



Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

INQUIRY INTO INTELLECTUAL PROPERTY ARRANGEMENTS

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

TRANSCRIPT OF PROCEEDINGS

AT PRODUCTIVITY COMMISSION, MELBOURNE
ON FRIDAY, 24 JUNE 2016 AT 8.41 AM

INDEX

	<u>Page</u>
MR MARK SUMMERFIELD	557-571
AUSTRALIAN BOOKSELLERS ASSOCIATION MR JOEL BECKER MR MARK RUBBO MR TIM WHITE	572-590
ELECTRONIC FRONTIERS AUSTRALIA MR JON LAWRENCE	591-602
MR PETER DONOUGHUE	602-609
MS DEE WHITE	609-616
MR PETER GLEESON	617-624
ASSOCIATION OF LIQUOR LICENCES MELBOURNE MR CON SARROU	624-632
PENGUIN RANDOM HOUSE AUSTRALIA MS JULIE BURLAND MS BRIONY LEWIS	633-646
LAW COUNCIL OF AUSTRALIA MR RICHARD HAMER	647-659
QUALCOMM INCORPORATED MR ALEX ORANGE MR PHIL WADSWORTH	659-672
IPTA MR MICHAEL CAINE	673-686
TEXT PUBLISHING COMPANY OF AUSTRALIA MR MICHAEL HEYWARD MR MARCUS FAZIO	687-697
MS WENDY ORR	698-704
SCRIBE PUBLICATIONS MR HENRY ROSENBLOOM	705-712

**HAPPY FINISH DESIGN
MR NICK RENNIE**

712-719

MR NICK GRUEN

719-727

MR DAVID DAY

727-730

5 **MR COPPEL:** Good morning everybody. Welcome to the public
hearings of the Productivity Commission Inquiry in Australia's Intellectual
Property Arrangements. My name is Jonathan Coppel and I am one of the
Commissioners on the inquiry and my colleague Karen Chester is the
other Commissioner.

10

By way of background, the inquiry started with a terms of reference
from the Australian Government in August 2015 to examine Australia's IP
arrangements including their effect on investment, competition, trade,
innovation and consumer welfare. We then released an Issues Paper in
15 early October 2015 and we've talked to a range of organisations and
individuals with an interest in the issues. We have also held a number of
roundtables, both pre-report, draft report and post-draft report and met
with many groups of interested parties to inform the inquiry.

20

We released the draft report in late April, which included over
20 draft recommendations, draft findings and a number of information
requests. We have received a large number of submissions in response
and now they total well over 500. So we are grateful to all the
organisations and individuals who have taken the time to prepare
25 submissions, many of those who are appearing at the hearings both today
and in previous days.

The purpose of the hearing is to provide an opportunity for interested
parties to provide comments and feedback on the draft report; things like
30 where people agree with the draft recommendations and where they may
disagree or where there may be differences of opinion on ease of
implementation or even factual comments.

35

Prior to this hearing today, hearings have been held in Brisbane,
Canberra and Sydney and also yesterday in Melbourne. A further hearing
will be held in Sydney next Monday. We will then be working towards
completing the final report, having considered all the evidence presented
at the hearings and submissions, as well as other informal discussions.
The final report will be handed to the Australian Government later this
40 year. All those participants and those who have registered their interest in
this inquiry will be advised of the final reports released by government
which may be up to 25 parliamentary sitting days after completion.

45

Regarding today's proceedings, we like to conduct all hearings in a
reasonably informal manner, but I remind participants that a full transcript

is being taken. For this reason, comments from the floor cannot be taken but at the end of today's proceedings we will endeavour, time permitting, to provide an opportunity for anyone who wishes to do so to make a brief presentation

5

Participants are not required to take an oath, but are required under the Productivity Commission Act to be truthful in their remarks. The transcript will be made available to participants and will be available on the Commission's web site following the hearings. Submissions are also
10 available on the web site. If there are any media representatives attending today there are some general ground rules and we ask you see one of our staff concerning those and that member of the staff is there by the door.

To comply with the requirements of the Commonwealth Occupational
15 Health and Safety Legislation you are advised that in the unlikely event of an emergency requiring the evacuation of this building that you should follow the green exit signs to the nearest stairwell. Lifts are not to be used and follow the instructions of the floor wardens at all times. If you believe you would be unable to walk down the stairs, it is important that
20 you advise the wardens who will make alternative arrangements for you. If you require assistance, please speak to one of our inquiry team members here today. Unless otherwise advised, the assembly point for the Commission in Melbourne is at Enterprise Park, situated at the end of William Street on the bank of the Yarra River.

25

Participants are invited to make some opening remarks of no more than five minutes, keeping the opening remarks brief will allow us the opportunity to discuss matters in participant's submissions in greater detail. Participants are welcome to comment on the issues raised in other's
30 submissions. Those formalities complete, I would now like to welcome the first participant who is Mark Summerfield. So welcome. If, for the purposes of the transcript, you could give your name and who you represent and then I invite you to make a brief opening statement. Thank you, Mark.

35

MR SUMMERFIELD: I am Mark Summerfield and I am with Watermark Patent and Trademark Attorneys, but I am actually mainly here in a personal capacity, so whatever I say here doesn't necessarily represent the views of my employer, but my feeling is that they're
40 probably fairly well aligned. Just by way of opening I would like to just summarise some of the points in my submission and that submission relates to the recommendation that business methods and software be excluded from the - from patentability under the Patents Act 1990, and there are a number of reasons why I regard that as a poor recommendation
45 and one that should not be carried over into the final report.

Primarily, the issue is that this whole category of business methods and software as it appears to have been brought together within the report is extremely broad and at one extreme you have the kinds of business processes that have already, on a number of occasions by the Full Federal Court in Australia been found to be unpatentable in any event. At the other extreme, under heading of software or computer-implemented inventions or inventions that have been implemented partially or wholly by means of programming, rather than preconfigured hardware, you have things such as the CSIRO Wi-Fi technology which is itself largely nowadays implemented in hardware that may or may not be programmed.

My background originally is as an electrical engineer. I practised as an electrical engineer for over a decade before entering the patent attorney profession. During that time I worked at Telstra's research laboratories, Telecom at the time. I worked - I did a PhD in optical fibre technology at Melbourne University. I did post-doctoral research at Melbourne University. I worked in a start-up company that was developing hardware and software for telecommunications access networks. I worked in a second start-up company which was developing computer-aided design software for use in the design and development of optical fibre technology systems; everything from devices through to large-scale national telecommunications.

Following that, I became a patent attorney and I have worked for a number of clients in related areas in relation to hardware and software, and within the general areas of technology that I've worked in and where I have assisted clients, I would have to say that the decision as to whether something might be implemented in hardware or might be implemented in software or might be implemented using some form of programmable hardware, which again, the tools are used in those cases are very similar to software development tools, they consist of effectively programming languages, that it is entirely an engineering implementation decision. There is no distinction in terms of the end functionality; the distinction is in relation to matters such as cost, performance, miniaturisation - those sorts of things that affect the engineering decisions and the final product design.

The general preference nowadays is for implementation to be as far as possible and, at least at the early stages of development, in programmable devices whether that's microprocessors with associated software, whether it is devices that are - there are types of hardware that can themselves be programmed; they are bit like digital stem cell arrays, if you want to think of it that way. They start out having no particular function and you feed

5 them a file and that configures them to perform a particular way. The reason, of course, that that is preferred is because you can then build the hardware once and you can reprogram it in development to adapt it, develop it, correct bugs. You can reprogram it even after it is deployed in the field, to add new functionality. There really is no clear dividing line between what you would do in hardware and what you would do in software in a range of these fields.

10 The other area that concerns me is in relation to the kinds of software that I worked on in the second start-up company that I mentioned. Highly technical software that is outside the everyday experience, I guess, of most consumers who deal with large-scale consumer operating systems office productivity applications. But when you get into areas that are more highly specialised and more highly technical, you are dealing with
15 software that require significant investment of time, money, human resources in order to develop features that people rely upon for such purposes as designing national telecommunications networks, for example.

20 That software can't be thrown together in a few days and put out into the world for people to play with. That software needs to work. It needs to produce the right answers every time. It needs to tell the users when it can't, for some reason, produce the right answers. It needs to be robust, reliable and people count on it, it's mission-critical. The development
25 cycles, to get an idea effectively from - for a new way of doing that more efficiently or more accurately or more effectively through to something which you can actually put out into the world, knowing that it is reliable, robust and people can rely on it for what they do - that's not a short cycle. It might require many, many months of development and the involvement
30 of very highly qualified people in order to bring that to a final form that's suitable for the market.

And so much software that is all around us every day that we don't see and that we take for granted is of the kind of nature that I've been talking
35 about. I don't think that that kind of software is really what you, the Commission, have had in mind, in preparing that chapter. I am not sure, reading it, that there was an appreciation there of the range of technology and the range of industries that would be affected by such a recommendation and that's the primary reason I have made my submission
40 and it is the primary reason I am here today.

MR COPPEL: Thank you, Mark. Maybe I could begin by mentioning that we have had a number of other participants in previous days commenting on the business methods and software chapter of the draft
45 report. One of the, is that they have made is that it's better to think about

business methods and software as two distinct forms of intellectual property. Listening to your opening remarks you seem to suggest the opposite, that a business method is sort of embodied in software and that the areas of intellectual property need to be looked at together. I was
5 wondering if you could comment on the - - -

MR SUMMERFIELD: I am sorry if I have given that impression. My opening comment was that your draft report had, in fact, brought them together into a single category. My belief and my written submission is
10 that no such single category actually in fact exists. So the first thing you have to do is separate your thinking from this idea that there can be a BM and S, a business methods and software category.

I would agree with probably - I mean, I haven't heard exactly what
15 people have said, but my general view would be that you need to separate the thinking about business methods from the thinking about software. I am not sure it is as simple as saying that business methods is one kind of IP and software is another kind of IP, because it certainly is true that software supports business processes and that software can support
20 business processes in a variety of different ways.

I am not sure that trying to separate them in terms of, "Well, here is one sort of IP and here is another sort of IP" is possible, but you do need to separate it as the Full Federal Court has effectively done in its three
25 most recent cases in this area; the Grant decision, the Research Affiliates decision and the RPL Central decision. They have said quite clearly a technological innovation is patentable; a business innovation is not.

So what they are looking at there is, where is the innovation? I mean,
30 one of the issues that I have with a particular client at the moment is if the client that is a large multinational company. It provides the sorts of high reliability, high transaction rate processing systems that run the global travel networks. These days when you fly, you get a e-ticket, you go into airports and everything is all computerised, everything is done. Millions
35 of passengers fly every day and this particular company has a data centre with 11,000 servers sitting in Germany and they handle 42 per cent of that traffic around the world every day.

There is enormous - and they have, I have to say, an R and D presence
40 in Australia in Sydney. They obviously have customers in this country. They do invest here. I recently visited them in Europe and they - part of the reason for investing in Australia is they saw it as a good, stable legal environment for the kinds of things that they do, as well as a good commercial environment and having the kinds of educational, intellectual
45 capacities to do the R and D that they are doing. So they now have

concerns about the position in Australia, at least from the legal perspective. They have been very surprised by what has happened here in recent times in that area.

5 Now, the reason that's relevant is because much of what they do supports things such as the searching for travel itineraries and things that work for what travellers want to do; the sale and processing of tickets, rebooking, managing seating on flights. All of the things that the airlines do, all of the things that passengers do. The technology they use to do that
10 involves enormous amounts of R and D work. It's not enough just to say, "Well, he's now willing to do it." It has got to be implemented within that server system in a way that it never fails. If that system fails - one of the things that it does is allocate spots for planes to take off and land. So if that system fails it's a bad thing.

15 So there are huge amounts of technological innovation and technological R and D, methodologies that they are developing that have wider application in large-scale transaction processing systems and database systems. Massive investments in that, and yet, a lot of it is
20 regarded from the perspective of patentability in what we are seeing from the examination processes not just in Australia but in the US as well. A lot of it is regarded as business methods.

25 Now, the issue here is that, yes, it is a business method; people don't invest huge amounts of money in these kinds of developments unless it's going to support their business and their customer's businesses, but in actual fact the investment and the research and development, and the deployment is in the technological platform that underpins that and so it is important to focus on where is the innovation? Have they just come up
30 with a new way of helping passengers to book tickets?

35 The implementation is neither here nor there or have they in fact created a technological innovation that has enabled that new service which otherwise wouldn't have been possible. So the distinction between what is a business innovation and what is a technological innovation is important. The distinction between what is a business method and what is software as distinct forms of IP, I think it not important in that context.

40 **MR COPPEL:** You have given a number of examples. Do you have any sense as to the life of these - the commercial life of these examples? Software is typically associated with something that is pretty fast-moving. There are always new developments. If you could give us a sense as to the life of these innovations.

MR SUMMERFIELD: Okay. The software that I worked on in the (inaudible) design area, which - I was there from 2000 to 2002. The Australian start-up company unfortunately is no longer in existence after a number of investments and acquisitions over the years, and there were all sorts of problems are doing there in Australia sadly, but the product itself still exists. I noticed, when I looked recently that they are still promoting one of the features that I was instrumental in developing while I was there, as one of the key features of their products that distinguishes it from their competitors' products and the underlying platform - and, in fact, the basic simulation play form that that uses is originally an open source platform Creators Think Autonomy(?) created by the University of California at Berkeley.

The work that we did was to say, "Well, there was no point in reinventing the wheel in that sense." We were strong supporters of open source in a variety of ways. The new intellectual property that we created was in the specific models for the various devices and systems that that system was - that our particular product was designed to simulate and the new user interface features that we provided to make it much easier for our target users to access that. So that kind of product has a long lifetime.

In relation to the high-volume transaction processing, our client there is about to move for commercial reasons from an IBM platform that many, many companies use that have to deal with really, really high volume high reliability transaction processing to developing their own. Of course, IBM charges ongoing licensing usage fees and it only runs on their hardware, so it's a nice business model for them. I was interested to see, when I looked at the information for that IBM platform that it's been around for - since the 1960s, I think or certainly the early 70s. The last time it had a significant update was 2005.

This kind of software that does really important stuff and has to be really, really stable, people try to get it right and then leave it alone. There is a lot of software out there with long lifetimes. Again, we are far too accustomed these days to our smartphone apps updating every second day and annoying us with those notifications. We are far too accustomed to Microsoft and it's new release product-release cycles. That represents only a very small part of the sorts of industries that we are talking about that use software and programmable hardware as fundamental building blocks in everything they do.

MR COPPEL: There are multiple ways in which to protect the investment in research and development and in a number of industries, they don't use intellectual property laws at all. They rely on secrecy, which has a downside that it may never enter into the public domain. I am

just wondering whether software is one of those areas where the ability to keep the innovation away from potential competitors is an option? How easy would it be to copy software, if it's kept secret, for instance.

5 **MR SUMMERFIELD:** Well, setting aside stray copying which, of course, is covered by copyright, one of the issues with software is that there are a variety of ways in which you inevitably expose your innovation to the market and to your competitors when you release software products. One of them is that people can see the functionality on the face of the
10 software. That may of course, in some cases, not tell them anything about what's going on inside or in other cases it might reveal quite clearly the kinds of innovations that have been made in order to achieve that new functionality. So that's one way. I mean, software inevitably goes out
15 into the world.

Reverse engineering is another and despite various technological measures to prevent that, pretty much anything that is done in software or in any form of programmable hardware is subject to reverse engineering, and the copyright protections that are supposed to prevent people from
20 doing that for a variety of reasons really are not going to be effective in an industrial context. So that's the second - - -

MR COPPEL: Why is that?

25 **MR SUMMERFIELD:** Well, simply because there is no way to know. You can have that says it is illegal to - as we do in Australia - that it's illegal to break the technological protection measures that have been put in place to try and prevent it, but you cannot know what somebody does in the privacy of their own research facilities. You cannot know that they are
30 doing that in Australia as opposed to in India when no such law exists.

So in practice, you really cannot prevent the reverse engineering of software. In relation to - again going back to the systems that I worked on in the simulation area, our customers were and still are presumably the
35 kinds of people who design; highly qualified engineers who design telecommunications devices, networks or optical fibre systems. They didn't just want to know that our software worked because we said it did, they wanted to know how it worked.

40 So we actually published descriptions of our algorithms and the underlying theory in the documentation for that software. We have no choice, because if those researchers and designers didn't know that they could trust those models and how they worked, and what the difference was between one model and another, then they were going to be confident
45 using that software. So that's another example of where there's a problem.

Finally, I've said in my submissions and I said elsewhere, I believe that open-source models and proprietary models are not polar opposites. They are complimentary models and most companies nowadays that work in this area are using some combination of open source and proprietary, aside from people who are purely running an open source-type business like Red Hat, but if you look at the open-source projects that companies like Microsoft, Google - as I've said, I've worked with companies that are using a mixed proprietary open-source model, that the travel global distribution system company I was talking about, they also have an open source policy and they use some open source software. They contribute open source - they contribute - go back to the open source community as well.

What other forms of IP protection allow in that environment is that they allow companies that are engaging in with the open-source community in that way to have control over the intellectual property. You can do really interesting things, for example, like put out open source code for people to use and build on, but because of the copyright protections and even the patent protections that might be in there - because once people learn how it works, they can be implemented perhaps without infringing copyright, but because of the IP protections that you can cover that with, you can impose licence terms on that that goes out into the world.

So you can say, for example, and in some ways Oracle's and some Java model was like this, and Google's Android model was a bit like this, you can put that code out into the world for people to use and you can say, "For non-commercial purposes, research purposes, whatever you want, you can do what you like with this code. If you want to give us back improvements you make or other code that you develop using it you are welcome to contribute to the community." But at the same time, you can say that "For commercial use, we are going to enforce our IP rights there." We are going to say, "You need a licence," or, "You need to participate in this program or you need to buy in into this part of our business. "

It also creates very interesting opportunities for hybrid models that can give you the best of both worlds, the best of what the open source advocates will tell you is great about open source and the best of what we've had for many, many years from the proprietary software developers who have - Microsoft, for whatever criticisms they sometimes cop, have delivered productivity software to ordinary people in businesses for a number of decades now that have made us all more productive. And they have done that via a proprietary model for the most part, and if you look at the open source alternatives to Microsoft Windows or Apple - well,

Apple's IOS is built itself on an open source platform, but to the office productivity software, Microsoft Word and the others in the suite, they don't provide businesses in the majority of consumers with a plug and play solution that they can just get down to work with. They are much better
5 nowadays than they used to be, but they still require a level of self-support that most users are not willing to engage in and most businesses don't have the time and resources for.

10 So the proprietary models do deliver, and they deliver - in Microsoft's case, they deliver the sorts of platforms you don't see as well; the cloud computing platforms, the database systems - all of the back-end things that are really highly technically sophisticated and Microsoft spends billions in R and D every year on. They deliver all those things as well. And open source doesn't really deliver for those highly specialised
15 technical markets. The people involved in that, generally speaking, are not connected to those markets and enterprises, and they're focused elsewhere, and they are doing great things and large parts of the web are built on it, but it doesn't deliver everything to everybody.

20 **MR COPPEL:** Okay.

MS CHESTER: Mark, I just want to explore a little bit more the views that you espoused before around the ineffectiveness of copyright when it comes to coding, just to make sure that I kind of understand it. So you are
25 saying that copyright is clearly a form of protection for coding, but it is more difficult to enforce those rights, because it is more difficult to detect when it is being breached. Is that what you're suggesting?

30 **MR SUMMERFIELD:** Yes.

MS CHESTER: Okay.

MR SUMMERFIELD: I'll give you an example. I mean, suppose we take something like the CSIRO's Wi-Fi invention which, when it was first
35 invented, really needed to be from your hardware and now you can do it in software with just an ordinary PC and microprocessor. You can do everything that is required to implement what was invented at CSIRO.

40 If I do that and then I release that code and somebody reverse engineers that or perhaps I provide the source code and open source it, if someone just- and I say, "Look, there's a licence term here. You can do what you want with it for non-commercial purposes, but if you want commercial use then we require you to take a licence." Now, if I have
45 only got copyright, what happens is that the code itself reveals the algorithm. It reveals the actual steps - general steps that you have to take.

If someone takes that code and they are just copy it and they just reuse it well then they have infringed copyright.

5 If somebody takes the code and they read it and by reading it they deduce the algorithm and they write down the steps of the algorithm in plain English or as a specification and then they hand that to another programmer who hasn't seen the code and says, "Look, we've got an interesting algorithm here. Could you write that code to implement this?"
10 Now, that person hasn't seen the code, they haven't copied it. They haven't been given anything other than the underlying algorithm and been told, "Go away and independently implement this."

15 That independent implementation almost certainly does not infringe copyright. The connection to the original code, via something which is not itself code is not - is certainly not a derived work, and the connection may - it probably isn't strong enough, because what you are seeking to protect with a patent in that case is the actual technology which you have developed which is then represented by a series of steps and an algorithm which can then be implemented in hardware or software in order to bring
20 that into a product.

There are two separate things there. There is the expression of the work as there always is in copyright, that's the actual code, but there's the underlying idea of the work in this case, is perhaps the algorithm.
25 Without the ability to protect what you have actually invented there, which is a new algorithm independent of how it is implemented, you have no way via just copyright to effectively protect that.

MS CHESTER: So if we were to draw a parallel with, say, code versus
30 say a book or a story, breaching copyright doesn't require a pure replication of the book itself. You can sort of still lift key ideas or, say, music as well and that can still be seen as a breach of copyright. What is it about the algorithm that sort of separates it from the coding? It is a function of the coding, so it is part of the embedded innovation. I am just
35 trying to work out why the copyright then isn't effective.

