess is the question?

MR HOOGENDOORN: I think it can. If a company - you can imagine there's a lot of ranges of tapware in the world and we do things, we think, a lot more refined and in a better way than most companies. If you make a product slightly different and make it slightly different for the whole range you're going to end up with a product that is going to be very, very similar to ours but we can say to our customers, look, this is a product that is obviously copied from ours and there's quality issues with using someone that you don't know. But I do believe it would be infinitely more desirable to let them go through that whole stage of having to redesign every part of the range than just the two.

MS KELLOCK: Because there's that time lag then.

MR McKECHNIE: Yes, and if I can just add to what where John is coming from there, but I could almost mirror everything that - the heartache that you go through at times, I'm sure. But in the case Knog we have a much shorter lifecycle so right now we're developing a complete new range of bicycle lights to replace a range that is now in its fifth year. Now in that range of lights we have I guess a similar situation, we have a range of variations of a product theme. Now in the case of the blinder light, which is our most popular light at the moment, because of the

nuances of registering designs in Australia, and other similarly set up jurisdictions, we decided we'd register everything in Canada to begin with because we can, we can register a range or variations on a theme.

5 Now if we have someone that comes along then and they copy like in the case with John, they've got a range of say ten products but they've only registered two, in order to change every iteration of a product range there's tooling, there's testing, there's a design process that you've got to go through to modify every component in the range. Now you've already
10 done that, as the originator of the design you've already done it, you've invested and you've got all the tooling, but as a copier instead of modifying two now you've got to modify tooling and designs relating to a whole range of products. So I'm talking, I guess, about a deterrence, a level of deterrence, in a situation where you can register a range as
15 opposed to only to be able to afford to register one or two key products.

MR COPPEL: So in Canada it's possible with a single application to cover a range of products, but this is an issue that came up in yesterday's hearing in respect of furniture and lighting, that there are different
20 prototypes that if you wanted to have protection on each you'd have to file an application for each.

MR McKECHNIE: Exactly. And describe every element of design with each design and if there's a variation it will be regarded as another design.
25 And so you can imagine with every design it's five, six, seven thousand dollars or something to register, multiply that by your designs, and then in the case of Knog we've got - we're in 50 countries now, we don't register designs and patents in every country but we target, I think, sort of five or six key markets. But we're a small company and we've got to scale that
30 up 5000 here, 5000 there, and then multiple designs, and then renewal fees every year, so it's massive. We are a small company. We're sitting on around about sort of 10 or 11 million in turnover. In the last five years we've spent over a million dollars in IP registration. So it's a pretty big chunk and then of course with R&D I think it's, - we spend in terms of
35 R&D costs - a large majority of our team are design based individuals so it's in the order of up to \$2 million in salaries, which are generally R&D costs for us.

MR COPPEL: Do you use trademarks - - -
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MR McKECHNIE: We do.

MR COPPEL: And does that provide, I mean, with a name like blinder it sounds like - - -
45

5 **MR McKECHNIE:** That's an interesting question because in the case of, not so much the blinder, but maybe some people if they're cyclists in the group here they might be familiar with our Frog light, which is a little silicone bicycle light, as most copied product and also our most popular product. We set a trend with that which then everybody has followed. That's been a situation where we learnt a lot about, that we didn't tie up our protection suitably. But we had a trademark on the word Knog, obviously, but we also decided at one point to let's register Frog. And so where we saw most of our copies was on Ali Baba and Taobao and
10 Aliexpress and those sort of online eCommerce sites.

15 I was able to use the facilities within the Ali Baba online structure to - with the IP protection, their protocols and policies, to stop a lot of sellers because they were using our name. So forget about the design, I was able to shut these sellers down just using a trademark as the driver to stop them. So it was an interesting situation where in fact we have spent so much on design registration but in this case we were able to use the trademark. So it's important to have a few tools across the board. But I guess in general design registration has been our most powerful tool to
20 stop people.