MR SUMMERFIELD: Well, again, using the Wi-Fi example, the primary claim in the patent that protected that innovation contains about three steps. It says you have this lot of data you want to transmit, and then
40 the first step says to perform one particular type of processing on that data, and then the second step says, well, take what you've just processed and perform this further step on it, and then the third step says then take that and perform this still further step on it, and then transmit it. So that is the level at which you can describe that algorithm.

45

5 The code to implement that, if you were to look at it all, taking into
account the fact that in practice there's various bits and pieces of it you
wouldn't have to write from scratch, because there would already be
libraries and other things out there that you could use, but the code that
10 implements all of that would be many, many thousands of lines long. If I
copy those thousands of lines or any part of those thousands of lines that I
am potentially infringing that copyright. If I did use the underlying
algorithm and get it back to those three steps, that's the underlying idea.
It's a technical idea. It isn't an aspect of what copyright protects in the
15 code. The code is a particular expression of that idea.

20 You can think of the - I mean, I don't like to say algorithm is an idea,
because ideas are not patentable and we are not talking about an idea in a
sense of the plot for a novel. We know the plot for a novel is something
15 that is not protectable, as the guys who wrote Holy Blood and Holy Grail
discovered when they tried to sue Dan Brown in the UK for his book, but
because it's a technical idea as opposed to a literary idea. I mean, I think
the fact that code is protected by copyright is as much as anything else a
historical accident. One thing I do agree with some of the more extreme
20 free software advocates about is that there is a serious question as to
whether copyright is really the appropriate type of IP right to protect
software.

25 At some point, it was decided, "Well, there needs to be protection for
software," and it was decided, "Well, let's pretend that" - it is a legal
fiction, I think, it takes no account of the actual process of technology. It
says, "Let's pretend that code is a literary work and throw it in with
literary works in the copyright law," which is now, effectively, the global
30 approach, so I don't think it can be changed now.

35 Code is not a literary work. It is not the same sort of an expression of
an idea that a literary work is an expression of an idea. I think, with the
benefit of hindsight, a little bit more effort in devising a generous form of
protection for software code might in fact have been a much better idea.

40 **MS CHESTER:** Jonathan mentioned before some other ways of
protecting intellectual property in the software space that don't require the
formalities of a patent or relying on copyright. With the exception of
some of the outliers that you've spoken about, if you are looking at the -
we've seen a lot of evidence around software having very sort of short
commercial lives, what role does - people talk about the first move
45 advantage. What role do you see that playing in a complementary sense?

MR SUMMERFIELD: Can I first challenge what you just said about
me talking about outliers. I don't believe I am talking about outliers. I

believe I am talking about things which are not readily visible to the majority of society and to consumers, but I am very pleased to see that Qualcomm are appearing this afternoon to talk to you as well. They know a lot about this area too. These are not outliers. The sort of
5 programmable hardware and software code that I'm talking about is all around us. It's just not the stuff that you see all the time.

MS CHESTER: So is there a - sort of like a statistical evidence-base that we can look at to get a better handle on whether or not there is a
10 misconception of most software being a very short commercial life, which is I guess what we have been drawing on in our report?

MR SUMMERFIELD: I think the notion that software has a commercial life - it's complex even in the case of the kinds of software that we look at all the time, in the sense that some features of software
15 have a short life. Some features last for many, many years. Not very long ago, I wanted to retrieve the electronic of my PhD thesis which I wrote on Microsoft Word 2.0 in 1995. I was able to load that into the current version of Microsoft Word. The formatting was a bit off, but a couple of
20 hours work and I was unable to do that and I was then able to save it back out in PDF which hopefully is a much more stable format.

There are features of software that although the application itself may be updated regularly, there may be underlying features are quite important
25 that were quite innovative when they were developed that require real technical effort to bring into effect and word processing is probably not the greatest example of that, but software products may evolve, but the core features on which they were originally - the platform on which they were originally developed may remain quite stable underneath the surface.

30
So the fact that we as consumers see software being updated regularly doesn't necessarily mean that all of the technology and research and development, and innovation that's gone into developing that software is becoming obsolete at the same rate. So that's one factor. You could ask
35 Microsoft how much of the early 1990s Windows NT code base is still in Windows 10. I daresay it's not zero. So they might actually be able to tell you something like that, if they were minded to.

40
The other thing I would say about patent protection for software that does have a short lifespan and see many examples of smartphone apps for example, that are fads and come and go, and things where there may be an opportunity that arises and then fades away. The patent system isn't well-suited for that anyway. I don't generally encourage people who ring up and say, "Look, I've got this great idea for an app and I want to know

how I get a patent for it" - I don't necessarily encourage those people to pursue patent protection.

5 There's an article on my blog which has been the most popular article
I ever wrote, which is called, "Can I and should I patent my smartphone
app", that goes through these issues. If it's got a short life span, if it's only
going to be commercially valuable - if you've got a first mover advantage;
if it's only going to go for a year to two and then you are going to be
moving on to something else, don't spend thousands of dollars entering
10 into an IP protection regime that's going to potentially take you four or
five years even to get a right granted.

15 I think there is a serious problem with a misalignment between the
way some people use the system and what is an appropriate use of that
system. It doesn't mean saying, "We shouldn't let software be patented",
what it means is making sure that people are better educated about the IP
rights that are available to them and what's most effective in their
business. I don't know what other patent attorneys do. What I do is I sit
down with people and I say, "What is your business plan here? What are
20 you commercial objectives and how do you see this panning out?" And if
patents are not right for them, then I will tell them "Patents are not right
for you." That's how it should be.

25 **MR COPPEL:** This is an inquiry where often the experience of other
jurisdictions is called upon, particularly in relation to proposed changes.
So we have heard with respect to fair use as an exception, the experience
in the Unites States statutory licensing for education in the area of
copyright, the experience of Canada in parallel import and restriction
removal in New Zealand. This is also an area where New Zealand has a
30 different approach. I am wondering if you are in a position to give us a
sense of how software is protected or not able to be protected directly in
the case of New Zealand. Do you have any clients for instance?

35 **MR SUMMERFIELD:** I can talk about New Zealand. Before I do that,
I just want to say more generally, there is an assertion in the report that
there is somehow a general trend around the world for protection of
software via the patent system to be wound back. I don't believe that that
is the case. Europe, for example, has been very stable for a long time and
I think the European system as it stands now is actually very good. It's
40 good in a number of ways. It's good because it's achieved a level of
stability, certainty and predictability where people such as myself can give
advice to people; whether what they are developing is patentable there or
is not and what the outcomes would be in those terms.

5 The United States and Australia, the courts have recently arguably moved in a direction that restricts, certainly, the patenting of computer-implemented business processes where there is no technological innovation in that and, as a result of that, I think that there has never been a time where there has been greater harmony between Australia, the United States and Europe in terms of what's protectable.

10 So it is not that there is a winding back, it's that I think that's there's an increasing consensus about the technological requirement. Now, what happened in New Zealand was in many ways rather unfortunate, because they had what was a very much needed replacement for their ageing and clunky old Patents Act, which was hijacked at the last minute by interests who wanted to include just the kind of software exclusion that you perhaps had in mind with the draft recommendation.

15 The result of that was a recognition of that debate, a particularly important New Zealand-based company Fisher and Paykel, in fact, were the ones who jumped in and said, "Hang on a minute, this is going to stop us from getting patents on the sorts of technologies we put into our domestic appliances which are all microprocessor-controlled now." So that led to this debate about embedded software, which then followed, which was a complete disaster. It was a huge waste of time and resources, as everybody tried to deal with that.

25 Engineers can't agree on a dividing line between what is embedded software and what is not embedded or standalone software. So quite how policymakers and lawyers and the Intellectual Property office in New Zealand were going to do that is completely beyond me. It was a terrible mistake to go down that path.

30 What they ended up doing was to say, "Oh well, let's just copy Europe." Okay, so let's say a computer program is not a patentable invention and to the extent that it's a computer program as such. So what they were hoping there is that they would draw on what has taken, probably, 20 to 30 years to reach a very stable and well-understood position in Europe as to what is a computer program as such, and what is, in fact, a technological innovation that is implemented through the use of software in computer technology and let's just hope that all of that European case law, and in particular the British case law is going to just be followed in New Zealand.

45 It is early days yet, but from what I'm seeing, that's not happening. New Zealand, in practice in the patent office at the moment is looking very much the way that Europe did 20 years ago, we would have ridiculous situations where somebody had a technological invention and it

would be claimed in terms of the algorithm, so the process as I was discussing before and it would then alternatively be claimed in terms of a piece of hardware, programmable hardware that was configured in order to implement that process, and you would get - despite the fact there is
5 only one invention there, and those are just two different ways of claiming it, you would find that one of those was rejected and the other one was considered to be completely fine. It's utterly inconsistent and it just creates confusion and uncertainty in the system, and we are seeing exactly those kinds of issues now arising in New Zealand.

10 I think it is inevitable as IPONZ struggles to implement this regime that's been imposed upon them that at some point a matter will end up going through the court system there. It's got to really get up through whichever High Court it is; Wellington or Auckland; the Court of Appeal
15 and the Supreme Court before you get any certainty. It's going to be many, many years and somebody is going to have to take it through that court system.

We are in the situation in Australia right now where we have had
20 three Full Federal Court decisions that are very consistent that have - as I said, the most important message that comes out of those is business innovation is not patentable but technological innovation is patentable. Some guidelines for how you deal with that - IP Australia, admittedly, is still grappling with that, just as the US patent office is still grappling with
25 the implications of the Supreme Court's Alice Corporation decision a couple of years ago, but the court decisions themselves, I think, are clear.

So we are in a position now where really, I think as I said, we are quite close to the US position. We are quite close to the European
30 position. We have a stable and consistent legal statement from the Full Federal Court and I don't see why we would throw ourselves into the situation that New Zealand is now in where we don't really know what the law is there. We suppose that according to the stated intentions that it is something like the UK, but the wording is not exactly the same and the
35 matter is going to have to go before the New Zealand courts and it could be years before that is resolved. So I really wouldn't want to see that happen in Australia.

MR COPPEL: Thank you very much for participating. Thank you. Our
40 next participants are from the Australian Booksellers Association. So when you are comfortable if you could give your names and who you represent for the purpose of the transcript and then feel free to give a brief opening statement. Thank you.

MR BECKER: Joel Becker, Chief Executive Officer, Australian Booksellers Association.

MR RUBBO: Mark Rubbo, Managing Director of Readings Pty Ltd.

MR WHITE: Tim White, president of the Australian Booksellers Association and owner of Books for Cooks and Microspecialist Books.

MR BECKER: Tim and I will be speaking, then the three of us will be open to questions afterward, so I will be going first. Thank you for the opportunity to present before this inquiry. Over the last seven years we have experienced significant disruption. Booksellers have been impacted by fear mongering that the physical book and the bricks and mortar shop were going to die because of e-books and online bookselling.

With the growth of the Internet and global online suppliers, consumer expectations have changed significantly regarding price and speed of availability. Seven years ago, rightly or not, book prices were regarded as being too high, relative to overseas exchange rates. We have actually seen a significant reversal of trends since the closure of Red Group, which owned Borders and Angus and Robertson about five years ago, there has been stability and many new bookshops have opened as well as expansion by existing franchise operations.

Several existing retailers have opened new businesses. Last year the ABA experienced a five per cent growth in membership, and by membership I am talking about the number of bookshops who are members. E-book sales peaked in 2014 and in more mature markets there has been a net drop in sales. In the US, sales for trade totals dropped from 31 to 32 per cent down into the low to mid-20s, with no sign of any rise at this stage. E-commerce continues to be a challenge to bookshops, but in Australia without physical warehousing thus far from offshore providers, and the growth of an Indigenous online market, this challenge has been met to some extent.

Following the work of the Book Industry Strategy Group and the subsequent Book Industry Collaborative Council, I worked with the Australian Publishers Association and we devised a voluntary 14/14 speed-to-market agreement to supersede the 30/90 day rule, which has been endorsed by government bodies. The ABA and APA and our members have abided by these terms over the last four years. Booksellers have long had the flexibility to order the edition of the customer's choice if not available in Australia.

I asked two of Australia's leading independent booksellers how much stock they sourced from local publishers and distributors. Mark Rubbo who is here today from Readings indicated that that was at least 95 per cent. David Gaunt from Glee Books indicated it was the mid-90s. David also added that over the last 10 years the percentage of stock orders from offshore has diminished as a direct response to more efficient publishing and competitive pricing from local suppliers, so what benefit can booksellers see from having to increasingly source books off shore and more likely, more expensively for them and for the consumer.

As part of an attempt to provide an evidence-based rather than an emotive response to the recommendations, I did a snapshot - which formed part of my submission - comparing present Australian retail price, ex-GST with US and UK prices for trade titles. It was a selection taken using - because I wanted it to be fair to the extent it was a snapshot - every internationally-released title under Readings Carlton front table, along with some randomly chosen new releases, cookery title and new children's books.

I also added, so that there was representation for the more popular end of the market, any bestsellers not already on that list from the Nielsen BookData, which is Australia's leading provider and collates of book-related data. The outcome of the snapshot was to show that at least 85 per cent of equivalent Australian editions were the same or less expensive than the converted retail price overseas or less than 10 per cent more expensive. I grant that this was not comprehensive, but as a sampling it reflects poorly on the recommendations of the review which is based on flawed out-of-date data from 2009.

It is appalling to think that we could have the parallel importation rules dropped using faulty out-of-date information. Without evidence-based dated justifying a change in PIRs, I can't understand how dropping PIRs could be implemented responsibly. I have a comment here also which actually relates to something that somebody said yesterday, that a university lecturer would likely fail any first-year student who used out of date information to justify conclusion when there was evidence that the information was no longer relevant or accurate. Along with the APA, we do support codifying the 14/14 speed-to-market agreement. We are also working collaboratively with publishers to ensure that prices are always competitive.

At the recent 8th Australian Booksellers Association Annual Conference, we had a forum on copyright and parallel importation rules. There were more than 120 booksellers present representing independent and franchise shops. Not a single shop indicated support for the removal

of PIRs. Where is the evidence that confirms that removing PIRs would be beneficial to local businesses, and if local businesses cease to be present, where is the evidence that this will be beneficial to the reader?

5 New Zealand is often brought up by both sides of the debate. Now I don't know that the elimination of parallel importation rules in New Zealand caused virtually all the major global publishers to leave New Zealand. I don't know that the fact that there are less booksellers in New Zealand than 10 years ago is a result of PIRs being removed, but I
10 invite you to find any evidence that proves that things have improved for the consumer in terms of either price or availability.

 Some of the best publishing in the world happens here. Some of the best booksellers in the world are in Australia. We have a system that
15 works. We have a vital healthy book industry that is seen out difficult times. We work through them. Trade publishers and booksellers, at the business-to-business level and at the institutional level are working together extraordinarily collaboratively.

20 We are an industry which relies on speed-to-market, simultaneous international publication, promotional spend by publishers and the risk sharing of returns. This symbiotic relationship is dependent on the current system. This is seriously at risk if parallel importation rules are
25 eliminated.

 The comparative relationship between Australian and international book prices are lower than they have ever been. If PIRs are removed and any or all of the following happens to a lesser or greater extent; that is, that bookshops and publishers close or reduce the size of their businesses,
30 Australian writers stop being published or earning an income, less books are published, jobs are lost, book prices in a less competitive market go up; there is less local availability, a successful creative industry is depleted or literacy rate drops, what are the unsubstantiated benefits worth that risk? All Australians should be rightly proud of the fact that we have a
35 vibrant successful, dynamic publishing industry that tells Australian stories at home and abroad. Why put that at risk?

 Publishing Australia is prolific and continues to grow. Australian independent bookselling is a global success story. In a nation of
40 24 million people we continue to grow, export and win. Our stories are embedded in the culture of Australia, thank you.

MR WHITE: Thank you, Joel. In my former life a corporate lawyer I spent 15 or 17 years reading terms of reference before making
45 submissions to bodies, whether they be the Full Court or a Commission,

so my starting point was to read in detail the 2009 report and to review the terms of referral and reference there, and the terms of referral and reference for this Commission.

5 When reading reports, whilst the ABA disagrees ultimately with the conclusions that were reached in 2009, it acknowledges that the Commission in 2009 identified and found qualified support for our position in relation to maintaining a form of limited territorial copyright. We believe that the methodology that was used on that occasion was far
10 more detailed and far more rigorous than what is apparent on the face of the current draft report.

 In the draft report, you purport to rely upon the 2009 report as a basis for making many of these conclusions about the state of the market in the
15 future of the Australian market as it should proceed. We are disappointed that there has not been able to over in terms of the major macroeconomic factors that have affected the book market. These major economic changes have been blatantly ignored.

20 The reality is, as a retailer with daily experience, I know that my customers are fully informed. They are often better informed than many shopfloor assistants. They are certainly better informed than any shop floor assistant in a direct department store or a DDS that will simply palletised stock on a one-off basis.'

25 The reality is that the Internet has since 2009 changed again retail. There is no detailed information, because the government in its wisdom in 2003/4 declined to continue with funding to understand the economic status of the book industry by withdrawing funding to the ABS for an
30 examination of the book industry on a regular basis.

 That proposition that the book industry should be reviewed was one of the recommendations of 2009. To the best of my knowledge, that recommendation has not been acted upon and was a fundamental basis
35 before moving forward on any implementation of change to PIRs. In the absence of that sort of investigation and that sort of data, I think it is important and crucial for this commission to step back and to determine whether there have been significant changes.

40 I have listed the Internet. The reality is that we are perhaps the most Internet-enabled country in the world. We are early adopters of technology. Smartphones - we have one of the highest levels of smartphone participation in the world. I've seen street-livers with smartphones here on the streets of Melbourne, just this morning walking
45 down from the market; a person with an Android capable of accessing

market information from Amazon, Book Depository, publishers worldwide. They have the ability because the network has already been built to have stock sent to them. The volatility of our currency. In the time of my trading, since 2000, I've seen the dollar at .47 and 1.12. Since
5 the 2009 report was issued, the dollar has inflated by 50 per cent and deflated by 50 per cent. The Reserve Bank constantly reminds us that the dollar is currently overvalued and is desperately trying to revalue the Australian currency.

10 Those sorts of factors have a direct impact on the day-to-day business of the book trade and any retail or importing business. Global publishing mergers, the largest publishers in the world have merged. We are seeing more and more globalisation which is leading to changes in distribution. We have also seen the fragmentation and the disappearance of educational
15 publishing in a deliverable model of real books over the counter.

The educational publisher is broadly, particularly in the US and UK, moving to a direct consumer, one global price, the highest price possible in US dollars, delivered by downloadables and not real books. In other
20 words, circumventing all forms of territorial governments, whether it be by paying tax for deliverables. So the ability for a retailer to actually provide books in a timely way is almost lost.

In my personal experience, I sell an occasional trade book to an
25 apprentice who has been so thoughtless as to again lose their book - their training manual and their knife kit, and a few other things, and so mid-term or mid-year they need a textbook to replace. I can't supply it. There is no supply, because it was available once at the start of the year and it is only otherwise available on extraordinarily short terms.

30 Now, the ABA is not saying that territorial copyright is something that should be maintained without some form of nuance. We seek a balanced and vibrant debate about the ways in which territorial copyright can act, both as an incentive to publishers and an incentive to ensure that
35 the Australian consumer has the broadest possible range of options of supply, whether it be over the counter, whether it be from an online retailer, whether it be direct, but at the end of the day, we maintain that some form of nuanced territorial copyright will provide economic benefit to Australia.

40 Now, I have made lots of notes and I realise that time is limited. So what I want to come to the point, ultimately, is that in my personal experience I know that I can't as a small micro bookseller, and I represent the bulk of our membership in terms of size - I can't negotiate with 700 to

1200 publishers worldwide for efficient or fair terms for delivery and supply of books.

5 I can't absorb \$10 to \$12 a kilo for delivery of books in store. I can't arrange my affairs in such a way that I have a media supply when I am faced with the reality that supply must come from overseas. Our fear is that by removing territorial copyright you will remove, under the current regime, an incentive to publishers to stop a broad range of material at an effective price.

10 We believe that the Internet and current global trends in retail consumerism mean that there is effectively a price - the international price. Our personal experience is that those prices that are sold in the store are determined by the Australian market and are lower generally.
15 That means the PIRs effectively allow for and provide risk management for publishers to ensure that there is sufficient supply. The books that we sell in our store are in limited quantities. They are not available in every bookstall, because not every bookstore curate a different collation of materials and endeavours to curate and present that to its audience, to
20 provide a specialised service.

The sort of books that I'm looking for are ones and twos. They don't come in in pallets. If they are not available in store, the consumer will simply say, "I will buy it online." It makes no sense to us that we can say,
25 "We will order it. We will get it to you at the same price, same mechanism, different supply chain." The consumer wants it now. If I don't make that sale that now, I lose that consumer, I lose that customer. The country will ultimately lose in terms of the fact that currently we don't charge GST. Currently those sort of supply chains don't return revenue to
30 the government and they certainly don't in which society.

When I sat down and compared the two options I would have, assuming that there is a reduction of titles available, because risk has increased for publishers, I will lose margin. Currently I get 40 to 55
35 per cent on a title as a discount. Not one of the publisher wholesalers in the US or UK will offer me better than 40. I get it, sale or return, which means I can take a risk or I can promote a title and risk is shared with the publisher. If I go to a wholesaler, there's no such thing. They tell me it's sale and return, but have you ever tried to send a parcel back the UK? \$32
40 for the parcel to go back, for one kilo. Try to send back 100 books to the UK. It takes three months if you send it by sea. It's not feasible.

So there will be a natural attrition. There will be a natural reduction on the part of booksellers to stock larger quantities of books. This will

lead to a less diverse, less vibrant, less social, less aware community, because there is simply less material available.