MS CHESTER: On the flip side though, for the consumer in sort of with the Phoenix name in tapware and Knog in bicycle lighting, does that brand awareness resonate with the consumer?
25

MR HOOGENDOORN: Yes.

MS CHESTER: So it's not just a protection in terms of being able to get them off the Ali Baba sites of the world but also in terms of the informed
30 consumer knowing that, no, I only want the Phoenix brand because of the quality, or I only want the Knog original.

MR HOOGENDOORN: And that's absolutely right. We spend millions on advertising our products and that marketing does help and people
35 do - the pull through marketing from a retail end is definitely there. What you're going to get is you're going to get to large sections of the market, the builder market, for instance, where they want our look but neither the customer nor the builder cares about where it comes from. And if they can save themselves two or three hundred dollars on each product then
40 they'll do that.

MS CHESTER: Okay.

MR HOOGENDOORN: Since we went through the whole only IP
45 protecting two products what we've now taken a stand and we've now

said, okay, we're going to protect many more products. But not only in Australia, we're now protecting in China as well. With our patents we're now protecting with PCTs around the world as well. The interesting thing, we're starting to become one of the big players in the Australian market so now we want to, like Mal's company, we want to export our products to major international markets. The US is going to be probably our first market.

So we attended the largest show for our products, a kitchen and bathroom show in Las Vegas earlier this year. We were in the - I guess because we're the first time kind of exhibitor we were in with all of the other smaller exhibitors and we spent the whole time just getting fawned over and people loved our products and they could see a real application for our products in their market. We were feeling incredibly high and very proud of ourselves by the last day. On the very last day, which is sort of the breakdown day, we came back to the stand to clean it all up and all our product was gone. All of our products had been stolen, so they didn't care what they smashed up but - yes, so we are going to the next capers which is coming up early in the new year and we'll be trying to find who has copied our product.

MR COPPEL: But, yes, clearly someone has come along and thought this is fantastic, it's all the latest and greatest, let's pinch it and take it back to China and reproduce it.

MS KELLOCK: Both of these companies have a strong brand recognition. But Steve, who couldn't be here, in CobaltNiche, is a designer who has a client - and he develops product, his business develops product for a client, and his main theme was that he thinks that he is treated unfairly around the copyright legislation compared to the artists that we've approached. And he cited an example, which I'd like to - just a couple of point forms here, he said, "We developed a significant project over an 18 month period. This represented a significant body of work from concept, strategy, design, engineering, prototyping, tooling, management. Our work totalled 160,000 k plus, or 1500 hours. It also includes some overrun, loss of fees, et cetera, in getting the job done to the client's satisfaction. At the end of the project the product was completed, the client was happy. The client asked us to arrange and art direct a professional commercial photographer to take a product picture. It was two hours' work. The client releases a media release which appears in a trade magazine. The article makes no mention of us, the designer. It mentioned the client, there was a picture of the product, even the photographer's name is acknowledged next to the photograph."

As a result, Steve believes, that because that photographer had

copyright, but he didn't because he had commercialised the product, and the client had, it had no protection. He believes that this contributes to a poor cultural awareness of design's role. And he said, "The client and magazine publisher were very aware of the appropriateness of the photographer of being acknowledged but the client was totally unaware and slightly reticent in acknowledging Cobalt as the product designers." For us, that's a huge issue, it's a big issue, and we believe that there is a gap there between what's protected under copyright then what's required as a design registration to get - and then what actually gets commercialised. And it seems to be as a result of that we're getting this replica issue, we're getting dodgy product coming into the country, we're not monitoring it, it's left to the companies themselves to really police to the detriment, I would argue, of their effort. And their resources are focused on things that perhaps their competitors in other countries don't have to worry about.

That is what concerns me, when you look at the spend around R&D in Australia, and we're known for having a good legal structure, but so you've got R&D and IP to result in this commercialisation but it's the designers in that commercialisation space that are making the decisions around what materials to use, what the process is going to look like, how all of that comes together. If we really are going to be a nation of ideas, people with ideas, then we need to finish that last bit and we need to put in a regime that will actually support that last bit not make it more difficult for companies. Today we've got examples of the best people within their sectors. So if they're having problems imagine what's happening out there in the rest of the community that don't have the knowledge or the wherewithal, or the resources that aren't growing as quickly.

MS CHESTER: Can I just ask a question of John and Mal, in terms of the infringement of your design rights that you're seeing, whether it's an unauthorised copy or a replica in the periphery of your range, of the design right, but the rest of the periphery is an unauthorised copy, given the commercial life that you're talking about, sort of five to seven years for your product ranges, is the unauthorised copying, or the replicas, is that the window within which that's happening as well?

MR McKECHNIE: It's actually a shorter window, so in many cases I've literally received documents from IP Australia, so a design registration certificate, acknowledging design that I registered 18 months ago, and on the one hand on my screen I'm battling trying to shut down a copy product and I've only just received acknowledgement of the registration. So it's not balanced, it's taking too long to get registration through and be acknowledged to the extent that we can then publish them and talk about them confidently. So that's an issue.

5 **MS CHESTER:** So from the issues listening to the discussion this
afternoon, one is the time delay with registration, things can't go to
market, and secondly, the way that they deal with a related suite of
products in terms of the design that's embedded in each of them, are there
any other elements of intellectual property arrangements as they currently
apply to design rights that - because it sounds like the infringement is
occurring with the design right protected period, whereas we've heard
evidence from others like furniture designers with replicas and
10 unauthorised copies, a lot of that can also be after the design right - - -

MS KELLOCK: Yes.

15 **MR HOOGENDOORN:** Yes.

MR McKECHNIE: Absolutely.

20 **MS CHESTER:** We're just trying to get a handle on what are the issues,
that we've got a full handle on the issues - - -

MR HOOGENDOORN: You won't find, for us, we actually find that
people copy the product for the first year and a half to two years. As I
said earlier, that's the period when the sales start taking off. As soon as
someone sees in Reece or Bauhn, or one of the major retailers, that
25 something really takes off then they start copying the product. We have
had exactly the same thing with a few ranges but other ranges which are
slower burns - and we actually design ranges sometimes not to be peaking
early but to just be around for a very long time and they will leave those
alone. And just because there's not that instant gratification out of any
30 products like that.

MR COPPEL: Do you certify the design range, you first register, do you
do that after a certain period of time or can you register and certify at the
one point?
35

MR HOOGENDOORN: We do it after a certain amount of time, yes.

MR COPPEL: Can I ask you then, maybe Jo-Ann, what you see as the
role of the government policy in terms of a response to these sorts of
40 issues?

MS KELLOCK: Generally speaking, the feeling within the group is that
we need to move towards harmonisation with the rest of the globe. Our
biggest concern is that given the Free Trade Agreements that have been
45 negotiated and continue to be where does that leave Australian businesses

in that space, and so if we could move to that place that would be a plus. The likelihood of that happening, I know, is probably not on the short term horizon, but that's our major concern.

5 **MR COPPEL:** Are you aware of the Hague Agreement?

MS KELLOCK: Yes.

MR COPPEL: Yes, and do you have any - - -

10

MS KELLOCK: And aware of some of the things that are happening in the UK, and generally speaking, just even the recent announcement around the replica furniture, sort of there's - our general, I think, Australia is a long way removed in the Southern Hemisphere, it's a big open space and whilst we seem to be over regulated in some parts we've got gaps in others. I think we need to learn to move more quickly in how we develop things because things are moving quickly. My worry is that we don't have a big Customs department to monitor a lot of this stuff that's coming into the country. So where is the rejected product from America, from the UK, from Europe, going to end up? That's my concern, that we're an easy target, and we're far removed from the rest of the globe.

15

20

People know, we actually have television programs here that encourage replicas, to purchase replicas, so it's a mindset, and that's when I step back to say about the cultural problem that we've got here, there's no recognition about design's role. We think it requires a suite of measures, it's not just solely this, there's other things that we need to educate as a sector the general public. We've got a role to play in that too. But what we're asking here is that if evidence is what's going to drive the change then we are ready to put the evidence together but we want to work with government to do that.