5 In the report, there are a number of other reasons why local supply
suitably balanced and nuance controlled, whether it be by 14/14 or
whether it be by a price band, whether it be by a recognition that the
global market determines maximum pricing, those factors will mean to us
that we want to be able to source broadly in the way we currently are. We
are continuously negotiating with publishers to incentivise them to ensure
10 better supply on better terms. We are competing globally for our
customers already.

MR COPPEL: If you can aim to wrap up - you have mentioned many
points and it would be useful to - - -
15

MR WHITE: I have. Okay. Now, my final point would be this. The
2009 report makes three recommendations in relation to our market and
the removal of PIRs. The first is that it should be delayed for a reasonable
period of time to allow the market to adapt. The draft report responds and
20 says that, "No, we don't need that time anymore, because the market is
adapting." The market is not adapting to the loss of territorial copyright as
a mechanism for business management and risk management. The market
is adapting currently in response to consumer demand and its needs.

25 PIRs, as the 2009 report recognised, provided a number of different
functions within bookselling and publishing. We will need time, if the
conclusion of this commission's report is still the PIRs should be removed.
We would say that we still need, as an industry, time to adopt to address
the underlying and implicit embedded factors around territorial copyright.
30 It is not about necessarily exclusively speed-to-market.

The second thing is that those recommendations required and
recommended a range of inquiries into author support, cultural support
and also measurement of the book industry. I have mentioned before,
35 those things have not been done. We would say that even if you were to
proceed with a recommendation that PIRs be removed, those
measurements and recommendations ought be adopted and ought be
included to allow for a proper and fair transition. The current way is
simply a guillotine.

40
In conclusion, thank you. This is a very personal and emotional thing
for me. As a bookseller, I love servicing my customers and I dread the
day that I will not be able to, because I cannot source a book at a fair or
reasonable price and my market is being dictated to by overseas interests
45 that have no interest in a local community.

5 **MR COPPEL:** Thank you, Tim. Thank you, Joel. Let me begin by just picking up on the point you made vis-a-vis the 2009 report and the analysis that was done there. In our draft report we initially didn't - we borrowed on the analysis. We initially didn't think that an updating of that work was of necessity for this report, because the way in which the terms of reference asked us to look at the issue of parallel import restrictions is one that was essentially to focus on the sort of implementation of a decision that had been taken in response to the Harper Report to lift parallel import restrictions.

15 So the idea was then to focus on those transitional issues that would be associated with that decision. We have received from you and many other participants and interest in what that analysis would suggest, if it were updated, so we are going to do some updating of that 2009 work for the final report and we will see what it shows.

20 **MR BECKER:** Could I please ask you a question? Are you suggesting, in fact, that the outcome is already determined and what we are giving is victim impact statement?

25 **MR COPPEL:** No. What I'm suggesting is that the government has indicated when it released the response to the Harper Report that they had asked us to look at the transitional questions associated with the removal of parallel import restrictions and my answer to you is that we will be doing further work to look at some of the changes that may have happened over the period 2009 to 2016.

30 **MR BECKER:** Could that conceivably result in the recommendation to not go ahead with the removal of PIRs or is that not within your remit?

MR COPPEL: I think the - - -

35 **MR BECKER:** If the outcome that I got from snapshots and some of the other evidence you have turns out to be accurate on a broader scale.

40 **MR COPPEL:** Well, let me put the question to you, because you have presented some information that is based on your own comparison of prices and have said that essentially they are either cheaper here or similar, and that's something that our work may reveal; the work is based on thousands of books. It's not based on a very small number of books.

MR BECKER: I understand that. That was a snapshot. Okay.

5 **MR COPPEL:** So if that is the case, what is the - I mean, you are already facing a very competitive market. That is revealed by the numbers that you've suggested that there is isn't very much difference in the prices that consumers face. What would be the change that would be a consequence of lifting the parallel import restrictions? It suggests that, already, individuals have the capacity to directly import a book. It would suggest, from our perspective, that the capacity for a book retailer to do the same would give you a more level playing field in terms of your ability to meet your customer needs.

10 **MR RUBBO:** Can I answer that? My business is a relatively large independent bookshop. In my report I've said we turnover about \$25 million a year, which probably makes us the largest independent bookseller in Australia.

15 **MR COPPEL:** Yes.

MR RUBBO: We have some buying power, but we cannot - I cannot buy a book more cheaply in most cases from an overseas supplier that I can from a local distributor. So I fail to see where an open market would give me any benefit. I think the other most important factor is that many of our major English-language publishing countries, the US, UK or Canada, have a completely open market.

25 I have been in this industry since 1976. I have seen it develop. When I started, probably 80 percent of the books we sold weren't originating in Australia. Now it's probably close to 40 per cent originate in Australia. To me personally, I take great pride in being part of that history.

30 Why take Australia out of that eco system where trading territorial rights, I believe, is essential to developing local publishing industries. Why take it out when you cannot demonstrate to me that I can buy more books more cheaply? The only company I can see that would benefit would be someone like Amazon. They are the ones who have buying power that they can go to Random House in the UK - US and say, "I want this price on this book to bring it into Australia."

40 Random House, US/UK will not deal with me. I have to buy my books from a wholesaler. Now the wholesalers in America are Ingram, Baker and Taylor and Bookazine. The maximum discount I know that they give is 44 per cent off the US retail price. You have then got freight costs. You can't return them. So as I say, I cannot buy that book more cheaply than I can from the local Random House company and I imagine that is true - there are not any retailers big enough to get that price.

Random House won't sell to a large chain like Dymocks, because they have contractual arrangements.

5 So Dymocks will have to go to the wholesaler as well. The wholesaler, so far as I know, and I may be wrong, would probably get between 50 per cent and 55 per cent discount off the retail price. Their margins are wafer thin. They are not going to give away a huge discount to Dymocks, unless they buy 10 - 20,000 copies of a book, but most books they're buying 100, 200, 20.

10 I just don't see where the economics of scale are going to come. The only thing - as I say, the only people who are going to be advantaged is the large offshore multinationals who are already really creating havoc in our industry.

15 **MR WHITE:** I touched on that briefly in my opening comments and I wanted to say this: I deal with all of the wholesalers. As a specialist bookstore, I deal with over 700 suppliers in countries all over Europe and the US. Given my size, I cannot negotiate on terms of trade in relation to freight, in relation to discount, in relation to boxes.

20 For example, I order a book from Hachette in France, I get a 30 per cent discount. I get the privilege of paying a fee for the box and a packing fee, and then I have to organise my own courier to do a pick-up from Paris to ship it to London to air freight it, because there is no consolidated air freight for books from France.

25 So as a specialist, I am already behind the eight ball. I am struggling to compete with anyone who decided to find some cheap way of air-freighting or posting books from overseas. The wholesalers themselves, they are large. The one that Mark was talking about they all proudly state they stock over a million titles.

30 The bad news is that there are over a million titles published in English every year. That includes of course, POD and a number of other factors, but the reality is that they're still only stocking physically the tip of the iceberg. If we want our customers to have a book today, we need it to be here available to us. The international wholesalers are predominantly domestic businesses with an international supply arrangement. They actually provide an important function in the US and UK markets by an alternate form of wholesale supply. There is no such arrangement here. Their stock decisions are based on their local markets. They don't curate their stock levels based on what they think they might export to Australia. We simply ask and we get when they get it. That's the best we can do. It's the best we've been able to do for 20 years.

5 **MR COPPEL:** So that the point you're making is that it's not so much competition that would be coming from individual readers who do make online purchases from Amazon, it's more competition between online retailers - wholesalers like Amazon, with the bookstores in Australia?

MR BECKER: Broadly. We - - -

10 **MR RUBBO:** Sorry, what was the question?

MR BECKER: Yes, I wasn't clear on that.

15 **MR COPPEL:** It sounds like you are not concerned about the ability for an individual who has the right to order a book online from an international bookseller, it's more the competition that you would see coming from an online bookseller like Amazon, establishing itself in Australia.

20 **MR RUBBO:** That is my concern. One of the reasons, I believe, that Australia has such a vibrant retail book market, apart from - certainly independent - is that Amazon never opened in Australia. If you look at every other market where Amazon operates in America and the UK, when they first opened they decimated the independent bookselling sector.

25 That's coming back, in America particularly. In England it is still very, very weak. Amazon held 40 per cent of the market there. So my fear is that if it was an open market and Amazon could stock - where it could open up here and supply, say, the New Zealand and Australian market with products sourced most cheaply. Amazon Subsidiary Book
30 Depository have just opened. They have an arrangement to supply Australian books to their customers. They use a third-party distribution centre to ship the books, but what they display on their site - so for, if Richard Flanagan for example - what they display on their site is the English editions.

35 So they are only cherry picking the Australian versions and I'm sure publishers will tell you - certainly local publishers like Text will tell you how afraid they are of that phenomenon. So if you search Richard Flanagan, all you see is the UK editions; not the Australian editions
40 which should be supplied here. But if you search - say, for example, Richard Flanagan had a new book out, and it was only available from Penguin Random Australia, then you would see that on the Amazon site, or once it came out in England, you would see the UK one, because they can buy it more cheaply from UK and Random House.

45

MR COPPEL: Joel, in your opening remarks, you mentioned some statistics on per cent of sales that are online sales and from book retailers.

MR BECKER: I referred to e-book sales.

5

MR COPPEL: E-book sales. I thought you also gave some information on online sales?

10 **MR BECKER:** With online sales, I indicated - my comments were that e-commerce continues to be a challenge, because you are competing with businesses that you can't compete with, because they are prepared to lose money to get market share. That is the thing we have to be really clear about. People aren't - they've confused the consumer in terms of what a book is worth, because they actually charge in some cases less than they
15 pay for it.

In the case of Book Depository they then ship it at no cost from overseas. If they were - it's kind of a weird thing. If they were operating wholly within Australia, we'd be going to the ACCC regarding
20 anticompetitive behaviour and certainly in terms of if the effects test winds up being applied, that would be the case. But, I mean, Mark has quite a significant online business.

MR RUBBO: Online, there is really only one significant player in
25 Australia which is Booktopia and the chief executive of that company is quite proud of saying what he turns over, which I think he says - he was saying he was heading towards 100 million, which if you say the retail trade here is, say, two billion, that's a significant share.

30 We don't know - Amazon and Book Depository would have a significant share. They would probably be the largest bookseller in Australia and, of course, that's a great loss to the Australian community in terms of GST that is foregone. But there are no figures on that.

35 **MR COPPEL:** Do you have an idea? If you have an online platform - - -

MR RUBBO: We do. About 12 per cent of our sales. So it's about 2.2 million, but it's a very competitive market. We don't compete with
40 Amazon.

MR WHITE: We have found some anecdotal evidence as well. Oddly enough I also deal in second-hand and (indistinct) books. I am regularly buying large collections of books from people - recently published books and they almost invariably still have the receipt of delivery docket in
45 them. Somewhere between 10 and 12 per cent of the books that I buy

second-hand are shipped in from overseas, in my limited small category which is 2 per cent of nonfiction. It's significant.

5 **MR COPPEL:** Tim, you made the point that if parallel import restrictions were removed, the industry would need time to adjust. What would you do? What would the nature of that adjustment be?

10 **MR WHITE:** Scary days. The first thing I would observe is that the ABA represents approximately 600 to 800 bookstores and we range from micro stores in country towns to businesses like Mark's, and Booktopia who are also members, but if you were to look for the median-sized bookstore, a single store, probably suburban or country with a few employees and not a huge turnover. We are small, small businesses. We will need to somehow find a way to market for those businesses that is
15 viable and sustainable, whether it be by a buying group or enhanced negotiations with wholesalers and fruitful they could possibly be is - who knows?

20 Perhaps it's - from the bookselling side of things, we will need time to try and find a way to market for the books that we need to sell, because the risk that we perceive is that the three types of books that we think are affected by territorial copyright removal would be, first, Australian-published books. Now, you would say, "What could happen to them? They're still here?"

25 The publisher has to somehow work out, do they sell the right to an Australian book? Do they increase the price of the Australian book to cater for the potential that they are going to be subverted in their own market by parallel or grade imports? Do they push the price down? Do they not sell rights? Do rights come with conditions and licences? How
30 do we know what volume or supply is going to go forward? There has been no modelling around that, and so we would say that if there is a move towards PIR removal, then there should be modelling around that sort of thing just for the local industry.

35 There are then two types of books that are distributed or brought in from overseas copyright owners. So first, a business might bring in a book that they will localise. Now, I'm not going to talk about text books, that's a completely different market and that is heading in a completely
40 different direction.

45 As a cookbook seller, I need books that are in metric, that use Australian language. The number of times I get asked what is a stick of butter or how many mls in a quart. Cookbooks are just one example. Gardening books are seasonal; they use different names. They use

different terms. In nonfiction, it's rife, but in popular fiction books are customised to the Australian market based on Australian cultural needs.

5 One simple observation is that if you look at fiction, the covers are entirely different. We have a different aesthetic appreciation culturally of what a book should look like to what the American market book do it as. Many people would say American books here are very ugly. There would be a barrier to trade. So we will need to find some way to incentivise local publishers to customise or to Australian-ise content; that is, to buy a
10 right to bring a book - to create the book here in Australia, having bought that right and to sell it at a price that is effective.

One example of a book that is currently available to me, both - it was published in the US at 29.95 USD and it's a book on vegetarian cooking.
15 It's a bestseller. A local publisher here decided to buy the right and sell it in Australia. They reproduced the book with Australian-ised content and sold it at 24.95. Without the territorial copyright protection, they were exposed to the potential that people could buy remainders or dumped book from overseas for a book that they were actually making an effort to sell
20 into the market at a better price in an Australianised context. The third issue is simply the distribution of licensing agency agreements.

Publishers look at their warehouses and say "Every inch costs me a dollar. I need to get a return on the investment of bringing a book into the
25 country." Now, we would say that in the event you remove the territorial copyright protection, they will not be able to make future good plans for bulk buying. The will be - the knee jerk reaction will be to say, "Everything is in there. You can have it, but we will fly it in after you ask for it, and it will be at the spot price when it arrives."

30 So pricing for retailers will be entirely variable. It will be volatile. Supply will be late and it may be even completely inconsistent, because they in turn will be seeking immediate supply just out of time from another warehouse somewhere in the States. There is then the issue of if
35 we want to do events. Currently, if I want to do an event with an author that has an imported title, I can at least rely on the local publisher to provide me with stock at a fair price at a healthy discount and an ability to return the stock. So I add to the culture of this city by selling books, promoting authors and turning up to events, enriching culture. Mark does
40 the same; many bookstores do this.

If we have to source 200 copies speculatively to go and sit at an event to sell an author, to support the cultural and social fabric of our city, we
45 can't justify it, because what is the risk that we might only sell 20? What do we do with the rest of them? Do we dump them on the market? Do we

pulp them or do we say, "We don't the event" or we only bring in 20 books and look the author in the eye and say, "Australians don't really care, mate."

5 All of these issues need to be carefully thought through and modelled. I don't know exactly what publishers are going to do but I think you can draw some parallels from what educational publishers are doing with their books and the fact that they are moving to uniform international high prices based on US dollars; they are restricting supply to either direct or
10 through very limited supply arrangements in relation to serious academic titles and they are moving to a downloadable and direct on-demand model tells you that there would be a significant withdrawal.

15 The 2009 report also acknowledges that there will be a significant transition period where there will be an impact directly on booksellers. Publishers may respond and may be able to reply, but the reported knowledge is that booksellers will suffer.

20 **MR BECKER:** I'd just like to add to that, because it's good that Tim has brought up what could happen if the legislation regulation goes through, but I mean, it's so - to even think about it going through is so counterproductive to the aims of Australian society, which is to have jobs, to be culturally rich, there are only - the way I see it there are only downsides and I'd want to see the evidence of any upsides with dropping
25 of parallel importation rules for the industry or for the society as a whole. Economically, in terms of jobs, all those levels - I just see no upsides.

30 **MR RUBBO:** Can I just add, I started off selling records and as you know, music is an open market. That industry (indistinct) because there was no collaboration between retailers and the producers. They abused their market power. They wouldn't supply music in a timely fashion or in the quality that was available. If you attempted to import records to - or CDs, because your customers wanted them, they would raid you and serve writs on you. Their prices were too high. They deserved to be made an
35 open market. The same applies to film, which is a closed market but this industry - it understands the problems. It knows that it has to be globally competitive. It knows that it needs to work together with retailers and they need to work together. They know they have global challenges and intelligent - and they - but they are also proud of what they've created.

40 Admittedly, that hasn't always been the case. When the 1990 reforms came in, a lot of publishers opposed them bitterly and booksellers and publishers were at loggerheads there. So I think you can't sort of compare music or DVDs with this industry. This industry is capable of producing
45 something very good for the Australian consumer at reasonable prices.

5 **MS CHESTER:** I just have one question, if I may. So I think we have all acknowledged today and certainly our draft report acknowledged that a lot has changed in the past six years since our - the Commission's 2009 report. So much so that prices have come down. Proactive initiatives by the industry with the 14 days in terms of faster supply to booksellers.

10 I guess, to some extent, that makes it a very different landscape, when you are looking at it from a transitional perspective. Given the risks of overseas suppliers coming to market. So I guess the question is, if the Australian publishing industry has really lifted its game and it's now a lean, mean machine for booksellers, with the exception of remainders and dumping and we will come back to that in a moment, why would it be that supply must come from overseas? Why wouldn't the booksellers, if they are getting a competitive pricing from local publishers - why would it be that they would look at sourcing from overseas?

20 **MR RUBBO:** Well, that is true and, once again, I think I come back to - my point is you have a very sophisticated publishing industry here and once again I say we all in this room should be incredibly proud of what's been achieved, but all our fellow publishing industries, UK, Canada, US - all have territorial copyright. And the reason they have territorial copyright is that so published authors and markets can be exploited for the best advantage for them.

25 I know that if a book is published here by an Australian publisher, it will sell many, many more copies whether it comes from Australia or overseas than it would if it was just imported and distributed. Michael Hayward will talk to you this afternoon and he buys rights to many overseas books. Many of those books, if they hadn't - if Michael hadn't published them, they would probably sell 20, 30 copies in this country, but he manages to sell two or three thousand. I would argue that that's a great social benefit to this country and to our readers that they're exposed to literature from around the world that they wouldn't otherwise hear of.

40 **MS CHESTER:** We might come back to the UK and US on territorial copyright in moment, but I guess my question might still be a little unanswered there in terms of - - -

MR RUBBO: Well, look no, I think that - - -

MS CHESTER: If the publishers remain competitive, as you say that they've become and it looks - looking at some high-level data in terms of

the changes in pricing over the past six years that they have, then why would it be that supply must come from overseas?

5 **MR RUBBO:** Well, look, I would turn the question around to you then. If the industry is operating as we would see is good for society, why make changes?

10 **MS CHESTER:** So there is an important aspect of the competitive pressure that comes from the removal of parallel import restrictions. It would ensure that the publishers continue to remain competitive over time.

15 **MR RUBBO:** I think you can do that in other ways. Canada has done it quite successfully and also you do have the competitive - you do have Amazon and Book Depository exerting quite a lot of pressure.

20 **MS CHESTER:** No, and we - I think part of the reason what the industry has done what it's done over the past, sort of, 10 years is because of the online pressure from Australian consumers being able to effectively import from overseas. Just on the issue of the UK and the US, and geography-based copyright - territorial copyright arrangements, I think we probably might need to clarify that a little bit because with the UK it is - but it's within the EU and with the US as we understand it now, it effectively no longer does have parallel import restrictions, given some
25 recent court decisions, about four or five years ago.

MR WHITE: Well, we would disagree with your analysis of the US market. We think that the practical reality is that it is still a closed market and trade publishing in particular acts that way. If you are talking
30 about the Kirtsaeng decision, there's an ongoing debate at a significant level across law schools, academics, judges as to what the outcome of that decision will be. I think it's very difficult to draw conclusions from that in this market for a number of reasons. The first is, it was dealing with second-hand goods. The second is that it was dealing with the doctrine of extinction at first use, which is unique to the US and to Europe.
35

MS CHESTER: Yes.

40 **MR WHITE:** It doesn't correlate with British Commonwealth-based copyright law and it hasn't led to a change in trade publishing practices. What it has done is it has changed the way in which trade publishers - sorry, educational publishers have responded to the market.

45 We think the relevant aspect of that decision is that the actual practical outcome that has occurred, the way in which Wiley responded to

the decision was to make universal US price for their book worldwide. There was no such thing as benign price discrimination and price discrimination in relation to territorial copyright can be benign or it can be aggressive, and we would say in the Australian market it goes beyond
5 being benign now, because of the extenuating external pressure provided by the Internet and by consumer choice.

The reality is that we believe are territorial copyright ensures and provides a certain level of risk management for local publishers to ensure
10 adequate supply at good prices for us to be able to meet our customer's demands in a timely and reasonable fashion. If you remove the territorial copyright, my personal view and I'm sure the view of our association is that it will actually force publishers to look at how much will the invest in stock in their warehouses? How much will they speculate on buying in a
15 right for a book to make it available to the Australian market?

We believe that there will be a significant shrinkage of available titles immediately available for supply. We think that this top-end view of how the market will work if you remove the PIRs is, with respect, uninformed.
20 We don't think that there has been any proper modelling of what will happen if you remove them. Our deep fear is that there will be a significantly less number of books available for us to sell, whether they be Australian or overseas-sourced.

They are currently competitively priced and are currently competitively priced because of general competitive pressures, because publishers understand that this is an issue and because of the access for consumers. We, as an association, want to go further and we are having
25 viable and significant discussions about exploring further the Canadian model where price bans come into play, so that there is even further tighter control to ensure that there is no aggressive price discrimination. We are territorial copyright now is beneficial for the current global market we are in.

MR BECKER: The think I'd like to add to that too also is in terms of Australian publishing, if Kate Grenville is published by Text, I believe. If a book of hers - the rights are sold to the US or UK market, the publisher over there goes in at a reasonable - what they think is reasonable quantity. If the book doesn't sell as well as they expect in that market we - the word
35 "dumping" got mentioned before - they can then decide to sell it back into the Australian market where it sell well, but it's a cheaper edition.

So it makes that a less valuable - I hate to use the word "commodity", to Text who has invested money in publishing and selling overseas rights,
40 and if parallel importations are allowed, then those books can be made

available and knock the stuffing out of the original investor. And the author's royalties at the same time.

5 **MR WHITE:** To expand on that, the issue is that again there is no
modelling about what will happen to the market for author rights. We are
interfering with a successful industry where we export content. If we
remove territorial copyright what is the natural consequence that will
happen on the ability of publishers and authors to sell their rights at
Frankfurt, London or the New York Book fair? Will they achieve the
10 same market price? I wonder. Will they want to, because they are
concerned that they may not be able to sustain the book in the very market
they are in.

15 There is also, it seems to me, an oxymoron in the way that the
recommendations are put forward. If the author or the originator of
content - if you create a book in Australia under your recommendations, if
they're adopted, will have this unique consequence that they will be able
to sell, arguably, a more enforceable right to a third party over their own
work than they will have themselves in their own market.

20 That is, if they sell an English language edition to the UK, the UK
can assert territorial copyright against the world at large for that edition in
that market. They can then dump it back into our market. Our Australian
author has no such protection. They effectively are somehow managing to
25 sell a bigger, larger property right than they themselves actually own at
the time that the book is created, if these recommendations apply through.

30 **MR COPPEL:** I think we have run out of time. We could certainly
continue, because it has raised many issues - - -

35 **MR WHITE:** Well, can I say, we would welcome any opportunity to sit
at the table with you and discuss this, because we think this is a crucial
issue for our industry. We recognise that these are complex issues and
that you have a very large and very complex report to deal with where this
is only a small part of it, but we would welcome any opportunity to sit
down and if there are going to be further considerations, Joel and I pretty
much - and I am sure Mark would be available too.

40 **MR BECKER:** We would be very happy to be part of an industry
roundtable.

MR COPPEL: Okay. Thank you very much, Joel, Tim and Mark, and
also thank you for your submission on the post-draft report.

45 **MR WHITE:** Thank you.

MR BECKER: Thank you.

5 **MR COPPEL:** We are going to take a short break for coffee and to stretch our legs - which is available just outside this room and we will come back at 10.35. Thank you. 10-minute break.

10 **ADJOURNED** [10.23 am]

RESUMED [10.39 am]

15 **MR COPPEL:** Welcome back. Our next participant is Jon Lawrence from Electronic Frontiers Association. When you're comfortable if, for the purposes of the transcript, you can give your name and who you represent and then a brief opening statement, thank you.

20 **MR LAWRENCE:** So I'm Jon Lawrence, from Electronic Frontiers Australia, I'm the executive officer of that organisation. EFA is an organisation that promotes and protects civil liberties in the digital space, often called digital rights, these days, as a generic term. We have been long-standing supporters of access to information and positive copyright
25 reforms in this country.

In general terms, we're very pleased with the draft report from the review and I'll just go through a number of key points that we wanted to highlight our agreement with. We don't, given that our focus is digital,
30 we don't have any opinion on issues relating to physical books, so I'm going to stay well out of that discussion.

Starting with draft recommendation 2.1, which is the general statement about formulating intellectual property policy, we strongly
35 agree with that recommendation and support it. We think that's a good approach to look at it, so it's saying that such policy should be informed by a robust evidence based and have regard to the principles effectiveness, efficiency, adaptability and accountability. So we agree that that's a good starting point.

40 In terms of copyright terms, we have a long-standing belief that copyright terms have been extended well beyond any reasonable point that one could argue that effect the incentivisation of new creations. The suggestion that anyone undertaking a creative act is going to involve a
45 calculation of potential earnings for decades after their death is fairly

absurd. So we would agree with particularly finding 4.2, we realise this is pretty unlikely to ever happen, but that reasonable initial copyright term would be in the range of 15 to 20 years, post creation.

5 Certainly, we think it should be less than the lifetime of the author. We are open to the idea that there could be a default initial copyright term, followed by some sort of registration process, which would allow certain rights holders that wished to maintain protection to do so. That would clearly have the advantage of dealing with orphan works and ensuring that
10 they no longer - that having a long, default copyright term obviously would create a whole issue of orphan works where the copyright holder may not be known, findable or even alive. While we understand that that's, given current international arrangements, particularly unlikely to ever occur, we would certainly support a significant reduction in the
15 current copyright term.

 Moving on to unpublished works, and draft recommendation 4.1, we strongly support the recommendation and the draft legislation that the government put out to extend, so that there is a copyright term applied to
20 unpublished works. Again, we would prefer that not to be as long as the current term but, clearly, there is an issue there with these works never come out of copyright at the moment, as I think the Library Industry Association demonstrated very well, with their Cooking for Copyright Campaign, I think that was a good way to look at it, where they took
25 things like recipes from Captain Cook's Diaries and said, "We actually can't legally publish this because it's not out of copyright because it's unpublished." So we strongly agree with that and we see absolutely no downside to making that change.

30 I will touch on parallel importing very quickly. Again, we have no position on physical books and physical products but, in terms of digital products, we strongly oppose any geoblocking or geographic restrictions and we are certainly concerned, particularly with the Trans Pacific Partnership Agreement that there are potential not just restrictions on
35 circumventing geoblocking but potential criminal sanctions involved with that, we think that's an extremely dubious and unhelpful restriction and we think there should be no restrictions on circumventing geoblocking technologies and particularly we would like to see Australian law clarified to that extent. We know and we've certainly had comments that it is not
40 illegal under Australian copyright law, but I think it's important that that actually be clarified and made explicit.

 Fair use, very quickly, we're very strong supporters of the introduction of fair use, broad, flexible fair use exception. We, pretty
45 much as you've done in the draft report, support the recommendations of

the ALRC from 2013, so I won't go on about that. Innovation patents, we support the abolition of innovation patents.

5 Draft recommendation 15.1, about free and open access to publicly funded research, we think this is a very important point. Any publicly funded research should be made available on freely access basis, certainly to Australians, if it's funded by the Australian government. We accept that there may need to be some restrictions about that initially, but it's pretty clear to us that any publicly funded research should be made
10 available to the public. We note that most federal government departments now use a creative commons attribution default copyright licence. We note that most US government organisations actually just publish everything, without copyright, in the public domain. So there's a couple of good examples there.

15 The last point I think's worth making, just in terms of compliance and enforcement, we certainly support the expansion of a safe harbour scheme with the removal of carriage service provider to extend that to all service providers. We think that's a necessary and overdue reform that will likely
20 benefit copyright holders, in that it's likely to result in a more efficient process for action to be taken on legitimate copyright infringement take down requests. We do note, however, that international experience, particularly from the US, shows that such take down processes, particularly those that are implemented under the terms of the Digital
25 Millennium Copyright Act in the US are unfortunately subject to routine and widespread abuse by rights holders and there, therefore, needs to be some degree of ongoing oversight to ensure that that is kept to a minimum.

30 The last point I'll make is to very strongly agree with draft finding 18.1, that the evidence suggests timely and cost effective access to copyright protected works is the most efficient and effective way to reduce online copyright infringement. That's certainly a position we've held for many years and we agree that the evidence is in and that that is
35 the reality.

MR COPPEL: Thank you, Jon. In the Commission preparing the draft report you've identified the framework we've used, which is to make an assessment of intellectual property arrangements, based on the
40 community-wide impact, which is the requirement of the PC Act. Another requirement is not to recommend areas that would be in breach of our international obligations so the recommendations are consistent with those obligations. One such obligation does relate to copyright formality, which are not permitted, at least for a period of a copyright life plus 50,
45 the Bern Convention. The United States does have a form of voluntary

formality after that period and you noted that the lack of formality can be a particular problem, with respect to orphan works, given the length of term.

5 Can you give us a sense as to whether you think there's a role for formalities to play, in a way that is consistent with the international obligations, in a voluntary sense, to address some of the issues such as the difficulties associated with orphan works? Or is it simply just too far in advance, life plus 50 isn't really going to solve this problem?

10

MR LAWRENCE: I think any copyright term of life plus it becomes a pretty moot point at that point, I think. Any organised rights holder is going to be actively protecting their work and taking steps. Any small author that has written a few books and done their thing and then disappeared into the world is probably never going to be found. Maybe at some point their estate may follow that up. I think unless we can get copyright down to a reasonable initial term, any sort of secondary stage I think is fairly academic at this point.

20

MS CHESTER: Yesterday, Jon, during the public hearings, we had a novel suggestion put to us by a copyright legal academic and it could potentially address a few of these issues and I just wouldn't mind kite-flying it with yourself. So given our obligations at the moment remain at life plus 70, copyright, say, for example, that copyright doesn't always remain with the author through the life plus 70, it can quite often transfer to a corporate entity, an intermediary. So one suggestion posed yesterday was maintaining our obligations, under conventions and agreements, but at 25 years there's a point where the copyright needs to revert again to the underlying right holder, the originator so, say, for example, the author and that that point in time there'd be some registration process, i.e. the author would realise that right. Two advantages here, it would actually help with the balancing act between the rights of the author versus the rights of the publishers, over time, and there's some new academic work around that balance, but it would also allow us to potentially identify where an orphan work may then be established, which would help folk, in the absence of extensive formalities, of what endeavours are required to establish whether or not you've taken the right initiatives to try to identify the ultimate author or owner of the copyright. Anyway, that was something that was suggested to us yesterday, during the public hearings, and I'd be interested to get your thoughts on it.

40

MR LAWRENCE: Yes. I think that's kind of similar to our thinking and, to be fair, this is a proposal that I'm not sure if it originated with him, but Lawrence Lessig, in the US, has certainly proposed this initial term

followed by if you do wish to continue to protect your copyright you then have to go through some sort of nominal registration process.

5 From our perspective we think, I would say, for the vast majority of
copyright works 15 to 25 years is actually more than enough for most
people but there is the larger, let's use Disney as an example, because it's
pretty clear that life plus 70 is all about Mickey Mouse, organisations like
that, that do wish to protect things on a longer basis should, arguably,
10 have to put some effort into that. Of course they do, in terms of policing
it, but if you look over at the trade mark context, that is something that
you have to proactively register and continue to maintain and protect in
order to maintain those rights.

15 So I think if people are going to say, "We need 150 years to make a
meaningful return on this piece of creative work" then there should be
some effort they have to go to, after an initial term, to continue to protect
that, because by pushing the default out for everyone, you create this
massive problem of orphan works, which, in many cases, I think people
would simply, even if they were contactable or alive would probably say,
20 "God, I've completely forgotten about that, you're welcome to use it." So
I think there needs to be a balance there, in terms of giving larger and
more lucrative rights holders the ability to have longer term protection,
and I say that because I think it's just the pushback on pushing copyright
back to a shorter term would be enormous and we've seen that because
25 that's how we got to life plus 70 in the first place. So I think it's realistic
to accept that larger rights holders should be able to, if they put effort into
it, protect their works for a longer period, but I do like this idea of it
defaulting back to the creator after an initial term.

30 I think if an author licences the copyright or something to a
corporation then that really should change the arrangement. There's then
no consideration about death and time after death, because corporations
don't technically die. Yes, I think, in that sort of situation some sort of
registration process is very appropriate. I don't think that needs to be,
35 necessarily, an onerous process, it can be done on a cost recovery basis.
To be honest, if I'm a copyright holder and if I feel it's too onerous or too
expensive for me to go through a registration process then perhaps that
copyright isn't worth protecting after all.

40 **MS CHESTER:** Just so it's not misunderstood, and just to clarify, for the
purpose of the transcript, so this suggestion was that the copyright would
still remain in place for life plus 70 years but at 25 years it would revert to
the original copyright originator and - - -

MR LAWRENCE: Assuming they were still alive, or to their successors.

MS CHESTER: Yes.

5

MR COPPEL: You made the point that you thought that copyright of 15 to 25 years was sufficient. On what basis - earlier you said it was the belief, do you have any evidence or material that leads you to that landing?

10

MR LAWRENCE: I think if you consider the creative process, anyone that's - we certainly accept and we support copyright very strongly, as an incentive to promote new creative works, but I think anyone that's sitting down and making some sort of calculation that this is only worth doing if I have 40 or 50 years in order to realise a return, I just don't think that's a reasonable thought process that anyone's going through.

I think for most people, to the extent that they are undertaking a creative work for financial return and, of course, many people do it for other reasons, I think looking at anything beyond 10, 15 20 years is just too far in the future to really make a determination. Now, of course, there is the argument that artists have a right and, in some ways they might see it as an obligation to leave something to their children and so forth, and that's not an unreasonable position. But I think if you don't realise an economic return on your copyright, within the first 15 to 25 years, then the likelihood that you're going to realise one any longer than that is, I think, quite minimal.

MR COPPEL: One of the examples that's been put to us is an author of a book that may, many years later, be written into a screen play, a period of 15 years, but quite often screenplays come many years after a book. That's one example that's been put. I guess what you're saying is that initial reward for the effort is one that wouldn't be seen as significant enough, I guess, to give it that initial impetus, which is a different way of thinking about - - -

MR LAWRENCE: Yes, I think that's a reasonable point. I think our position is not necessarily that copyright should be limited to 15 to 25 years, it's just that there should be a default initial term. Anyone that does wish to seek extended protection should have an ability to do that, but it shouldn't be the default. By doing that we then free up the bulk of material. We essentially, largely minimise, if not completely eradicate, the problem of orphan works and, in a sense, rights holders that wish to continue protection can and the people that don't -

45

MR COPPEL: In your initial submission you made the point that Australia's copyright regime is inflexible and confined to practices that lag behind current technological developments. Can you provide us with some specific examples that illustrate that point?

5

MR LAWRENCE: Sure. The widespread of social media is probably the most glaringly obvious one, the sharing of images and creation of memes and all these sorts of things which people do every day on social media would in breach of Australian copyright law. So, to a large extent, in that circumstance the introduction of fair use exception would bring the law up to date with current practice.

10
15
20
There are, I think, not just in the social media space as well, but pretty much everything on the internet is a form of copying. The internet essentially is copying. I think if you look at business models such as Google search engine, or search engines generally, social media sites generally as well, it's arguable that these businesses simply could not exist under the current Australian Copyright Act. That's a clear disadvantage to Australian businesses. I think Australian businesses in those sort of spaces are always going to struggle in what is a large, very globalised market. The last thing we need to do is to be putting the Copyright Act down in front of them as well.

25
30
I think in order for us to be the innovative and agile nation that we are, we need to move to a broad exception in copyright so that new business models and new service models can be developed and can have the ability to get to market without being shut down, on a copyright basis, even before they get their first customer in the door. I think fair use has clearly worked well in the US for the last 40 years, Singapore. Israel, interestingly, is a good case study. They shifted from a British fair dealing basis to fair use and I think that's one of the reasons why they have a very innovative and dynamic tech sector.

35
MR COPPEL: You've made the point that it would lead to a situation where you would avoid an innovative business being shut down because of copyright, are there any examples of that, to your knowledge?

40
45
MR LAWRENCE: Yes. There's certainly one case here and there have been similar - yes, one case here, which has parallels in the US, where these businesses have been allowed to succeed, which was the Optus TV Now product, where Optus was essentially providing a record and playback service to its users, or broadcast free to air television. Now, the ultimate decision of the Federal Court, I think, was on quite a technical basis but it was certainly - there was no ability for them to say, "This is a fair use, we're broadcasting your signal, as it was sent out, with all your

ads.” Of course it was the football codes that took issue with this because they wanted to have their own, exclusive internet based licencing deals. That’s certainly one example where I think a fair use exception may have changed the outcome slightly and may have allowed for more innovation in that space.

MS CHESTER: Jon, you touched on geoblocking in your opening remarks. We spent quite a bit of time, in our draft report, trying to better understand the problem of online piracy, which is a gross infringement of copyright holders’ rights. So we looked to an evidence base, as we like to do, and in looking at that evidence base there’s been some very interesting consumer surveys which try to understand why people do pirate online.

What was interesting from that was a lot of it was a sense of frustration of accessibility, timeliness, cost fairness, so there was always a small cohort, a minority cohort, that will pirate, regardless of what happens, but there was this the middle that matters will be happy to pay if it was cost effective and they had timely access. So that was really the thinking behind our draft recommendation around geoblocking, i.e., not that the Australian government should be encouraging people to do anything illegal within their contracts with the Netflixes of the world, but nor should Australian legislation make circumventing geoblocks illegal.

Now, this is an area where we’ve received some conflicting evidence and, at the end of the day, we might ultimately need to get some legal advice ourselves, but whether or not Australian legislation is clear that there is nothing in Australian law that makes it illegal for an individual to circumvent a geoblock. You did touch on this in your opening remarks, but it would be good to get your sense of whether or not that uncertainty does exist and, if it does, which part of the legislation?

MR LAWRENCE: So it’s certainly my understanding that it’s commonly accepted that it’s not illegal to circumvent a geoblock and certainly common practice in the DVD space. I suspect most of us here hacked a DVD player to remove region coding and I think there’s a pretty general community acceptance that geographic regions on DVDs is a pretty consumer hostile business practice. We would certainly like to see more clarity in the Copyright Act around the issue of geoblocking.

The problem, I think, particularly when you look at film and TV distribution arrangements that unfortunately we’re still seeing these industries play out through what are pretty legacy business models, creating artificial scarcity around release dates and all sorts of things which really don’t, I think, ultimately benefit anyone in the long term. We’re not saying that everything should be released globally at the same

time, but I think there are good reasons why distributors and producers should look to be much more open and accessible in their content.

5 I think, as you found, in the Netflix example, I think there are up to five million users now already in 12 or 14 months. I mean that's a pretty clear example that Australians are not just happy to pay but, to some extent, desperate to pay for good content. I'd like to hope that at least one of the domestic providers in this space does survive, and I suspect there'll be some consolidation at some point and in a sense that's the market
10 working itself out. I've certainly been spending a lot of time on Stan. I think, right at the moment, Stan actually probably has a better offering than the Australian Netflix because, of course, Australian Netflix is quite restricted, given existing distribution arrangements and that's the market, that's fine.

15 We think any moves to restrict geoblocking or restrict circumvention of geoblocking as, for example, are included in the Trans Pacific Partnership are, by definition, a restraint on trade and unsustainable and unjustifiable.

20 **MS CHESTER:** Could you just elaborate on that, what part of the Trans Pacific Partnership Agreement you feel interacts with Australia's obligations, with respect to geoblocking or circumventing it?

25 **MR LAWRENCE:** So I don't have it in front of me, but it's my understanding that there are a number of elements in there which do potentially not just restrict the ability of people to circumvent geoblocking but, in some cases, actually add a criminal sanction to do so.

30 **MR COPPEL:** If you could send us that afterwards, that would be helpful.

MS CHESTER: Is that in your post draft report sub that we're yet to get?
35

MR LAWRENCE: It can be, yes.

MS CHESTER: That would be great, which we're going to get in the next few days, I imagine.
40

MR LAWRENCE: You were going to get it in an hour but you might get it tomorrow now. Yes, I'll dig that up.

45 **MS CHESTER:** That'd be great, thanks.

MR COPPEL: One of the things you mentioned in your initial sub was you thought enforcement arrangements could be made less onerous. Do you have any specific reform in mind that would do that?

5 **MR LAWRENCE:** I think we need to accept that the concept of a graduated response scheme is probably likely dead in this country. I think we've seen three attempts to implement one and each time it falls down at the point of who you think is going to pay for it. I can't see any movement beyond that. I certainly can't see a government legislating on
10 that space. That would be, I think, a very, very brave government to go into that arena, I think, given the level of consumer awareness and, in many ways, hostility to these sorts of things that we see on a regular basis and I think that's partly to do with the fact that many Australian consumers do have very long-standing frustrations about the fact that they
15 have been essentially treated as second-class citizens by TV and movie distributors for many years and I think it's going to take some time for people to get past that.

20 We see the phenomenon now of everything being fast-tracked from the US, which is certainly a recognition of that. But I think the likelihood of a graduated response being implemented here is very low now. I think there's a fair bit of evidence to suggest that they are of limited utility anyway, so putting that to one side. It will be interesting to see how the first injunctions, in terms of blocking off-shore websites and so forth, that
25 are argued to be facilitating copyright infringement, it will be interesting to see how that works. These things are, of course, entirely trivial to circumvent. Literally 10, 15 seconds changing a configuration you can get past these things, so they're certainly not going to stop anyone that is committed enough to getting around it, they can do a quick Google search
30 and work out how to change their DNS proxy settings.

35 Will they lead to a reduction in more general infringement? I suspect that's doubtful. In fact, in many ways I think one of the things that these cases are showing is just a little bit of what's known as the Streisand effect, where the more you try and hide something the more visible it becomes, in a sense. I think some of the sites that are being sought to be blocked at the moment are probably enjoying a significant increase of traffic from Australia while that court case plays out.

40 We think that those sorts of enforcement activities are, essentially, futile. Of course, the other thing about site blocking is that, from a server perspective, it's, again, trivial and a few seconds work to jump to a new domain name or a new IP address or have mirrors around the world. The Pirate Bay, for example, is probably the most blocked site on the planet, it
45 doesn't stop it continuing to exist and doing its thing.

5 So in a sense these sorts of top-down approaches are, I would say,
architecturally opposed to how the internet is made and built and therefore
they're just not effective. We've always believed, as you found in your
report, access timely, cost-effective, convenient access to content and
people will pay for it, or the 95 per cent of the population will and
copyright infringement is, to some extent, a fact of life and predated the
internet. I spent a lot of money on buying blank cassettes in my youth. I
think the market has come a long way, particularly in terms of film and
10 TV distribution, in the last 12 months, as we've seen. I think as that
continues to pay out we'll see rates of infringement drop.