25

30

MS CHESTER: There was a report by ACIP about 18 months ago in that design area and I only just picked up on it this morning reading the Lexology download that the government has just announced its response. I don't know if you've had time to digest that yet?

35

MS KELLOCK: No, I haven't as yet.

40

MS CHESTER: It's a bit of a bifurcated response, adopting some of the recommendations and then saying these other ones are going to be looked at by the Productivity Commission as part of our intellectual property arrangement, so I have not expected you digest it or absorb that yet. But it would be helpful given the group that you're representing, Jo-Ann, if you could give us some form of feedback in the next little while as to what

45

extent the recommendations that have been adopted address the issues as you've identified in your broader table and then what of the outstanding recommendations, your views around those?

5 **MS KELLOCK:** I'm happy to do that.

MS CHESTER: That would be really helpful.

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

MS KELLOCK: Thanks for the opportunity, yes.

MR COPPEL: Our next participant is Jo Spurling. So, welcome.

15 **MS SPURLING:** Hi, how're you going?

MR COPPEL: Good, thank you.

20 **MS SPURLING:** Sorry, I'm a bit nervous. I'm not very good at public speaking, unfortunately. So I'm an author - - -

MR COPPEL: First, if I could ask you for the transcript if you could just give your name and who you represent and then opening statement?

25 **MS SPURLING:** Yes, sure.

MR COPPEL: Thank you.

30 **MS SPURLING:** No worries. So my name is Jo Jette, I'm representing myself as an author. I also work in the digital creative industries, and have done for the past 15 years. And I'm also formerly the editor of a few different magazines, being Desktop Magazine, Wooden Toy Publishing and VNA Magazine, T-World, I've also worked for. My main concern is in regards to the proposed changes to copyright law and the proposal that
35 a creator would only own the copyright for 15 years. Obviously as someone who is a writer that's deeply concerning for me. Mainly because it's not a hobby for me, I take my craft very seriously. I want to make writing my career. I want to do it professionally.

40 I've just published my first novel which took me six years to write based on characters that I first published short stories of in 2006. So if you follow the line of thinking with the proposed changes, if I started in 2006 and we're in 2016 those characters have been published for 10 years already so essentially I've got five years to do something with those
45 characters and then it's open slather on anyone who wants to come and do

anything with those characters. Essentially the worst case scenario, say, a pornographic director likes my characters, he can put them in a movie based on my storyline and there's nothing I can do about it. And obviously that's concerning to me because it's my intellectual property,
5 it's my creation, it's my legacy as well, and I've written a children's story, I don't want my children's story characters appearing in a porn.

To be honest, I'm really confounded that the Australian Government would want to strip creative people of their right to own their work, at
10 least until they pass on, because you spend so much time putting something together and it has so much value to you and an idea is so fluid it's really difficult to put like a benchmark time on an idea and say well you've come up with this idea so you've got 15 years to do something with it, if you don't do something with it in 15 years then too bad. A good
15 example would be George R R Martin, I'm sure you're all familiar with Game of Thrones. Game of Thrones was first published in 1996 but was not picked up or converted to a TV series until 1991(as said), which is outside the 15 year period, or it would be outside the 15 year period.

So that means that HBO would have been able to create the TV series without having to pay him any royalties for that or without his input, which he is quite involved in the show, and the publishing company would have been able to stop paying him royalties because it's now free to
20 anyone. And the show actually created a resurgence in sales for the books. So sales of the books went through the roof. So I guess that's my biggest concern. One other concern that I have with the report is just lack of evidence and referencing in the report.

I read the report and I was looking for references. I know you have a
30 heap of references at the end of the report but there was no actual referencing to the time periods around where you've gotten this information from. I looked for it and I was looking for a reference to say, hey, you can find this reference here, but there was none of that. And that really concerned me because to be honest if you're in university and you
35 handed that in it would be a fail because the professor would say well you haven't provided any evidence or references to back up what you're saying. So I found that deeply concerning.

I also think that history has proven time and again that many works
40 have a life span that extend well beyond a 15 year period. Even a five year period, I know that it was mentioned that most works see their growth in five years or the most return in five years and then after that it tends to drop off. But I would argue that with literature especially that a lot of times a book may not be popular for 20 years after it's written but
45 then in the 21st year all of a sudden everyone wants to read it. It might be

picked up and used as a text in a high school or a university, and I don't understand how that was quantified. It doesn't really make any sense to me.

5 I'm also really concerned, some of the statements I could point to, the first one it was in section 4.2, page 114 of the proposal, "Ensuring works are generated by the most efficient creators and at least cost to society, traded efficiently, and do not impede competition", now the thing that worried me about that is efficiency does not necessarily equate to quality.
10 So just because you have something that's been produced cheaply and efficiently doesn't mean that it's going to be of a quality. And I would be - I mean, I know that you, if I presented a report to you, then maybe I'd produced it cheaply and maybe I produced it efficiently, but it wasn't of quality, I couldn't back up my research, then that wouldn't be acceptable.
15 So I find that also concerning.

The other one, also in section 4.2, was your statement of, "Encouraging the creation and dissemination of creative works that would not have occurred in the absence of copyright", which is contradictory to
20 the proposal that removing copyright would encourage the dissemination of works. Because what this is actually saying is that these works would not have occurred in the absence of copyright. So I don't understand why that statement is in there, because it is contradicting the proposal. It's also having copyright makes you feel safe to create works and put them out
25 there and hope to make a career out of them because you know that your idea is safe and someone can't take it from you. That's so very important if you're a creative.

I think that creatives would feel threatened and also not valued if their works aren't protected. It also is basically negating the value of content. Content is very valuable, it takes a long time to create, and if you want quality content it may take longer than, say, someone who just wrote - I could write a statement tomorrow but it's not necessarily going to be factual, it's not necessarily going to be correct. It's not necessarily even
35 quality. But if you take a week to do it then, you would assume that the longer something takes you would get more quality out of it. So I don't again I don't think something being efficient is necessarily going to be something that is of good quality. Sorry, I am very, very nervous so I do tend to rabbit on a little bit when I'm nervous.
40

One final thing is that I don't understand how removing the right of intellectual - copyright after a 15 year period is going to encourage innovation and creation because if you spend that much time creating something only to have it taken away from you after an arbitrary period
45 why would you do that? So you wouldn't spend 10 years building your

5 dream house if you knew that you were only going to have it for 15 years and then after that 15 year period anyone could come in and do whatever they wanted to it and you wouldn't be able to control it any more or have access to do what you wanted to do with it. That's my main concerns as an author and as a creative person.

10 **MR COPPEL:** Thank you, very much. Well I think we can allay your main concern because we do not recommend in the draft report a reduction in copyright term - - -

MS SPURLING: It says 15 years, though.

15 **MR COPPEL:** We have a finding. We don't have a recommendation. And that finding is based on sort of the average commercial life of a published work, which is in the order of 15 to 25 years. Now, because of Australia's international obligations and we're bound by our Act and not to be in breach of those obligations our report and the recommendations that are made in the report are consistent - to the best of our knowledge, consistent with those international treaties. But I can say for certain that
20 there is no draft recommendation relating to term. I think that's the first point. The second one, I guess - - -

MS SPURLING: Sorry, can I just query that, though, because a lot of my fellow authors and creatives have been saying that there is the 15 year
25 term though. So does that mean that the report is perhaps confusing in the way it's been written in regards to that?

MS CHESTER: I think some of the media reporting might have been confusing and unhelpful.
30

MS SPURLING: Well, I also read 15 year, a 15 year period and a five year period in that document in relation to copyright.