15 **MR COPPEL:** I've just got one final question, it relates to open access
for government materials. Yesterday one of the participants made the
point that even if it's open, access may be complicated due to things like
what was called link rot, as an example, so open, online access. She was
suggesting that more is needed to provide that level of access than simply
an open copyright for those sorts of materials. I was wondering if you had
any views on that point?

20 **MR LAWRENCE:** That strikes me as a fairly simple problem to solve, I
would think. I mean there are many good online search repositories and
search engines that can find content, I think. There's a number of
distribution methods now, there are academia.edu, I think medium.com,
25 all of these sorts of spaces that are providing great ability for people to
publish material.

I think, in general terms, the way that academic publishing has been
controlled and the costs involved do need to be addressed and I think, as a
30 general principle, anything that's produced with public funds should be
freely available. How that's suggest, in terms of technicalities, I don't
think that's a major issue.

35 **MS CHESTER:** Jon, I just have one more question, but I'm also
conscious we're starting to run over time. So if this is covered in your
post draft report submission then just let me know.

MR LAWRENCE: Sure.

40 **MS CHESTER:** You mentioned before, in your opening remarks, about
the expanded safe harbour provisions and you mentioned that there would
ultimately be benefits to copyright holders. Is that something you
elaborate on in your post draft report submissions, or did you want to
elaborate on that?

45

MR LAWRENCE: I pretty much read what we've written, which is by extending the safe harbour program essentially you're bringing potentially all service providers coming into the fold where if they put processes in place where a rights holder can come and they can launch a complaint and say, "Look, this is breach of our copyright" they then have a fairly streamlined process to evaluate that and if it's legitimate take it down. Clearly that would potentially be in the interest of copyright holders because it streamlines that process for them.

Where I think many service providers, outside the safe harbour scheme at the moment, just probably simply aren't doing that and they don't have to the clients legal letters and court injunctions, potentially, and so forth, which isn't a streamlined process. So I think that provides some certainty to the service providers, it provides them an appropriate and fairly straightforward process to deal with it. But, as I also mentioned, these sorts of streamlined processes are, unfortunately, subject to routine and widespread abuse, sometimes quite unintentional on the part of the rights holders, so there does need to be some oversight of that process. But we see no reason why a local service provider that's starting a social network for education shouldn't enjoy the same safe harbour protections as Telstra and others.

MR COPPEL: Thank you very much for your participation today, Jon, and we look forward to receiving your post - - -

MR LAWRENCE: I will get that to you promptly. Thank you.

MR COPPEL: Our next participant in Peter Donoughue. Welcome. Make yourself comfortable and then, for the purpose of the transcript, if you could give your name and who you represent and then if you care to give a brief opening statement please do so. Thank you.

MR DONOUGHUE: Thank you. My name is Peter Donoughue, I'm retired from the publishing industry but still actively involved as a sessional lecturer, at Melbourne University, in the Master of Communications program. I lecture on copyright in the industry, that nexus and what's happening in the world of copyright issues and debates. I've got a list of talking points here, which I'd like to read, if that's okay, only one page long. I fully support all the PC's recommendations in this draft report but wish to focus today only on the recommendation to repeal the current parallel importation restrictions. The Commission would be well aware of the antipathy this proposal has once again aroused in the book industry.

I would urge the Commission, in its final report due in a few months, to address the precise reason the industry is so negative. Unfortunately this did not happen in the draft report. That issue is the industry's universal and passionate belief that the Commission wishes to abolish
5 Australia's territorial copyright status, which the PIRs, in inverted commas, make possible. The industry constantly conflates these two quite separate concepts and realities. This misunderstanding needs to be vigorously counted, a stake driven through the heart of it or, as in 2009, the government will be frightened off by proclamations of Armageddon.

10
Australia is a rights territory naturally, due to its geography, an isolated island with no porous borders and oceans away from the major publishing centres of New York and London, its population size, which can sustain economic print runs, its high literacy levels, the fact that we
15 speak English, its mature and efficient book trade infrastructure, retailers, wholesalers, freight systems, multiple publicity platforms, etc.

Australian publishers can therefore confidently purchase, by contract, exclusive Australian rights and publish Australian versions of overseas
20 titles. They are willing buyers and they'll always be willing sellers. Despite claims to the contrary the PIRs don't grant, enable, instruct or make possible this exclusivity. All they do is protect those publishers who abuse their contractual exclusivity by overpricing and/or underservicing. Book sellers cannot parallel import to offer their customers a better deal.

25
Provided the local publisher publishes in accordance with the going rate of the Australian dollar, does not indulge in unjustified mark ups, has invested in or contracted efficient distribution and offers trading terms that are deemed acceptable by booksellers and others, then exclusivity can be
30 guaranteed. Operational excellence will invariably secure close to 99 per cent of local demand. It would not be a sound commercial proposition for retailers to buy around.

Finally, I would urge the Commission to undertake another pricing
35 analysis to establish the current state of play in the industry. It could be a truncated version of the excellent 2009 analysis. Today's industry has come a long way from the outrageous pricing practices that analysis showed. This would help confirm, or otherwise, the widely held belief that removing the PIRs would have minimal effect on prices today, which
40 I do believe.

Now, without the PIRs the possibility will exist of parallel
importation but, in today's real world, not the probability but at least the competitive threat will always be there. We need to go from "can't
45 legally" to "won't commercially" import. We're at a sweet spot now, in

the industry, where prices and the exchange rate are aligned. The PIRs are therefore neutered, they are benign. They have no effect, either way, on importation patterns. It may well be decades, if at all, before the PIRs are a factor again in industry behaviour. Online and global realities have
5 stunned them. The PIRs grant protection, not exclusivity, but precisely when they shouldn't, when publishers are being uncompetitive. Thank you.

MR COPPEL: Thank you, Peter. I'm still not quite sure of your
10 distinction between parallel import restrictions and territorial copyright. The argument that's been put is that parallel import restrictions are what makes it possible to ensure territorial copyright.

MR DONOUGHUE: Well, that's just wrong. Categorically,
15 conceptually wrong. In practice it's not the way things work. You can gain exclusivity by contract with an overseas publisher or literary agent, without having parallel importation provisions in place.

Now, a number of publishers will say that's not possible, because
20 overseas publishers won't sell you exclusive rights if they consider it an open market, if Australia was, all of a sudden, classified as an open market, as in the Middle East or Africa or South East Asia or Continental Europe. But that's not how the realities of trading in Australia will work. We are not going to be a market where competing editions fight it out. I
25 know many publishers will say, "We may want to buy exclusive rights to Australia, but the overseas publishers will not sell us exclusive rights, they'll only sell us non-exclusive rights." I find that completely and utterly unconvincing. If publishers front up confidently and wish to buy exclusive rights, and pay more for them, then there'll always be willing
30 sellers, that's the way commerce works.

MR COPPEL: So you're saying it's the commercial outcomes, rather than the legal provisions, that allows - - -

MR DONOUGHUE: Yes. The commercial realities are not dominant in
35 the industry, dominant. No bookseller is buying around today. Not just because the PIRs are there, it's just because they'd lose money on the proposition. There's no margin advantage, there's no arbitrage possibility and it would cost them. The air freight is very expensive, return rights are
40 simply non-existent or impossible to indulge in and it's just not, in any way, shape or form, a probability.

There'll always be the rogue outlier, of course, someone who's on the
45 stop, can't get credit from this particular publisher, may buy around from an overseas wholesaler, the American edition or the British edition.

There'll always be that. But compared to the loss of market now, through customers going direct to Amazon or the Book Deposit, it fades into insignificance.

5 **MR COPPEL:** You mentioned, in your remarks, that even in the absence of parallel import restrictions the local booksellers would supply 99 per cent of the market, where does that number come from?

10 **MR DONOUGHUE:** My own thinking through almost three decades on this issue. From 1989 onwards I've been a supporter of the abolition of these provisions. The point is that I think it's ironic, but I think it's also telling, that the Australian Booksellers Association now are in favour, publicly, of retaining these provisions. That demonstrates, very clearly, their need for and support of local supply.

15 Australian booksellers are just very, very professional and they rely on local publishers buying rights and supplying, in a distribution sense. They just need that for their business. They would not buy an Indian edition or buy an American edition or a UK edition to somehow thwart the
20 business or undercut the business of a local supplier on whom they rely.

First of all, they'd make a loss. Secondly, they would give a slap in the face to some publisher who supports them, in terms of author tours, functions in their shops, publicity. It doesn't make any commercial sense.
25 It doesn't and will not operate. The ABA have come out and quite categorically said they support the parallel importation provisions, which means, when you deconstruct it, they support local supply, they support local publishers, they want to be involved in this ecosystem locally.

30 **MR COPPEL:** A number of participants have made the argument that the local publishers will co-invest in the marketing with book stores, under parallel import restriction regimes, because the risk of that investment being undermined, through a successful book being imported directly - - -

35 **MR DONOUGHUE:** By who?

MR COPPEL: Well, current arrangements could be by an individual, it's not illegal to do that.

40 **MR DONOUGHUE:** They can do that.

MR COPPEL: But the point is that the nature or the level of the risk and who bares that risk would limit that sort of activity. I'm wondering what
45 your view is on that argument?

MR DONOUGHUE: If that publisher was not publishing with the consumer in mind, in other words, pricing I mean, with integrity and aligned to the current state of the Australian dollar et cetera then, of course, that publisher may well be at risk, but they'll be brought to heel by natural commercial competitive forces. Very few publishers are overpricing today, very few.

In fact the only, I think as a general statement, you could say, the only publishers or distributors who are, compared to the level of the exchange rate, oversupplying today, are American University Presses who don't have adequate distribution in Australia and where the local distributor doesn't get sufficient trading terms to price far more - to lower their prices. Therefore, they might well get bought around, but that's it. So what? It's the competitive pressure they need. But, generally speaking, in the trade, it doesn't happen. There's no overpricing, except in outlier cases.

I think if your new analysis shows, I think what it will show is that most prices these days are well and truly in line, in fact some smaller assessments, over the last few months that have been done by booksellers, have shown that they're, under exchange rate adjusted prices, to their American and British versions, not over.

MS CHESTER: Peter, we did try to seek to focus on the transitional issues around the removal of parallel import restrictions, given the terms of reference we got from the government and the government's response to the Harper review saying that government was minded to do that, but will get the PC to look at transitional issues, and you've touched on a few of those, which we do articulate in our draft report, so the prices have come down since 2009. Where the Australian dollar is at the moment is a pretty good sweet spot, in terms of transitionally managing this.

The other one that we touch on is that we now have quite robust antidumping arrangements, which addresses one concern that the industry has raised. On the issue of prices, we mentioned it a couple of times during the hearings, we are now looking to update that previous analysis for our final report. Are there any other transitional issues that we're missing, in terms of industry adjusting to the removal of parallel import restrictions?

MR DONOUGHUE: No. In my view, no. I mean the Harper Review got it wrong when it assumed that pricing, at the moment, was exactly as your 2009 report suggested, and you've clarified it. The Harper Review was unaware that prices had come down substantially and was unaware -

and strange that the Australian dollar has come down. So you've got two factors at play; they publishers responding to Amazon and the Book Depository, they brought prices down by 15, roughly, and the Australian dollar took them down another 15 when you compare at today's rates. So the Harper Review should have acknowledged that, but didn't. Therefore, their suggestion that there be transitional arrangements, which the government took up, didn't make any sense. There doesn't need to be a transition if you remove something that has no effect.

MR COPPEL: The question then would be why remove something which has no effect, the key question.

MR DONOUGHUE: There are two or three things that can be said about that. I think they should be removed to stop these zombies from arising at some stage in the future. Secondly, I think they should be removed because every seven, eight or so years we go through this debate, and it's horrible, it's horrible. I'd like to end the debate once and for all. They're the two major reasons. I'm sure that if they're removed, in a couple of years' time publishers and authors will look back and say, "What was that all about?"

MS CHESTER: A lot of people that we've heard from in our public hearings, Peter, have pointed to New Zealand as a case study, as to what will happen in Australia, the Armageddon scenario, if we move parallel import restrictions. It's something that Jonathan have been grappling with, in terms of trying to unbundle a number of factors that may have impacted on where the New Zealand publishing industry is today, given that parallel import restrictions were removed there in '98, but the structural changes to the publishing industry occurred about a decade after that.

It would be good, given your professional background in the industry, to get your insights on what were the factors at play in New Zealand and is that the Armageddon in store for - is it an Armageddon, firstly, in terms of availability of a variety of local content of books in New Zealand and what's happened to publishers there?

MR DONOUGHUE: Well, I was around, of course, in 1998 when the New Zealand provisions were abolished and we had operations, we had a warehouse, we had sales people, we had distribution, obviously, into New Zealand at the time and at that stage, in those years, the price mark ups from publishers who owned both Australian and New Zealand rights were quite high. Of course there was a great difference between the Australian dollar and the New Zealand dollar at that time than there is now, where we're virtually at parity now, \$1.04, \$1.05. The New Zealand trade, the

booksellers, the educational booksellers, the higher education campus shops were very aware and voiced to us that if the government went ahead and abolished these provisions they would still order from Australia, it didn't make any sense that they'd go directly to the US, that they'd go
5 directly to the UK, but they wanted the freedom to do, when necessary.

Publishers in Australia really upped their game. Everything started to be air freighted, mark ups came down, a lot of distribution operations, particularly warehouses, were closed, that's true, but that's because of
10 global realities. The same thing over the last five years has happened in Australia. Lots of warehouses have closed, publishers have converted subsidiary companies to branch offices, their structures have become global, and those forces that operated out of the 10 years from 1998 to 2008, before the GFC had another effect, they are at play now in Australia
15 and they're at play all around the world.

So I agree with you, in your conclusion I think you quote the Lloyd Access Economics Report on New Zealand, anecdotally I relate to that, I can see that as being genuine. I'm not up to speed on what current
20 publishers in New Zealand feel and do and lament, or otherwise, about the opening of the market. But for 10 years in Australia there was no, no at all, reflection on how terrible that choice in 1998 was. It's only come up now and it's come up in the same way that the importation provisions in the US Copyright Act and the importation provisions in the British
25 Copyright Act have now come into the debate here. I think local publishers, in quoting those endlessly, are wrong also.

They are dormant. If you talk to an American publisher about the importation provisions in the US Act and how it restricts behaviour, or
30 otherwise, they don't know what you're talking about. I mean it makes no sense for an American publisher to buy a British edition of an American book because it would be way too expensive and the cheapest supply is always in the US, obviously.

British publishers are sitting right in the midst of an open market, Continental Europe, and they can buy American editions from Europe, but they don't because the economics of it aren't encouraging. Commercially it doesn't make that much sense. So I just don't agree with the
35 scaremongering by the industry here.

40
MS CHESTER: Just one other quick question that you touched on a little bit earlier, in some of your remarks, it's been suggested to us that the current arrangements between author, bookseller and publisher in Australia enables an element of risk management and risk sharing with
45 new books coming to market, in terms of advances and in terms of

publishers agreeing to buy back from booksellers unsold books of first releases. It's been suggested to us that the removal of parallel import restrictions would see the demise of those risk management/risk sharing arrangements. It would just be good to get your thoughts around that.

5

MR DONOUGHUE: I just don't believe it. It's just not going to happen. It's a massive, even virtually demented vision as to how things are going to work out. It makes no commercial sense whatsoever. Now, in 2007, 2008, 2009 when publishers were very, very slow, if at all, to
10 adjust their prices, in the process of the strengthening of the Australian dollar, yes, the fears there were much more grounded that if the PIRs were removed suddenly then there would be a lot of importing. But the publishers would have lowered their prices and adjusted and commercial realities would have got back into alignment. It happened, via Amazon,
15 the pressure from Amazon and the Book Depository. In fact, the Labor government's decision not to proceed with the abolition in 2009, because of the emergency of online realities, Amazon and such, turned out to be correct.

20 So I suspect that in the industry at the moment I think we're getting a lot of - there are a few thought leaders in the industry and a lot of followers who are really just clueless when it comes to the actual commercial realities of importation and are coming up with all sorts of nonsense.

25

I'm reminded of the industry here at the moment, in respect of the parallel importation provisions, has been like a small medieval village which sees witches and demons in the woods and they're afraid they're going to come out at night and eat their children. It's a fervent religious
30 belief that the industry is going to collapse if these PIRs go. I just can't understand where that fear comes from.

MR COPPEL: I think we're going to have to leave it here, we've gone a little bit over time, so I thank you for your participation today, Peter, and I
35 call our next participant, who is Dee White. Thank you, Dee, and when you're comfortable if you could, for the purpose of the transcript, give your name and who you represent and then a brief opening statement. Thank you.

40 **MS WHITE:** I'm Dee White and I'm the author of 18 books for children and young adults, and I have two new books coming out next year. Despite being an author I do pay tax and I am currently not the recipient of any welfare payments from the government.

All I'm basically asking is for the opportunity to remain self-funding from my writing and to be able to continue to write books that kids need to read and help them deal with the difficulties in their lives, to help them empathise with others who are going through hard times.

5

My debut trade book, *Letters to Leonardo*, came out in 2009, which, coincidentally, was when the first PIR thing came about and I was actually there present at that last hearing. The book's about a 15-year-old boy coming to terms with his mother's mental illness and after it was published I received letters from people, from adults and children all over Australia, who told me how much they could relate to the book and how much Matt's experience was like their own life.

10

There were letters from readers who told me how much it helped them to feel like someone understood their reality. One reader wrote, "My name is Taraka and I'm turning 15 in June. I only just finished *Letters to Leonardo* 10 minutes ago and I can tell you now, I cried too hard. It reminded me a lot of my own situation and while reading it I often thought about my family. I thank you for writing it." And a grandmother with a mentally ill mother wrote, "I think it's marvellous to have books like this for kids to read and learn about mental illness." These are just two of the examples of why it's important for publishers to be able to take risks with new authors and with important issues like mental illness.

20

Letters to Leonardo has been used in secondary schools, in class sets. It's allowed me to go into schools to talk to kids about why I wrote the book, about mental illness. It's helped kids who are in that situation to feel like someone understands. It's helped other kids to understand what it's like to be in that situation.

25

So if PIRs had been removed back in 2009, when *Letters to Leonardo* came out, and the fair use recommendations had been implemented, I really doubt that most of my 18 books would have been published. Many of them are educational texts and, in Canada, where the fair use provisions apply, educational publishers have gone out of business and creators income has been reduced, in some cases, to less than a quarter of what it was. A teacher can buy one book and photocopy it for the entire class. How is this fair use? If a teacher pays for their mobile phone does that mean that every student in the class should get their phone paid for free?

30

One of my education novels, *Hope for Hanna*, is inspired by the true story of a girl growing up in Uganda, where AIDS is rife and children are stolen and forced to join a rebel army. I've also had a huge amount of feedback from readers on this novel, many of them thanking me for telling

them Hanna's story. One group of Australian readers were so inspired by it that they busked to raise money to buy a goat for a village in Uganda.

5 Books for children have the power to enrich lives, to cross cultural boundaries to allow young readers to share an experience to inspire them to do great things. If what is published in Australia depends on our ability to secure government funding many important stories, like *Hope for Hanna* and *Letters to Leonardo* won't be told.

10 I sincerely believe in the deep importance of what I do, reaching out to young readers, inspiring and helping them through life's hard times. But writing is also my superannuation, it's how I'm planning for retirement, it's a job I'll hopefully be able to do well beyond my 70s. It provides a cumulative income so the more books I have published the
15 more potential future earnings I have. The more readers' know me, the more they look for my books, the more books I have. The broader scope for school visits, where I can introduce even more readers to my books. I'm working towards self-funding my retirement and not being a burden on the taxpayer. But the fair use recommendations and suggestions to
20 abolish PIR restrictions will make that even harder.

When you talk about restricting the copyright to 25 years, it just doesn't work for children's books. Hazel Edwards' book, *There's a Hippopotamus on my Roof Eating Cake* has just been made into a play, 33
25 years after it was written. John Marsden's books, more than 20 years after they were written, have just been made into a TV series. Enid Blyton, *Harry Potter*, they're books that are going to be around for generations to come. They're books that are read by mothers and grandmothers and they pass them on to their kids, so how does that work for children's writers to
30 cut out all of those future generations?

In our user pays society why shouldn't we, creators, be paid fairly for the use of our work? The Commission talks about how consumers bear the burden of having to pay for access to our work, but you don't hear this
35 language being used in relation to goods and services. We have to pay to access electricity services, we have to pay to access water, we have to pay to access telephone services, even if we don't use them. All we're asking, as creators of literature, is that people pay fairly for what we actually produce. We are producers, but we're also consumers and we're
40 taxpayers too. We pay tax on what we earn, including grants and prizes, literary prizes, and we spend money that goes to boost the Australian economy. Book creators are big buyers of books.

45 On page 130 of its report the Commission states, "Most of the additional income from higher book prices goes to overseas authors and

publishers whose works are released in Australia.” Surely the situation will be made even worse by the removal of PIRs because it will make it more economical for Australian publishers to distribute works from overseas parent companies, rather than to produce their own. Even more money will be going to overseas authors when their books are brought into the country and sold, instead of ones produced here. What this means for authors like me is that there will be fewer opportunities for my books to be published in Australia.

10 School visits are one of the best parts of being a children’s author. You get to talk to your readers about your books, you get to share your passion for literature, you get to inspire kids about reading and literacy. A large part of an author’s income is derived from school visits. But if you can’t get new books, you can’t get school visits. If publishers are fighting to stay afloat, they won’t have the funds to support authors visiting schools and festivals.