35 **MS CHESTER:** So that was where we were looking at there's some statistics from the Australian Bureau of Statistics that look across all the forms of copyright materials and look at what the commercial life would be, and our findings, so this is just like an observation, is if you were going to construct the optimal term of copyright purely from the perspective of the commercial life it would be somewhere between 15 and
40 25 years. So people have misread that and some media reports have misreported it to say that we were recommending reducing copyright from life plus 70 years to 15 to 25 years. And we're not. So that's wrong.

45 **MS SPURLING:** Okay, so maybe then in that regard then you need to look at the way the report has been written and actually be a lot clearer in

the language because that's definitely what I picked up. Especially in the infographics as well, it comes through and a lot of people will refer to those because it's a bite size amount of information. So are there any changes proposed at this stage to - - -

5

MR COPPEL: We will look at the language and to the extent of any ambiguity there then that's something that we will seek to modify. But the second point about referencing, I think is linked to the fact that our style standard for overviews excludes all references. But you will find throughout the remaining 550 pages quite extensive references to - - -

10

MS SPURLING: I didn't just read the first 100 pages, I read quite a lot of it, and there were things I felt should be referenced but then I couldn't find the referencing for that.

15

MR COPPEL: Okay, well that - - -

MS CHESTER: Well, Jo, if you want to let us know what that is because we would like to get that right for the final report?

20

MS SPURLING: Yes, sure.

MS CHESTER: But, yes, it's clear from your commentary today that you're read more than the opening there.

25

MS SPURLING: Of course. Yes, it was quite a huge document to read but, yes, and obviously as well I think that the bigger a document is, then the more people do tend to switch off, especially if you're talking about moving into a digital age then you need to look at maybe being more concise.

30

MR COPPEL: The work that you have published, is that recently published, or?

35

MS SPURLING: Yes, so I've been publishing since about, yes, 2006. So I've published a series of short stories, I've also published in magazines, I ran my own magazine for three years, and I've recently published a full length novel and I'm working on my second one at the moment.

40

MR COPPEL: How does your experience then relate to the Australian Bureau of Statistics which is sort of picking up an average that suggests that most of the royalty payments will be coming in the first few years after initial publication?

45

MS SPURLING: I would argue that that is actually not the case because it takes - I mean, if you're lucky and your book gets picked up and becomes popular, say like The Martian, he self-published and got picked up by Amazon and he's the dream story, just had a movie with Matt
5 Damon in it, the writer, Andy Weir. But I think that by the time you actually publish you then have to go through the whole promotional cycle, it's not - it's not like something that's going to occur, like I mean I've been - I published my book last year and I'm still going through the initial promotional cycle now.

10 I know that especially because I self-published it's going to take me a long time to build up that audience because I work full time and I do it in my after hours. But, yes, I would argue that if you're self-publishing, which a lot of people are doing now because it can be prohibitive to go to
15 the publishers because you've got to get an agent and agents are hard to get and then, publishers of (indistinct) books every day, so people tend to self-publish. When you self-publish it does take longer to pick up that audience because you don't have the money and perhaps the connections of a larger company. But I still don't think that that makes the content of
20 any less value, it's just a different cycle.

What you will find moving forward, especially with digital, is a lot more people will be self-publishing because they've spent all this time creating this product and just because a publisher says no doesn't
25 necessarily mean that the book - I mean, Harry Potter was rejected twice before it got picked up and that's now a multibillion dollar franchise, so I think that what we will see over the next few years is a move a lot more to self-publishing and books will take longer to pick up sales. It doesn't just happen straight off the bat. Maybe if it's a big publishing company and
30 they create a book and they have the money to pay for reviews and everything else and get advertising, because a lot of these bigger companies, especially with music as well, they pay to be on the radio and they pay to get reviews. So it's not organic.

35 If a band - because I've got a lot of friends who are musicians, if you're a band, say, and you've just released your album but you can't afford to pay to get on Triple M or Triple J then your song won't get played so you then have to build your audience another way, and it can take 10 years for an album to get a decent amount of sales. So it's quite a
40 different world, I guess, when you move away from the big corporations. But I think we will see a shift more towards that, especially with digital.