20 But more important than the financial aspects of this is the fact that author visits in Australia and at literature festivals enrich the lives of Australian children. Our books take them into new and familiar worlds. Our author visits encourage children to pick up books and start reading, to take a journey with us, to venture into our story worlds. Author visits in schools promote literacy and engagement with books and reading.

25 Where will we get our books published if there are fewer opportunities here? US and UK publishers worry about taking on Australian authors because we’re not available to do school visits and it’s expensive to bring us over there. So getting published will be even harder, forcing authors like me, if I want to be self-funding, to relocate overseas.

35 On page 132 of its report the Commission states that our concerns about reduced income would be addressed by direct subsidies and funding. However, in the last few years we’ve seen funding cuts of \$105 million to the Australia Council and the withdrawal of support by the Newman government for the Queensland Premier’s Literary Award. The funding pool is getting smaller, not bigger.

40 I have a few questions for the Commission about their proposal to fund this shortfall of the income through government assistance. What author created income data have you collated in support of this proposal? How much money would be required to meet this shortfall? How would it be allocated? For every author who successfully applies for a grant there are hundreds who miss out, what happens to them? How will they be supported? And where would the money come from to fund something

like this? The taxpayers, the consumers? The very people who are supposed to be gaining from the removal of PIRs. So they might save on books but they're going to be basically having to pay taxes to fund the arts industry.

5

In this era of budget deficits of \$300 million arts funding cuts in the last three years what guarantees can you give us that funding will be provided to stop our industry from dying out like the publishing industry in New Zealand? How would these funding suggestions help unpublished authors? How would unpublished authors get grants for unpublished books when they don't have a track record and nobody to vouch for them? Normally when you apply for a grant you'll get publishers that will write letters, vouching for you. If you've never had a book published you just don't have access to that kind of thing and there won't be grants available for you.

15

MR COPPEL: Dee, if this is written text, it's perfectly fine if you can submit it because I know we're fairly limited for time.

20

MS WHITE: All right.

MR COPPEL: So if you want to wrap up your main points and we can have some questions.

25

MS WHITE: Okay. All right. So basically the effect on me will be reduced royalties, income reduced even further if booksellers can get books from overseas and sell them cheaper, limited opportunities to earn from school visits. The Australian publishing industry currently supports around 20,000 jobs, where's the money for that going to come from?

30

Basically one of my other main points is that the Commission says that the basis behind this is to generate new ideas and if there's limited access for new authors and creators to come into the publishing industry, how are those new ideas going to be generated when the publishers are going to be forced, because of financial decisions, to stick to tried and true authors with a proven sales record. So how are the new authors going to break in and where are the new ideas going to come from? Basically, how are our kids going to be better off in this world where the access to Australian culture, the access of author's in schools, how are they going to be better off when it's going to be severely limited?

40

MR COPPEL: There are lots and lots of questions there, we're not going to be in a position to answer them, but certainly I'd like to clarify that in our draft report we do not make any recommendation that suggests reducing the term of copyright. This is something which Australia has

45

committed to in its international obligations. So the copyright term is not the basis of a draft recommendation in the report, contrary to some of the information that you may have seen in the media. Can I just ask, that misinformation may have come from a draft finding in the report, which
5 suggested the term of copyright of 15 to 25 years is something which - - -

MS WHITE: I think it was you suggested that would be reasonable because the commercial sale of books, beyond a five year period that you said books were not commercial.
10

MR COPPEL: That's right. And that information came from information from the ABS. I mean you have 19 books so I would be interested in hearing from you how you relate to that, from that information?
15

MS WHITE: Well all of them are still earning money.

MR COPPEL: Can you give us an idea then as to that profile? Do you typically get a higher level of royalties initially after publication and then see that slow?
20

MS WHITE: Well some if it is also ELR and PLR and some books are dual purpose. Like my first book, *Jewel of Words*, which is a non-fiction book, it was created for a primary school audience. It's about Australia's national identity, it's a book about Henry Lawson and Banjo Patterson. That has now been repurposed and is being used in Year 12 Australian History classrooms. So kids' books have an ongoing life and they can be repurposed for different situations.
25

MR COPPEL: So those ABS statistics were saying that something like 80 per cent of the revenue from a new title would be in the first few years after initial publication. You're saying here that it's much flatter than that.
30

MS WHITE: Yes, and it can change, especially with ELR and PLRs. The more you get out in schools, the more readers get to hear about you the more they'll go to the library and borrow your books.
35

MR COPPEL: Are you self-published?

MS WHITE: No, not at all.
40

MS CHESTER: Are you books published overseas and sold overseas?

MS WHITE: Yes, some of the educational titles are published in England as well. So my publishers are Pearson Education and Walker Books.

5 **MS CHESTER:** With your arrangements with your publisher in the UK, how does it compare to the commercial arrangements you have with local publishers? I know you're not on the ground over there so therefore you're not visiting schools and the like, but in terms of your royalties and advances and things like that?

10 **MS WHITE:** Well, that's all packaged and I only really receive income from the Australian books, at the moment, for those particular education ones, because they were done for a flat fee and I get ELR and I have rising royalties after a certain amount of sales. So most of the income from that is ELR and PLR, which is Australian generated.

15 **MS CHESTER:** So just the way the commercial arrangement has been structured you can't unbundle what you're earning from the UK arrangements because it's embedded in the whole contract.

20 **MS WHITE:** No.

MS CHESTER: Okay.

25 **MS WHITE:** My two new books coming out next year are with EK Publishing and Scholastic, so that will be a different situation again.

MS CHESTER: Dee, I don't know if you were here before, we had Peter Donoughue, who's a retired publisher, did you hear any of his -

30 **MS WHITE:** I did hear some of what he said.

MS CHESTER: Did any of that resonate with you, in terms of even where prices have moved from 2009 and the publishers who have become much more competitive and efficient that the removal of parallel import restrictions won't have the impacts that some thought previously?

35 **MS WHITE:** Well, I don't feel that way because I know authors that, in spite of what Peter said, I know authors who have books that are being sold or being published overseas and cheaper copies of them are being brought in by online publishers and sold and the authors are not getting much money for them. The books are being produced cheaper in America because the economies of scales there, they've got a larger print run, they're producing them cheaper, they're like disposable books so basically you read them once and then they fall apart.

5 So those books are being brought in by the online publishers for the same price, or maybe a little bit cheaper than the Australian ones, and that's what they're having to compete with. So I can see already that's an issue and it's going to be made worse. I know at the last Productivity Commission hearing Morris Gleitzman talked about 30,000 copies of his books would be coming in and being sold cheaper.

10 **MS CHESTER:** Yes, we heard from Morris in our Brisbane hearings on Monday and had a chance to meet him afterwards and chat further, so that was very helpful.

15 **MS WHITE:** I can't see why booksellers, and Dymocks were very heavily involved in the last one, why would they not bring in cheaper books if they can make more profit margins, which is what they're about.

20 **MS CHESTER:** I think what the industry is suggesting to us now is that they've become so much more competitive that there's not the price disparities that there were previously. But we're going to do some more analysis around the pricing for our final review work.

MR COPPEL: That's fine with me.

25 **MS WHITE:** Basically I think that the Australian publishers will not have the money to - they will not be able to take the risk. I know Walker Books, they're a reasonably small publisher in Australia, they're head office is in the UK, they're already reducing some of their staff. If this is brought in then they will be getting most of their decisions made from Walker Books in the UK. So already you can see that they are choosing
30 UK authors over Australian authors because it's cheaper and they have access to them over there. They can go and do the school visits over there and so it's already getting harder for Australian authors to be published under those circumstances. With the removal of PIRs it will make it even harder.

35 **MS CHESTER:** Dee, would you like us to take the full record of what you were - we have to try to limit people to five minutes.

40 **MS WHITE:** No, no, that's fine.

MS CHESTER: We could take it as a post draft report submission, that way it will be on our website.

45 **MS WHITE:** Okay. Can I email it to you because I've been scribbling all over it.

MS CHESTER: That's fine. If you speak to Ellie, she'll help you out.

5 **MR COPPEL:** Thank you very much, Dee, for participating today and also for your post draft submission. Thank you. Our next participant is Peter Gleeson, from Raw and Cooked Media. Welcome, Peter, make yourself comfortable and when you are if could, for the transcript, give your name and who you represent and a brief opening statement. I emphasise "brief" because we are running a little bit behind schedule.

10 **MR GLEESON:** No worries. Today I'm just representing myself, contrary to what was originally submitted. Peter Gleeson is my name. As a documentary content creator and producer and as a content creator, I'm very sympathetic to people like Dee and anybody who is creating content
15 out there, and sympathise with the fear that some of these recommendations in relation to fair use conjure. I'm guessing the challenge in any recommendation or report or eventual bill is to be thorough and specific enough to protect the right people and the right publications without being so exhaustive as to restrict usage in the future
20 that is clearly fair. From my perspective much of it comes down to proportionality and of course context.

So today I'm talking from a very specific context, that of documentary production. Documentary and drama don't seem to be
25 differentiated in the current fair dealing arrangements around copyright, and are very different genres with often very different purposes. Documentary is much more, often much more, about critique and evaluation of issues, social, cultural, political, and interrogating the reality that we live in rather than creating a story for entertainment, or for social
30 purposes as well.

So in reference to the Commission's recent report and fact sheet around fair use, I very much agree that the current fair dealing
35 arrangements are too narrow and prescriptive and do not reflect the way people use content, and are insufficiently flexible to account for new and also historical legitimate uses of copyright material. We agree that Australia needs a new principle's based fair use exception in this context which will still protect user rights without undermining the incentive to
40 create.

I think documentary content creators with the current arrangement get a very sour deal when it comes to the use of copyright material, and that's a key word, use, as there are many different forms of use. At present
45 Australia has a very closed interpretation of what is fair in the use of copyright material, and I'm referring mainly here to music composition

and recordings but it might similarly apply to other creative material, be that artworks or other media.

5 The way in which fair dealing is assessed relies on a very small
number of very specific and exhaustive illustrative purposes and if a
content creator situation does not fit very snugly within one of these
illustrative purposes, or parallels one of these illustrative purposes,
creators find themselves facing either great uncertainty and/or financial
and legal vulnerability and/or great cost, crippling cost, which forces them
10 to either abandon the creation of ideas and the creation of content, which
would be considered totally legitimate in other countries such as the US,
or it forces them to modify content in a way that degrades the very essence
of that documentary format, that genre in which they are operating.

15 Documentary or factually based production and consumption, as I've
said, is very different to drama. One captures real life, comments on it,
reflects upon it, questions it. At its best documentary illuminates truths
about ourselves and the way we behave as humans, as we organise
ourselves, as we behave as a society, as an economy, as a nation, it equips
20 us with insights and knowledge about ourselves and our culture. But to do
so it must legitimately be able to depict reality and all the elements that
make up reality, and that includes the creative works and ideas and
commodities within that reality.

25 For what is culture if it's not the way people interact with what is
around them, be it ideas of individuals, artists, corporations, politicians,
elders, holders of traditions, agitators, be it commercial items or
commodities, clothing, food, fashion, buildings, cars, architecture. Or be
it other creative work, song, dance, books, stories, public art. Without the
30 freedom to document these elements, documentarians are crippled, the
documentary form is reduced and its core asset, the use of reality to relay
social and cultural narratives, to investigate and interrogate social mores,
to entertain, to reflect, to educate, is degraded.

35 Fiction and content on the other hand constructs an imagined reality
by the use of fictitious scenarios. It is of itself composed from
copyrighted elements such as screen play and more often than not
composed music in one form or another. Sometimes the music is a
dedicated score in which case the copyright of that score is protected, as it
40 should be, from being unfairly appropriated by others. Other times
existing music might be applied extradiegetically or performed within a
scene as it is written in the screenplay. And in this case of course again
copyright protection is applied and should be applied by the use of
licensing fees for both the composition and the recording.

45

In this constructed written the pre-existing musical work is, under the current law, protected - sorry, I'm repeating myself a bit here - from being illegally exploited or appropriated and a licence fee usually paid precisely because it offers up meaning that is utilised by the filmmaker in a deliberate and premeditated way and in which uses the work in a way which replicates the original use. Now in a documentary musical compositions can be used in different ways, and I would like to contrast two ways.

The first way is very similar to the way music is used in drama, a filmmaker will construct a scene out of elements of reality and they apply music or other creative works. And in doing so will add that extra layer of meaning extradiegetically, in the same way that you would in drama. And we should licence that and reward the artist for that. However there are situations in which music and other creative works already exist within the reality that is being recorded by a documentarian and which comes to exist in the footage because it forms part of the reality which is being documented. It might be completely incidental to what is happening within a particular scene.

For example, on a jukebox in the background or a radio or a TV, and have zero relevance to what is important in a scene, or it might be in a scene whereby real people are reacting to the works in a way that illustrates something of importance and in doing so transforms the meaning of the creative work in isolation into something else which will have an illustrative effect. An example, just off the top of my head here, a doco about neo Nazis in which the subjects are shown listening to neo Nazi music as a way to illustrate how neo Nazi messaging might work, how neo Nazi values are introduced or naturalised through ritual, et cetera, et cetera.

So the meaning associated with the song being used does not replicate the meaning of the song itself, and it's considered transformative. And this is an established principle, as you would know, in other countries. It's this kind of usage that needs to be differentiated from normal usage as music applied extradiegetically or deliberately to appropriate meaning from the original work. At the moment it's assumed that all use is deliberate and controlled and so purely incidental music captured in the background of documentary footage is subject to the same interpretation as if someone applied it extradiegetically.

It creates situations in which documentarians are faced with huge licensing costs should they wish to use a creative work that is already embedded in footage as a result of already being embedded in the culture that they're documenting. Moreover it disables them from being able to

truly document reality in that reality arbitrarily or accidentally happens as it - sorry. Moreover it disables them from being able to truly document reality if that reality arbitrarily or accidentally happens to contain copyrighted work and as such, especially with documentarians who work
5 on tiny budgets, they're often faced with coming up - producing a film where sometimes 60, 70, 80 per cent is devoted to paying for music.

Of course, we acknowledge that the use of such footage containing copyrighted material should be fair and proportionate. The interpretation
10 of this fairness and proportionality, however, cannot be encapsulated in any meaningful way simply by applying a tiny handful of impractical exhaustive and limited illustrative purposes. The American university, Washington College of Law Centre for - - -

15 **MS CHESTER:** Peter, can I just make a helpful suggestion?

MR GLEESON: Yes.

MS CHESTER: Because we're going to run out of time to have any
20 discussion with you. Because we can only really allow five minutes for opening remarks and I think you're about 180 per cent over that at the moment. We can take that and make it a post draft report submission so it's then in the evidence base. But I think unless there's any really new points you wanted to make I'd rather we have a chance to get into some
25 questions with you?

MR GLEESON: Absolutely, yes.

MS CHESTER: If that's okay?

30

MR GLEESON: Sure, yes.

MS CHESTER: Because I just saw there's another page to come and another page to come.

35

MR GLEESON: Yes.

MS CHESTER: Yes.

40 **MR GLEESON:** Yes, so I guess my main point is that the crippling costs, the fact that it's very different to drama and the illustrative purposes just don't allow for that. It's been proven, or at least suggested in the literature that I've read, that when fair use is open to interpretation by the courts it does not result in some huge backlog of cases before the courts.
45 It is very rarely in the courts. It happens in the open and people kind of

5 know the boundaries of what is fair and what is not. At the moment there's a lot of content that just doesn't get produced because of the costs associated with it and there seems to be just an acceptance that if there's music that happens to be captured incidentally that you either have to pay for it or you're going to be very, very vulnerable. We all know kind of how the publishing and record companies go to approach that kind of thing. Thank you.

10 **MR COPPEL:** Well, thank you, Peter. I just wanted to pick up on that last point, is it that the default regime is to make those payments even though you think there may be still an ability under fair dealing, under our current copyright law, to use that material as an exception but because it's a little uncertain the safer option is to make the payment for the use of that material? Or is it the - I mean, you presumably work quite a lot in
15 archives, is it the repository that is conscious that there may be a risk from their perspective in allowing access and use of the material in a way that may be in - may be, it's uncertain - in flout of the copyright law?

20 **MR GLEESON:** Well, I think with archives it's a little different to observational documentary in that, and I don't have a lot of experience in archival work, but my perception is that archival work is usually pre-licensed. Or if it isn't decisions can be made prior to production, in preproduction, or even in production, as to whether or not there's going to be a certain cost involved. It's a lot more certain than if you just happen
25 to capture something and then try and licence it. If you just happen to capture something and then try and licence it you're at the mercy of whatever arbitrary fee of a record company and of a publishing company would like to put on that.

30 **MR COPPEL:** So you're mainly making contemporary documentaries, is that right?

MR GLEESON: Yes.

35 **MR COPPEL:** Yes, okay.

MR GLEESON: So there is an attitude where it's just not worth the risk so you pay what you can, or it's just not worth the risk, you just take it out. Or you find a, like a sound alike, in which case you present reality
40 but it's not really reality because you are reconstructing a scene and trying to implant that into observational footage, which degrades your key asset as a documentarian that you're showing reality.

45 **MS CHESTER:** And it's primarily music that you have this issue of incidental capture within your documentaries?

MR GLEESON: Yes.

5 **MS CHESTER:** So I guess two quick questions. So the first one is how do you deal with that today in terms of is it example by example of what music you're picking up in a documentary film that you then have to go and identify the rights holder or who represents them and then seek permission or make some form of commercial payment, or is there sort of some umbrella arrangement similar to licensing?

10 **MR GLEESON:** No, it seems to me that it's very unregulated, there doesn't seem to be a code of practice, there doesn't seem to be some way you can estimate what things cost. Everything is skewed to the advantage of the publishers and the record companies. There isn't supposed to be 15 any favoured nations type negotiating but there doesn't seem to be any regulation around that. There doesn't seem to - I mean, you're just kind of at the mercy of the way that people want to negotiate with you. So what happens as a result is all the money for the production potentially - or a large amount of the money for the production, potentially goes to music 20 costs. It might be one per cent of your actual content but it goes to them and it goes largely offshore I imagine and it stops you from having that money to spend on further productions, other production values if employing people.

25 **MS CHESTER:** So if we were to take an example of I think one of your documentary films, Hotel Coolgardie, which I'm assuming is a pub?

MR GLEESON: Yes.

30 **MS CHESTER:** There's always music in a pub. How much of your production costs would have been absorbed by paying the requisite fees for the incidental background music in the shooting of that documentary film?

35 **MR GLEESON:** I don't want to go into that too much but what I can say generally is that another approach that people take is to stagger their licensing costs. So it may be that you pay for the territories that you can afford at that time or the format that you can afford at that time, whether it be festivals, theatrical, video-on-demand TV, whatever, so it's very 40 uneconomical to do it that way.

MS CHESTER: Are there any sort of concepts that you had, like creative concepts for a documentary film and then you've just thought it's not going to be economic because there's going to be so much incidental 45 music such that it's going to make it unviable to - so I'm just trying to get

a handle on what chill effect is this having on you in terms of what you can and can't do as a documentary maker?

5 **MR GLEESON:** Well, again, just speaking generally, yes, it's on everybody's mind. As soon as music comes up and there's - you have to consider that your costs are going to skyrocket. If I shot a documentary about this room that went for - and I shot for the whole day, and nobody came in here with their ghetto blaster, my costs would be minimal. If
10 someone came in here and walked past and had a song playing potentially I would have costs on my hand.

MS CHESTER: I think shooting here wouldn't be commercially successful for you, but - - -

15 **MR GLEESON:** Anyway, if you have these local scenarios, if you were - I don't know, if you were doing something on the Tiananmen Square and the guy in front of the tank, this is an extreme situation, and somebody walked past playing a popular song, currently there would be a
20 very strong argument that you would need to licence that, even though it's completely irrelevant.

MS CHESTER: Okay. So with what we're recommending on the fair use with the fair use factors and the illustrative examples?

25 **MR GLEESON:** Yes.

MS CHESTER: Does that kind of resolve the issue for you going forward?

30 **MR GLEESON:** Yes, we really support that. But I guess being that there's a lot of opposition to the fair use principle in general, if the fair use principle were not to be adopted, if there were just to remain a fair dealing principle, then those illustrative purposes really need to be expanded
35 because they are so constrictive and so crippling to documentary filmmaking in an observational context.

MS CHESTER: It would be helpful for you and it would be quite illustrative of itself if you could sort of just even in an email tell us what
40 would need to change to the fair dealing to bring it up to speed with documentary filmmaking and incidental use of music.

MR GLEESON: Yes, I'd love to do that, yes.

MS CHESTER: That would be fairly helpful.
45

5 **MR GLEESON:** Again it comes down to proportionality because you don't want to be - I mean, you can't feature an entire song or an entire book or anything like that but if there's a piece of work that is featured in your documentary to illustrate a point, to make an argument, and you're not exploiting that for its own, that reflects the original purpose of that song, if it is a transformative use, then I think that's a very legitimate use and that most people would consider that fair.

10 **MR COPPEL:** We've had a number of submissions from documentary makers and that made similar points to you, they've also emphasised just the cost of the royalty payments for incidental use, but also the time involved in getting permissions.

15 **MR GLEESON:** Yes.

MR COPPEL: What's your experience?

20 **MR GLEESON:** Just speaking generally, what the current arrangements allow is for the record companies and the publishing companies to leverage the amount of time you have. When you're creating a production you have a very strict schedule and you have a lot of bouncing balls, there are a lot of things that need to come together at certain times. If you are vulnerable within those arrangements then that's open to complete and utter exploitation.

25 **MR COPPEL:** Okay?

MS CHESTER: That's good.

30 **MR GLEESON:** Yes, you got it.

MR COPPEL: Thank you very much for your participation.

35 **MR GLEESON:** Thank you.

MS CHESTER: Thanks, Peter.