MR COPPEL: When you self-publish, do you work with book shops for distribution or are you also self-distributing?

45

5 **MS SPURLING:** Yes, so I work with Amazon. So I distribute through Amazon and I also distribute through local bookshops, independent bookshops, and it's a lot harder to get into the bigger bookshops. I sell from my website and also through Apple, I see my - like I've done a digital version of my book. So I have a digital and a print version and I sell that through Apple and also through Amazon.

10 **MS CHESTER:** That was going to be my question, the split between digital and hard copy in self-publishing, so you've obviously gone for both platforms, and what are you finding the experience like in terms of the sales that you're making in your book, Jo, how much of it is digital, how much is hard copy?

15 **MS SPURLING:** Yes, I would say surprisingly print is more.

MS CHESTER: Okay.

20 **MS SPURLING:** Which I actually thought was surprising, I thought that digital would be more, but print, I think people do still like print and having a book, I don't think that will ever die. I have a lot of friends who say print is premium. I sell my book for \$15 including postage in Australia, or \$10 overseas plus postage. I think that's a reasonable amount. It cost me, I think, \$3.60 to print each book, which I do myself, I pay for that myself. Then the digital version I sell for just the standard
25 Apple and Amazon price, which is 2.99, which I think is fine, and I can sell that all over the world.

30 **MS CHESTER:** For doing it at \$3.60 per unit, what sort of print run do you need to do to get that price?

35 **MS SPURLING:** I can print five, I can print 15, I can print 160, it doesn't matter, they're all the same. That's printing through Amazon. So Amazon offer that. Unfortunately, the Australian companies are just not competitive on price. Yes, I would say that would be - if I could afford to print in Australia I would love to print in Australia, I would definitely be happy to do it.

40 **MS CHESTER:** What's the cost comparative for doing it in Australia versus what you can get through Amazon?

MS SPURLING: If I print it in Australia I'm looking at probably anywhere between 10 to 15 dollars per book to print.

45 **MS CHESTER:** Do you need to have a commercial arrangement with Amazon beyond the printing?

5 **MS SPURLING:** No, I don't even have a commercial relationship with them for - I own everything. They don't. They will take a commission but I own everything, which is awesome. In fact it's a really good - I mean, I would like - I actually would love to set up my own company that did eBooks and promoted them, similar to band camp, but it's just having the time and the money obviously. The same with everything.

10 **MR COPPEL:** Okay, great.

MS SPURLING: Awesome, thank you, so much. Thank you, for having me. Sorry, for being a bit nervous.

15 **MS CHESTER:** No, that's been helpful, Jo.

MR COPPEL: You didn't sound nervous.

20 **MS SPURLING:** No worries at all. If you ever have any questions about digital and printing and self-publishing I would be more than happy to answer them because I've had quite a lot of experience in doing it. I also did a digital magazine for three years which went really, really well, I only gave it up because I got sick of chasing artistic people for interviews. Thank you.

25 **MR COPPEL:** Thanks, very much.

MS CHESTER: Thanks, Jo.

30 **MR COPPEL:** Our final participant registered for today's hearing is Robert Bouvet. Welcome, make yourself comfortable, I think you may have heard, when you are if you could give your name and who you represent, for the purpose of the transcript?

35 **MR BOUVET:** My name is Robert Bouvet, I represent myself. If you have a look at my submission you will see that I created the original work for a very famous Australian film, quite a while ago now. My concern is that the court system is not adequate to deal with IP matters. That's why I would advocate for a dedicated IP court. I think it's a big plus because I think lawyers tend to confuse patents and trademarks with copyright so if
40 copyright could be just set aside and dealt with by just one dedicated court it would be terrific.