40 **MR COPPEL:** Our next participant is Con Sarrou from, yes, the Association of Liquor Licences Melbourne. Make yourself comfortable and then if you can give your name and who you represent for the transcript, and a brief opening statement. Thank you.

45 **MR SARROU:** Yes. My name is Con Sarrou. I'm pleased to appear before the Commission on behalf of the Association of Liquor Licences Melbourne. Our association represents the views of bars, nightclubs, and

live music venue proprietors in Melbourne and is run by a committee who work on an honorary basis. I've been a licensee for 20 years and have formal accounting qualifications. The main problem we have at the moment is the high cost of copyright that's levied on businesses, like bars, nightclubs and music venues. What I might do is quickly go over some of the points so you've got more time – a little bit more time for discussion because – yes.

MR COPPEL: So we've got your initial submission and your post-draft submission. We've got the points there. So if you want to - - -

MR SARROU: I just want to probably paint a picture of industry and how we interact with the copyright agencies and give a little bit – a few examples as well on that so I'll just – but we do want to say that we agree with the Productivity's Commission draft finding that Australia's music copyright arrangements are skewed far too heavily in favour of copyright owners to the detriment of both consumers and intermediate users and also that we support the direction the Productivity Commission is taking in attempting to achieve a fairer system which balances the interests of rights holders, licensees and consumers.

The other important thing is we're not saying that licensees should not pay copyright fees, but rather we're saying that Australian licensee should be paying a fair price for that music copyright.

I just want to give you an example, say, of a – the way that the copyright works. Currently in Australia we're paying – we pay money to two copyright organisations, APRA and PPCA, one on the publishing and one on the sound recording. A song in America, for example, a Katy Perry song, if it's played in America they might be paying the equivalent of about 20 cents a person for going into a venue. I mean, all of the licences are structured differently, but we try to get some sort of base level. In Australia we're paying 85 cents a person to APRA and about \$1.27 now, I think, to PPCA. So it's over \$2 a person.

The impact of that is it's a distribution of money. So the money that's collected in Australia, or in America for a Katy Perry song, remains in America. In Australia, we collect over \$2 a person walking into a music venue, and apart from running costs the majority of that is sent back overseas. If it's an Australian artist getting their music paid overseas it's a lot – a small amount of money is raised overseas and the money remitted to Australia is a lot less. We've estimated that the Australia small business are paying probably seven to 10 times more in copyright fees than what overseas businesses pay. I think, in your draft report, you mention that the way that we can work through this problem is going to

the Copyright Tribunal, but that's probably an overly complex forum, say, for resolving copyright issues for small businesses.

5 Just a little bit about APRA and PPCA, they've got different fee structures and different methodologies. APRA is based on – charge their fees on people attending a venue. PPCA charge on the venue capacity. It impacts the way businesses can make decisions because if you've got a quiet night or a mid-week night, if you decide to open up, you have to take into account the cost of these fees, copyright fees. I did give examples in
10 our previous submissions, like you get a venue with a capacity of 350 people and you want to open up mid-week you'll still be required to pay to APRA 85 cents on the people attending and to PPCA your capacity by \$1.27. So if 20 people walk through the door, you'll still be paying 350 people by \$1.27. That makes a big impact on whether music venues
15 decide to open or not. That then impacts, I guess, economic activity and employment and all those other things. To be able to play music, you need licences. You can't get away without having a licence, an annual licence, from APRA and PPCA.

20 With APRA there's a – to give you an example of some of the conditions that you have to sign - you can't negotiate these conditions, they're part of your agreement to play their music – fees are payable in advance, APRA may require a licensee to provide attendance figures in the form of a statutory declaration, licensees must on request provide a list
25 of all music played at the venue in the form specified by APRA, licensees must keep accurate books of account in sufficient detail to ensure that amounts payable to APRA can be properly ascertained, APAR reserves the right to audit and examine the licensees books of accounts, and in the event that APRA establishes that amounts owing to APRA have been
30 under-reported by more than 10 per cent pay the cost of the audit and APRA may immediately terminate the agreement of the licence, or if the licensee does not pay any sums due.

35 So they're the kind of day to day pressures that small businesses have to undertake outside of the normal pressures of running a business.

I just want to mention a little bit about PPCA. Unlike APRA, PPCA does not provide a list of songs that they represent. To us, it's important to have their song repertoire because being a copyright on the recording,
40 you could have an original – a song that was written and recorded, say, in America, written in America, if a cover version of that is written over here it's possible that the cover version is covered by APRA but not the original version. So without having a repertoire of the songs you may not know if you're infringing copyright.

45

PPCA's position in the past has been that all music is covered by them, all recordings. Even if they've told me, even if it's one song and musician on that song that's covered by them then you need a licence. If you need a licence you have to pay the fee that they charge basically on
5 your capacity. They're some of the day to day dealings that you have when you're dealing with copyright.

The main issue that we said was, really, the cost of copyright. As a result of the big price increases, they've probably gone up 15 times what
10 they were 10 years ago. We then looked at the overseas copyright agencies to see what they're charging by comparison. We are paying closer 10 times more. It might be five times more. It depends on which country you look at. We then thought well we've tried to reduce copyright fees for business but we've had no great opportunity to do it.
15 That's why being able to be part of the Productivity's Commission review is important to us. Look, there's probably – I won't go into the figures of the tables.

MR COPPEL: I think we got those in the initial submission, yes.
20

MR SARROU: I've done that. I've got other copies here. I'm happy to provide the spreadsheets where they came from if that helps you verify figures. But that's about it. I should've mentioned also that we've got – they are interstate industry associations like ours and the one in Western
25 Australia and South Australia both wrote to me saying they're supporting what we're doing today.

MR COPPEL: Thanks very much, Con, for those opening remarks and also for the initial and the post-draft submission. You made the point that
30 there's a negotiation between the collecting society, but that negotiation, you suggested, was sort of like a take it or leave it. That would then leave you, if you were dissatisfied with that, with the option of going to the Copyright Tribunal. But you made the point there that it's overly onus. Could you just explain what you mean by the difficulties of bringing a
35 case to the Copyright Tribunal?

MR SARROU: Yes. Okay. We're in a position where the copyright fees have increased about an average of 10 cents a person in 2006 to over \$2 a person today. A person, even myself, involved in a venue - it was a
40 large venue - to even think about going to the Copyright Tribunal to put a case, we really don't have the time and the resources to do that when we're running our businesses, and when our time is spent on things like our association. We're just doing it on an honorary basis. We're not big enough to have resources that can follow these things up.

45

When that case did go before the Copyright Tribunal, brought up by the PPCA, that led to the increase in the costs, I mean, licensees weren't invited into that. We didn't know about it actually when it was happening, so.

5

MR COPPEL: Who was the case against?

MR SARROU: It was the PPCA had a report from, I think, it was Allan's Consulting about the value of music and they went with that document to the Copyright Tribunal to argue for increase in copyright fees.

10

MS CHESTER: So they go through an authorisation process with the Australian Copyright Tribunal for fee increases?

15

MR SARROU: Yes, they went through that in 2006. A bit like, I guess, all licensees and all their – well all – as a licensee back then we didn't receive any notification from PPCA that they were doing that. So as a stakeholder or as a licensee we probably should've done. But, I mean, they went and got a – probably a very expensive and convincing report and - which they took to the Tribunal and the Tribunal agree with them. But one of our issues with that was that the Tribunal didn't probably look at overseas rates or comparisons, they just took that report and made a finding on that. That's where we find ourselves today.

20

25

MR COPPEL: One of the reasons that the ability to negotiate can be limited, that's being put to us, is that – I mean, the collective societies have a, sort of, mandate in this space for licensing of copyrighted material. There are codes of conduct. There's a code of conduct in Australia. It's been said that the level of transparency and accountability in those codes of conducts, which are voluntary codes of conduct, are limited. I'd be interested in getting your perspective on the role that such an instrument plays in terms of that relationship between your members and the collecting society.

30

35

MR SARROU: There is a code of conduct and if we didn't have the high level of copyright fees that we have then, I guess, the code of conduct is – yes, is for people to have a complaints mechanism. What our people are saying is they wouldn't have to – they wouldn't have a complaint if we weren't paying these high fees. So not many people actually use, that I'm aware of - say would go to the code of conduct.

40

If I can say it like it's a master-servant relationship. So it doesn't matter what you'd put forward, I mean, if we put forward that they should reduce their fee, well they wouldn't agree to that. So there might be

45

peripheral issues that they might look at. But they wouldn't look at reducing the fees and that's the main problem that businesses face is actually – yes.

5 **MS CHESTER:** So, Con, you mentioned that you can't get a list from PPCA of the artists that they're, effectively, representing. I guess, one of the key issues around transparency and accountability is, I guess, follow the money. Are you able to tell from PPCA reports what they're
10 collecting and then who it goes through to? Is there a sense of what we would call hypothecation, so the \$1- whatever it is for Katy Perry actually goes through to Katy Perry as a royalty flowthrough?

15 **MR SARROU:** I've had a look, in the past, at APRA's financial statements. I guess I haven't found PPCA's. They're a proprietary limited company, so I'm not sure if they're published. APRA do publish their figures.

MS CHESTER: Can you follow the money through those things?

20 **MR SARROU:** Not really. When I've looked at APRA's financial reports, they quote the money – the reciprocal money that comes in from overseas, but they don't quote or state in their public accounts what money goes out. So the fact that we're collecting substantially more in
25 Australia, you would expect, sort of, for the copyright fees and if the majority of music is coming from overseas, you would expect the majority of their fees, or the net collection fees, getting paid to the overseas collection societies in the countries, say, in the Katy Perry. But that's not – APRA don't publish that in their accounts. So it's a bit hard to know the
30 net outflow of money, but it would be significant because the majority of rights holders are overseas.

MS CHESTER: Yes.

35 **MR COPPEL:** Is that important to you? I mean, does it really matter?

40 **MR SARROU:** Well, it doesn't really matter to us. But it matters to the point that it's impacting the running of businesses because there's an economic impact. So, I mean, APR, because they're concerned that people might be under-reporting, they send people into your business. APRA will say that they introduce themselves at the door, but most – the
 venues will say they don't. So we've got people – they're hidden people with clickers, that's the – so the amount of money going out and how they run that side of the business is, sort of, it's of no business of ours. But we're just saying in quantum, in quantum, that the level of money going

out is really coming from the pockets of small businesses that are just trying to survive.

5 **MS CHESTER:** Yes. The reason I, sort of, asked the question about the transparency and accountability is that given the price disparities that you've mentioned between what a licensee would have to pay in the US versus here to listen to the same piece of music, and given there's no cost differences in terms of accessing that music given it's all digital these days, it would suggest that there's a very different licensing or royalty arrangement that Katy Perry has in the US than what she has here, or the money's been divvied up a different way. So that's why I, sort of, wanted to get a better handle on that.

15 **MR SARROU:** Yes. I don't think there's a different licensing arrangement. I think APRA hold the rights, say, to play – they have the rights because they're part of a global affiliate – all the global affiliate organisations, the collection societies. So there wouldn't be a different pricing regime with the Katy Perry song here, it's just that APRA and PPCA charge a lot more for their licences and whatever money comes in, than what they do overseas. Yes.

25 **MS CHESTER:** So Jonathan mentioned the voluntary code of conduct for Australian collection agencies. As part of our inquiry we actually went to Europe and also spoke to some folk in the UK. We're not still sure whether the UK is part of Europe but it's – the numbers are coming in as we speak. It's not looking too good.

30 We spoke to a gentleman who actually heads the, sort of, equivalent of APRA or PPCA in London. He said that the EU has a determination, which we now have a copy of, which requires – and it's compulsory. It sets out the governance arrangements for collection agencies in Europe, and it also goes into issues of how they're meant to negotiate and what's considered to be fair and reasonable. It'd be really helpful if we gave you the details of that, if you could have a look at that and let us know whether or not you think that that might be improve matters for your negotiations and transparency and accountability.

40 **MR SARROU:** Yes, I'd appreciate that. I'm happy to look at that. That's one of the things that has been too difficult in the past to actually have a forum to try to get a fairer deal. Yes.

MR COPPEL: Have there been any cases that you've brought, or in other States in Australia, to the Copyright Tribunal?

5 **MR SARROU:** No. I mean, we're probably, it's probably something we might need to do in the future subject to – if nothing changes is to get a collective to go to the Copyright Tribunal and probably look at that original case in 2006 and have someone review that, the evidence in that, so.

10 **MS CHESTER:** It was suggested to us in public hearings in Sydney that under the voluntary code of conduct that there's a requirement to report complaints to the Copyright Tribunal. So if these two organisations get a whole bunch of complaints, that goes through to the Copyright Tribunal. The Tribunal is meant to do something about it. So it might be worthwhile having a look at that aspect of the code of conduct as well, because it would suggest that the Tribunal might need to act if there's a plethora of complaints without an individual having to actually make – go
15 directly to - - -

20 **MR SARROU:** What we did a year and a-half ago, went to the National Small Business Commission in Canberra, and we put the same, sort of - our problems forward to him thinking it's from a – in that forum. Then, I mean, they received, I think, 58 submissions which included four State based industry associations. So they got a reasonable response. It mightn't sound like much but when you include that it includes a State based organisations. But it's been a little bit difficult to get – to convince
25 people that our segment of industry has a problem.

MS CHESTER: Okay. Con, in your post-draft report submission, you mentioned something about allowing parallel import restrictions to be removed.

30 **MR SARROU:** Yes.

MS CHESTER: Which doesn't currently apply to music. So I wasn't sure how to connect the dots to how that would help your members.

35 **MR SARROU:** Yes. It was just an idea that came up in one of our discussions that the fact that we can import, you can import beer, you can import music CDs. If the prices charged in Australia are that high, our thinking was why couldn't we buy a licence from overseas?

40 **MS CHESTER:** I get it. Okay.

MR SARROU: Yes, sorry. Just from a legitimate organisation, it could be from BMI in America or PRK in the UK. It would be APRA's affiliate. It might be difficult to manoeuvre something like that because
45 they're all as – probably they've got regional arrangements. But in the

5 bigger picture we're saying, like, if APRA and PPCA say, "There isn't really a problem here, the rates are fair", then we would have no objection to somebody, a business in Australia, say, buying their copy of it – basically buying their copyright licence from overseas and they'd be paying the fees, probably provide a song list, and the overseas association would just distribute that money like they would normally to a local business.

10 **MS CHESTER:** Okay. So what precludes you now from entering into a licensing arrangement with the collection agency in the US? Is it that there's territorial allocation of those rights?

15 **MR SARROU:** I think it's territorial. We actually tried. We just did it as a bit – our association did it a few years ago. They said, "No, no, you'll have to deal with your" – "the Australian collection agency". They wouldn't deal with us. But that's not to say that doesn't have to change, yes.

20 **MR COPPEL:** Was that a legal requirement on them or was it simply that they had their network and therefore to - - -

25 **MR SARROU:** Yes, I'm not sure. I think it might be more. Probably an agreement they've got amongst themselves. So they do belong to a – sort of, a global – yes, a global network. So they'd have to have probably their own rules in there.

MR COPPEL: Yes.

30 **MS CHESTER:** Okay.

MR COPPEL: Well thank you very much for participating today and also thanks again for the two submissions that you've put in.

35 **MR SARROU:** Okay. Thank you very much.

MS CHESTER: Thanks, Con. Con, the team would be interested in the underlying data and where you sourced it.

40 **MR SARROU:** Beg your pardon?

MS CHESTER: The underlying data that you had.

MR COPPEL: The spreadsheet.

45 **MR SARROU:** Yes, yes.

MS CHESTER: The spreadsheet.

MR SARROU: I can send that.

5

MS CHESTER: We would be interested in seeing that.

MR SARROU: Yes, yes. Okay.

10 **MS CHESTER:** Thank you.

MR COPPEL: Thank you. So we're going to take a short break so people can stretch their legs and get something to eat, and we'll reconvene at 20 past 1. Thank you.

15

LUNCHEON ADJOURNMENT

[12.44 pm]

20 **RESUMED**

[1.20 pm]

25 **MS CHESTER:** Folks, we'll resume our public hearings and welcome back. I can already welcome to the table our next participants, Julie Burland and Briony Lewis. If you would mind just stating for the purposes of the transcript your name and which organisation you represent and then if you could make some brief opening remarks, that would be appreciated.

30 **MS BURLAND:** I am Julie Burland, CEO of Penguin Random House Australia.

MS LEWIS: I am Briony Lewis, general counsel, Penguin Random House Australia.

35

40 **MS BURLAND:** Penguin Random House is Australia's largest trade publisher, a truly global publishing house with a strong tradition of publishing the very best Australian writers. We work closely with Australian booksellers to connect these writers with the widest possible readership. We employ more than 500 people in Australia and have four sites around the country, including two distribution centres.

45 Today we want to address the proposed removal of parallel importation restrictions as contained in draft recommendation 5.2. We understand that the Federal Government has indicated it favours the

removal of limited territorial copyrights and the Commission has focused on that in its response to the terms of reference. We are concerned that the Commission has chosen to draw attention to the alleged benefits of removing territorial copyright, without proper analysis of the basis on
5 which Harper recommended these changes.

The factual basis of Harper has changed. The price and availability arguments relied on by Harper are no longer present in the market and as a result we feel it's premature for the Commission to advise on transitional
10 arrangements. It remains open to the Commission to find that the previous concerns about the possible effects of the Act on availability and price are no longer present and we urge the Commission to do just that.

An overriding question that we have is how can the Commission
15 consider transitional arrangement recommendations when it has acknowledged that the pricing and availability and other market data in its draft report are outdated. Given that the government's stated aims were to reduce book prices and increase speed to market of titles, the use of outdated data is a fundamental problem. Today we want to emphasise our
20 concerns and urge the Commission to advise the government that there should in fact be no change to territorial copyright regime in Australia, because on balance the costs to consumers are just too great.

For the purpose of this hearing, we want to draw the Commission's
25 attention to three key issues that any change to territorial copyright will need to address. How do we protect low prices and high diversity for consumers? How do we protect Australian local investment and how do we avoid what has happened in New Zealand happening to this market.

We know that you have heard these points over and over again. The pricing data used in the draft report is outdated and incorrect. Book prices have gone down in real terms and not just as a result of foreign exchange impacts. Book diversity has gone up. Digital disruption has been made as well by the local publishing industry. Foreign exchange rates fluctuate
35 and so does the impact in the industry. The current system champions consumer choice but why would the above positives from the current model be seen as a good reason to dismantle an existing economic structure.

The Commission must make the government aware of current
40 industry realities and confirm that the Harper rationale for change to territorial copyright no longer exists. We appreciate the references to culture and the cultural landscape might appear flippant or trite but we passionately believe that the change proposed will have a lasting effect on
45 our culture, our literary landscape and our national identity. This belief is

5 based on actual knowledge of how our industry works, including what returns we currently get on our significant investment in local authors. Every acquisition of a new book is a gamble. In fact, we think of every new acquisition of a book as a start-up and, to be honest, some work and some don't.

10 The appropriate economic structure that we have in the form of limited territorial copyright allows us to take that front and sometimes we back a winner. In fact, we are privileged to be the publisher of a number of global award-winning authors. The reason why we have been able to compete so well on the world stage with our books, well it comes down to Australian talent, as well as appropriate economic structures in place to support local investment in that talent.

15 Man Booker prize winners don't just roll up at your doorstep. They are nurtured and grown in an industry that can support them, as they help Australians participate in the global literary landscape. It is pretty clear that the current system is not broken. Why change it?

20 I will briefly explain the financial basis of our business. In a market without territorial copyright, local publishers compete from the point of first publication with foreign publishers for the same sale of the book. Mass foreign imports are a real threat to local publishing. Foreign publishers pay authors less as export royalties or nothing for remainders. Right sales are also an important aspect of our business. In the absence of limited territorial copyright, the local publisher is less inclined to sell rights to foreign publishers, because those foreign publishers would be able to supply and export an edition of the same book straight back into the Australian market.

30 We also make foreign titles available to local consumers. Territorial copyright enables us to import titles with the confidence that they will get a reasonable return on investment. This increases consumer access to foreign books and the relative investment certainty means that local publishers can use the return on their sale of foreign works to invest in local authors.

40 If local publishers like us have to compete on this uneven commercial ground with mass foreign imports, it would naturally result in less investment in local authors and content, particularly new Australian authors, less financial incentive for us to pay authors adequate advances, less money to invest in marketing and publicity campaigns that benefit consumers, local authors and local booksellers, reduced economies of scale to enable us to offer favourable terms and competitively-priced books.

5 We do not consider that the current anti-dumping regime in this country will be adequate in the terms of responsiveness or adequate support for our industry to alleviate the inevitable influx of foreign editions. We consider it an inappropriate replacement for the current system, because it's a slow process and titles involved are likely to be time sensitive. If a remedy is imposed a few months after, it may be too late. The remedy itself is inadequate, the imposition of a duty, not the prevention of the actual import.

10 While we consider that on the face of it mass foreign imports would qualify as being products that would be sold below their normal value here and be something that would cause material harm to the industry, the additional compliance, policing and investigation costs for Australian publishers is a burden that we do not need in an environment with such tight margins already. Would publishers, authors and booksellers really have a big enough voice or deep enough pockets to compete against the steel producers and chemical manufacturers for the attention by the ADC? We don't think so.

20 A close example of the removal of territorial copyright is New Zealand. As you know, New Zealand repealed its equivalent legislation in 1998. Since that time, Penguin Random House New Zealand has contracted with severe job losses. Our two physical distribution centres have been moved to Australia and our investment in local New Zealand writing has reduced considerably. Title count in our business in New Zealand has reduced by 75 per cent.