MR COPPEL: So I sense that you are saying that based on personal
45 experience where you had - - -

MR BOUVET: Yes, I have been fighting for many, many years, for 30 years, but lawyers seem to apply the law like a rubber stamp, you know? And the original Copyright Act says that you must present your work as a manuscript in hard copy written form, and this is what the lawyers have
5 been pushing. But recently there's been a few amendments brought to the Copyright Act where an author can present his work as - in electronic form or as a tape recording - so in my case it was a tape recording, and as you know it can be converted into writing, it could be reduced to writing by just dictation, so I can't see where the problem is but they keep pushing
10 for the hard copy in written form. Hard copy written form.

MR COPPEL: So you think a dedicated IP court would be one way of addressing these disputes?

15 **MR BOUVET:** For sure, yes.

MR COPPEL: We heard this morning, you weren't here this morning, that litigation can be very expensive.

20 **MR BOUVET:** Yes.

MR COPPEL: Regardless, even when there are very simplified processes. It was suggested that there could be other measures to address disputes that lead to an outcome that's amenable to both parties.
25

MR BOUVET: Well, mediation. Then mediation would be a terrific idea. I also feel that in addition to lawyers we should have people who know what they're talking about when they're talking about copyright, publishing and so on, and scripts for films. I think it's a very narrow kind
30 of field when you write for films you write vision so which is different from writing a novel. So the court must consist of judges, I guess lawyers, we can't get away with that, but also with people who know a lot about film scripts and of course publishing as well. Because sometimes it starts as a book and then it's converted into a screen play and then from the
35 screen play it goes to a film.

MR COPPEL: So the argument is a dedicated court would be experts in intellectual property, or in copyright, which would be an expertise that's built up through hearing day in, day out, cases relating to intellectual
40 property, which is one argument that's been put to counter that view, is that intellectual property can cut across other forms of law and it's helpful to have an expertise not just in the narrow intellectual property law domain but across other forms of law, contract law for example. The other is typically a dedicated court wouldn't be the ultimate court so if

there were an appeal you would still have the situation where that case would then be heard by a court which may have limited expertise.

MR BOUVET: Yes.

5

MR COPPEL: I don't know if you have any - if you think that would be a problem, or is it - - -

10 **MR BOUVET:** Well, for me, I'm not a lawyer, for me it seems to be straightforward, you've got all your material there to prove that you are the author so there shouldn't be any arguments? That is why I've also mentioned section 219 of the original Australian Copyright Act. I don't know why in 2000 the government decided to remove that section. It was very fair because it said, okay, the author gets a percentage of whatever
15 the film earns at the box office. That's after costs of production. So 219, if you could bring 219 back into the Copyright Act that would be great.

Also there seemed to be some confusion about the meaning of the word, "créateur", which is a French word? Some people can't see what it
20 actually means, it means somebody who conceives something, somebody who creates something from nothing. So when they say that the makers of the film are the authors that's wrong because a film is not an original work, a film is a copy of a screenplay and a screenplay in turn is a copy of an original story, which very often is in the form of a novel, like Gone
25 with the Wind for example. Yes, and 4.2 and finding 4.2, and recommendation for one, I think it's way too short. Liked speaking for myself, it's been - it's taken some 30 years and I still can't get through and if you bring it down to 15 to 25 that's it, I'm - - -

30 **MR COPPEL:** Yes, so, again, as we mentioned to the previous participant, there's no recommendation in the report to reduce the length of copyright term.

MR BOUVET: Yes, much too short.

35

MR COPPEL: Yes, okay.

MR BOUVET: Yes, that's it.

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

MR BOUVET: Thank you, very much. Thank you.

45 **MR COPPEL:** So ladies and gentlemen, that concludes today's scheduled proceedings. For the record, is there anyone else who wants to

appear before the Commission today? If not, I adjourn the proceedings. This concludes the public hearings for today in Melbourne and we will reconvene tomorrow morning at 8.45 again in Melbourne. So thank you, very much.

5

MS CHESTER: Thank you.

10 **MATTER ADJOURNED AT 5.05 PM**
UNTIL FRIDAY, 24 JUNE 2016 AT 8.45 AM