30 We note that the Commission has previously questioned whether the changes in the New Zealand market are due to digital disruption. We welcome that question. When you compare the two markets that are both subject to the same digital impacts, with one retaining a limited territorial copyright and the other removing it, which market looks healthier following the impact of digital? We say Australia. That is a compelling example of the right economic model being in place to enable local publishers to respond to these types of market disruptions. Why tamper with that when there is no overriding consumer or industry to be achieved?

40 We urge the Commission to remove draft recommendation 5.2 from its final report. As outlined above, there is no price or availability question to be answered by the Australian publishing industry. The removal of territorial copyright would have a drastic and detrimental effect on the local publishing industry and local authors. The current system gives us flexibility and dynamic market with fair competition rules

to withstand shocks like digital disruption, financial crises, et cetera, to the benefit of the consumer.

5 The current rules encourage investment and they encourage risk
taking and entrepreneurial behaviour. The current environment seeks
local publishers working closely with local booksellers and authors. It is
open to the Commission to confirm to the government that the pricing and
availability arguments of Harper no longer exist. Australian narratives
and a strong creative industry are important to Australians. Australian
10 children deserve Australian stories. Thank you for your time.

MS CHESTER: Thanks very much for those opening remarks, Julie. I
might begin where you finished with respect to Harper. Thank you for
understanding that our terms of reference actually required us to be
15 mindful of the government's response to Harper which was that they
would move to remove parallel import restrictions and we were asked to
look at the transitional issues.

UNIDENTIFIED SPEAKER: Could you speak up a little bit. Sorry, I
20 can't hear you at all.

MS CHESTER: Sorry. Could you say the last bit again? Sure. Sorry,
I'll just get a sip of water which might help with my clarity of voice.

25 **MR COPPEL:** Feel free to come forward. You can come forward if it
helps.

UNIDENTIFIED SPEAKER: No, no. You were very quiet this
morning. I don't know whether the microphones are on.

30 **MR COPPEL:** No, they're not.

MS CHESTER: They're just for recording. They're not for projecting.

35 **UNIDENTIFIED SPEAKER:** Thank you.

MS CHESTER: The government's response to Harper was they're
minded to remove parallel import restrictions but wanted the Productivity
Commission to look into and advise on transitional issues, which is very
40 much the focus of our draft report. While you're right, Julie, in saying
that our draft report didn't replicate the pricing analysis that we did in
2009, our draft report did actually provide some commentary narrative
using high-level statistics on developments since 2009 to inform where we
landed. So we did note that a confluence of events have occurred. Prices
45 for Australian books have come down materially since that time. The

industry, through its own proactive initiatives, are mindful the government at any time could reconsider parallel import restrictions to go for the new 14-day code of conduct arrangement of getting books to booksellers.

5 We looked at sort of a suite of transitional issues then in terms of what had changed, so prices having come down, where the Australian dollar is today, recent reviews of the robust anti-dumping arrangements that we have in Australia. I think that that all made us view that the transitional issues that would have been present in 2009, aren't present to
10 the same degree today. That said, we are very mindful that industry is a bit concerned that we haven't updated our pricing data and we've had some partial pricing data from the industry which suggests that prices now are very competitive globally, Australia versus US and Europe, and so we will be looking at updating that data for our final report.

15 Just coming back to the point though then on the transitional issues, I guess my first question would be, apart from those transitional issues that I've just mentioned, are there any others that we haven't identified in the report that we should have?

20 **MS BURLAND:** As in?

MS CHESTER: I've identified a bunch of factors that we think were important as the backdrop to considering what transitional issues might be
25 faced by the industry. Are there any other issues.

MS BURLAND: Well I think the subsidy. I mean it's been recognised but I also think the subsidy is an issue as well, how much money we invest in local writing, local investment, local marketing publicity and
30 how will the government - as we've heard from other people, we're having cuts in arts, so how will you really actually fund what we do? Like you may fund an author but how do you also fund the publisher, because it takes an author and a publisher to make a book. A book just doesn't just arrive to us made. So how would you, fully ready to go, how would you do the funding? I know you mentioned that it would have to happen but
35 in reality, how does that funding actually take place.

MS CHESTER: I guess what we're suggesting is, given the industry's now asserting that it's become lean, mean and competitive and it's
40 competitive on pricing terms. We wouldn't see that there would be a flood of imported books into the Australian market vis a vis what could have been expected in 2009. I think, Julie, you might have been here a little bit earlier when we heard evidence from Peter Donoughue, a retired publisher, who painted a very different scenario of what he would expect

might happen within the publishing industry post removal of parallel import restrictions.

MS BURLAND: Yes.

5

MS CHESTER: He didn't paint the sort of doom and gloom scenario that yourselves and others are suggesting.

10 **MS BURLAND:** I mean I don't know when Peter retired but the publishing industry has changed dramatically since I have been in it in the last 15 years. It's changed very dramatically. The risk that there is to how global we are now, I mean we just had an example this week of Tim Winton, one of our leading authors, a book was available from him in a store here in Melbourne. It had come in because it had been
15 remaindered in the UK and there is one of our bestselling authors sitting in a store for \$10 because it's remaindered by somebody. That means that there's absolutely no income for Tim at all because on a remainder sale you don't get any income. I mean just seeing that is just an impact because these books will make their way in and that was coming through a
20 remainder merchant. At the moment we can call the store up and take action on that but in future you'll have bestselling award winning authors, you'll have checked copies in stores.

MS CHESTER: If we just maybe set aside the issue of remainders for a
25 moment and we'll come back to remainders and dumping.

MS BURLAND: Yes.

30 **MS CHESTER:** If the industry today now is price competitive and you do have the advantage of the differential transportation costs of getting books to Australia, why is it that you think there's going to be a flood of imported books with the removal of parallel import restrictions, if you have become competitive on a pricing basis?

35 **MS BURLAND:** I still think it goes around to - all we're doing with this is actually making the US wholesalers stronger and that they may be able to negotiate good terms because they do buy off a bigger publisher than we are in the US or the UK. I mean it would probably more so be the US, and so they might buy something on great terms. Again, this is going to
40 be overstocks and remainders as well. They'll be sitting with a whole lot of stock there and they'll be selling it back into the market cheaply, and so we won't be able to take the risk on publishing a book. It won't be the bestsellers because they probably would take that risk. It will be the new writers that suffer the most because we will be seeing - we won't be able

to make the sales, the right sales, or anything like that, because we will be worried about those books entering the market again.

5 **MS CHESTER:** In a scenario where remainders came in or books - so just with remainders and sells, when they come in, are you suggesting that they're sort of at below cost when they're sent to countries where there aren't parallel import restrictions?

10 **MS BURLAND:** Remainders, yes. They're coming in at whatever price the wholesaler wants to sell them to. I guess they've got to just have a look at what they've bought them for which tends to be very cheap. I mean the example that I've got is actually the UK, they do export. They do airside trade paperbacks. They don't put it into their own market. They just airport trade paperbacks and then they sell those to people who
15 are actually leaving the country. They don't put them into their bookshops and so all of a sudden these editions are entering our market, editions that they wouldn't actually put into their own market. So I think that's a telling thing.

20 **MR COPPEL:** These are sold in airport shops; is that so?

MS BURLAND: We call it "airside". They sell them airside, yes.

25 **MR COPPEL:** What is it that is about a remaindered book that removes the royalty payment to the author?

MS BURLAND: The contract. In the contract that we don't pay royalties on remainder sales.

30 **MR COPPEL:** What then determines classification of being remaindered or not remaindered? From the picture you're painting, it seems very easy just to classify a book as a remaindered book.

35 **MS BURLAND:** If the publisher has an overstock, it will be classified as a remainder and they sell at a certain price. It will be classified as a remainder and so no income will go to the author.

40 **MR COPPEL:** We haven't heard from any authors, other than the connection or parallel import restrictions of that is an issue which is a bit surprising because it doesn't sound too complicated to classify something as a remaindered book.

45 **MS LEWIS:** I think what happens in reality is that if in an environment of no parallel importation, books are released simultaneously or "in a foreign jurisdiction or close to the (inaudible) release". The foreign

5 publishers again, economies of scale, large print runs, give it a punt on the basis of sales that have happened in Australia, on the basis of marketing and other activities that are happening in Australia. If it doesn't sell in the foreign jurisdiction, they can ship it back here very cheaply at a remaindered rate.

MS CHESTER: Okay. So what's the percentage of say books sold in Australia today that would be remaindered books?

10 **MS BURLAND:** I don't know that. We can find that out for you.

MS CHESTER: It would be good to know what it is sort of internationally. Do you know what the percentage of remaindered books are in the US?

15 **MS BURLAND:** It's more of a bookseller question.

MS CHESTER: Yes.

20 **MR COPPEL:** What about remaindered books by Penguin.

MS BURLAND: Yes, we sell when we have overstocks. Yes, we do.

25 **MS CHESTER:** What percentage of your annual sales? Maybe it would be best to look at it in terms of the number of books Penguin sells in Australia each year. What percentage of them are remainders?

MS BURLAND: I would have to get that information.

30 **MS CHESTER:** Okay. Can you get that information for Penguin globally?

MS BURLAND: I will try, yes.

35 **MS CHESTER:** That would be helpful. You mentioned, Julie, and other publishers have as well, and we understood sort of the book ecosystem of the local author, the local bookseller and the local publisher and we do understand that that's an important relationship. How does that relationship differ in a business model sense for Penguin Random House
40 globally? Is it unique here in Australia in terms of what you do with your advances, your royalty payments, your treatment of remainders, your ability to take back unsold books from booksellers? Is that not replicated anywhere else globally?

5 **MS BURLAND:** We run very independently of our parent companies in the US and the UK and so we have the relationship deal with the booksellers and the authors. So we have a relationship. Our UK and US companies don't have the relationship with our authors and our booksellers.

10 **MS CHESTER:** Yes. So how do authors get by then in the UK and the US if they don't have that sort of relationship that authors have down under?

MS BURLAND: Are you talking about an Australian author?

15 **MS CHESTER:** Yes. I'm just trying to work out whether the Australian business model across the three is unique and, if so, why. Then secondly, if it's not replicated in the UK and the US, how do local authors there - - -

20 **MS BURLAND:** Well local authors would have the same model. So local authors in the UK would have the same models with the booksellers and the authors as well, but with an Australian author, obviously the home, we've nurtured that author. The closer relationship is here and then you've been able to get the author out into the stores, work with the booksellers, et cetera. But just because a book is published Penguin Random House Australia, doesn't mean it's published by Penguin Random House UK and US.

25 **MS CHESTER:** Yes. I was talking about the local authors in those jurisdictions. So Penguin Random House in the US with the local authors in the US would have the same sort of business model with royalties, advances, taking back unsold books and remainders?

30 **MS BURLAND:** Yes.

35 **MS CHESTER:** Okay. We've heard evidence that in the US, effectively there are no longer parallel import restrictions. I know it's not exactly a like comparison because they have the right of original sale, but given Court interpretations there now, and as we've heard from submissions and other evidence, that effectively they don't have parallel import restrictions. Yet that business model of author, publisher and bookseller is still in place.

40 **MS LEWIS:** I just think you cannot compare an Australian market to the US market just due to size. I mean it's the very reason why we need the current system to be maintained. America does not need these sort of legislative provisions in place just due to their actual size. I mean in and
45 of itself that's how they operate and they don't need these sort of things.

We are a completely different market and we're a completely different size and that's why we do.

MS CHESTER: Okay.

5

MS BURLAND: Sixty per cent of Penguin Random House business is international books and 40 per cent is local, so you've got to protect that smaller percentage, where over there it's just 100 per cent is theirs.

10 **MS CHESTER:** I guess if you're price competitive now, where's the protection? Do you see what I mean?

15 **MS LEWIS:** It is because of the current - I suppose what we're struggling with, to be honest, is that it doesn't seem that logical to have a system that's working where there is high availability, high diversity and low prices and then to use that as a reason to get rid of that system.

20 **MS CHESTER:** Yes. I guess it's kind of central to competition policy that contestability is very fundamental. So while the industry has come a long way in six, seven years, which we identify in our report, the only way that we would know that the industry would stay that competitive over time would be if there was that sort of level of contestability through the potential for parallel imports to come in.

25 **MS LEWIS:** There is contestability in our view due to things like the Amazon effect. I mean that does keep us honest. We are driven by consumers and consumer demand and that is also why, to be honest, we don't rely on provisions like this in the Act in order to improve our business model. We have clearly efficiency drivers, including what
30 consumers demand. We all live in the world and we all live in the world of Game of Thrones where things are required that very same day and that's how we operate and that's why we've improved.

35 **MS CHESTER:** Julie, you touched on the New Zealand experience for Penguin Random House.

MS BURLAND: Yes.

40 **MS CHESTER:** It would be great if you could just talk us through the timelines for those structural changes, noting that the parallel import restrictions were removed in 1998 and what were some of the other factors, really the economics of what was happening in the New Zealand market and globally for the costs of publishing and other competitive forces?

45

MS BURLAND: In 2003, we closed the - we're a merged company now for Penguin Random House. We closed one of our warehouses and last year we closed the other, but it has been a big impact in terms of what they actually publish locally.

5

MS CHESTER: Sorry, so the 2003 closure of an initial warehouse was because of a merger.

10 **MS BURLAND:** No, no, sorry. We were running our businesses separately before 2013. So in 2003 we had an instant reaction and we closed one of the warehouses. The amount of local publishing has dramatically increased. You go into New Zealand stores and you can see that there are American and UK books in stores. I mean they've had the digital and so we have we. We've had the digital. They actually went
15 into a recession. We had the GFC. When you look at the pricing as well, our pricing has dropped more than their pricing. So even though it is an open market, our pricing hasn't managed to drop more, so our system is obviously working, where they have had a bit of a drop but yet their availability has absolutely shrunk. PIR removal has not worked for them
20 and I think that's just such a risk to think that that could happen to this industry and to think that our local publishing list could drop by 75 per cent and not see some of the Australian. I think, in particular, children's authors would be impacted by that. When I look at our New Zealand publishing list, we hardly publish any children's books any more. The
25 thought of our children not reading children's books would be heartbreaking. They've gone through everything we've gone through.

MS CHESTER: Maybe if we could just go through the timelines again. So when parallel import restrictions were removed there in '98, there were
30 no other sort of structural changes until 2003?

MS BURLAND: No, we did have some shrinking of our workforce at that stage.

35 **MS CHESTER:** When you mentioned that the local content or the availability of local content in New Zealand had changed over that timeframe, when did that change occur and from what to what?

40 **MS BURLAND:** I've got from 2007 we had 350 local titles that we published and we now publish something local 70 local titles a year. So that just shows you the amount - - -

MS CHESTER: What was it back in 1998 though?

MS BURLAND: I don't know 1998. We actually tried to find that out but we couldn't get that.

5 **MS CHESTER:** I think that's probably the useful reference point for us because doing it nine or 10 years after that to then three years after, there's a lot of factors.

10 **MS BURLAND:** Yes. I can tell you the workforce has dramatically decreased since then, the size of the offices that we've had have dramatically decreased after that. Even you when you look at that they lost Red Group, we lost Red Group. Everything has been the same in both markets and it's interesting to see which market has survived and stayed strong.

15 **MS CHESTER:** Yes.

MR COPPEL: You mentioned also that prices for books dropped in Australia more than they did in New Zealand.

20 **MS BURLAND:** Yes.

MR COPPEL: Is that also true for Penguin Random House books sold in New Zealand, that there was a difference between the Australian market and the New Zealand market?

25 **MS BURLAND:** Yes.

MR COPPEL: Could you then talk us through how you determine the recommended retail price of a book?

30 **MS BURLAND:** We've got financial modelling. We have to work out margins that we need to keep the doors open and exist. So we do a lot of financial modelling on that but we also have to make sure we look at our competitors and what the competitors are doing. That's our local
35 competitors but also our international, the Amazons and all that. So we go through a big process of looking at what the price is internationally versus what the prices are in the local market. But more so now, we have to look at what's being charged internationally. We can work that out. With New Zealand, the economies of scale just aren't there for them with the pricing.
40 So we have to look at the pricing that's out in the marketplace as well.

MS LEWIS: Combine with that a removal of a very limited territorial copyright, then it just reduces the investment certainty again.

5 **MS BURLAND:** Yes, because we have to pay bills. We have to keep things open, and this is why, as I said before, international books do actually cover some of our local investment, and so that's a big factor as well. We do very well with our international books and then we have to make sure because of the risk, all the risk we take in the local books, and to keep the local sector vibrant, we do cover some of our expense there as well.

10 **MR COPPEL:** So if in an international price, in a sense you're saying that there's sort of less market power in New Zealand than there is in Australia because of the smaller size of the market, maybe the cost of a direct import is higher than it would be for someone purchasing a direct import online book in Australia. So your price to market essentially is what you're saying?

15 **MS LEWIS:** That's one factor.

MS BURLAND: Yes, one factor. We've got other factors.

20 **MR COPPEL:** Have those factors changed over time?

MS BURLAND: Yes. Now that consumers can get books from Amazon so quickly, we have had to change the factors, very much so, and just our cost bases as well.

25 **MR COPPEL:** In your submission you give evidence on the price of books in Australia and other international markets where I think you've taken a list of 150 books. Is that data something that you can share with us?

30 **MS BURLAND:** Yes, did we not?

MR COPPEL: I think we've got the results but is it possible to share the actual titles that you've used, how you've determined those titles.

35 **MS BURLAND:** We used our bestseller list there.

MS LEWIS: We can provide that.

40 **MR COPPEL:** Yes, thank you.

MS CHESTER: Okay. Thank you very much. I think that covers the questions that we have for you this afternoon.

45 **MS BURLAND:** Thank you.

5 **MS CHESTER:** Thanks, Julie. Thanks, Briony. I'd like to call our next participant, Richard Hamer, from the Law Council of Australia. Welcome, Richard, and thank you very much for the initial and post draft report submissions that we've received from you. We've also met with some of your other colleagues earlier in the public hearings.

MR HAMER: Yes, I understand that.

10 **MS CHESTER:** If you could just state your name, which organisation you represent, for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks. Imagine I've got a debating bell and I'm going to ring it at five minutes, if you wouldn't mind.

15 **MR HAMER:** Sure. My name is Richard Hamer. I'm representing the Law Council of Australia.

20 **MS CHESTER:** If you'd like to make your brief opening remarks. Thank you.

25 **MR HAMER:** Sure. We're in a slightly different position, I think, from a lot of the people who have come to this inquiry in that we support quite a number of your recommendations and we certainly support the approach that has been outlined of recommending policy changes based on a careful analysis of the actual evidence. I did want to make a couple of overarching comments really, rather than get into the detail, because we've I think filed some probably 80 pages of submissions dealing with a lot of detail. I'm happy to answer questions, if I can, but the overarching points where I think where I see some weakness in the report which could be I think dealt with.

35 The first is that a lot of the underlying analysis is directed to whether intellectual property rights result in innovation and so the assessment is to what extent has the existing intellectual property right caused innovation to occur. I'll explain why we can say something about this as lawyers in a minute, but it seems to us that there is a fundamental problem with that. It's a bit like saying a property in land is conferred in order to cause people to create land. If you do a study into that you'll find that actually
40 very occasionally people reclaim some land but basically land is not created because there's property rights in land; rather, the property right in land is primarily conferred in order to enable people to build on the land and can carry out transactions with it.

Similarly in the case of intellectual property, our experience is that it is all about the - it's partly about certainly development of intellectual property in the first place. A large part of it, 99 per cent, is about the development and commercialisation of that intellectual property. So as
5 lawyers we see every day people engaging in financing transactions starting from angel investors through private equity, through venture capitalists, stock exchange floats, where a primary question that is always asked is what is the intellectual property, what is its term, what is its validity. That's something that's essential to investors and without that
10 intellectual property, the idea, the innovation, never goes anywhere. It seems to be a critical matter that the report should consider not only is intellectual property causing the innovation to be made but what is the impact of intellectual property on its development and marketing. That seems to be a key issue.

15
We were conscious that there were very limited studies on this and some of the studies just didn't seem to demonstrate what the report concludes from them. For example, there was reports that in many industries people were not particularly concerned about intellectual
20 property and that was taken as supporting the view that intellectual property was not important to innovation in those industries. It's not really a logical conclusion because there are many industries where people are making commodities; they're making generic products where they're not concerned with innovation. They're concerned obviously to cut costs
25 and IP is to them a nuisance. If you're looking at the people who are innovating, the IP is of great importance to them, or that's been our experience and observation.

I have some other comments but in light of the timing I'll reduce
30 them. The second overarching matter was I think also important and that is that in the report there are some general recommendations and there are some quite detailed recommendations. There's detailed recommendations about what the obviousness test should be in patent law going down to the legislative drafting. It does seem to us that that's not an appropriate way
35 to proceed, that whether you apply an administrative test that is used in the European Union and say we should make that part of Australian legislation, is something which I think is not an appropriate way for the Productivity Commission to proceed, rather it would be appropriate to set out some principles that this should be evaluated and have it evaluated by
40 a body which can look at it in the context of the overall legislative scheme. So it seemed to us that that was a sort of fundamental issue that closed through quite a number of the recommendations and we've dealt with that in the report. They were the two overarching issues I wanted to talk about but in that context I'm happy to talk about any of the pages of
45 submissions that we're putting in if I can.

MS CHESTER: Thanks very much, Richard. I do appreciate you keeping it brief. We have read your submissions so we do have some more detailed questions that we'll get to.

5

MR HAMER: Sure.

MS CHESTER: Maybe if I just begin by commenting on and asking you a few questions about your opening remarks. We were given broad terms of reference to look at all the intellectual property arrangements and we were asked to say are they getting the balancing act right in terms of the needs of creators of inventions or creative ideas from authors through to plant breeders.

15 We did look at sort of assembling quite an extensive evidence base and I think the surveys that you refer to were just one small component part of that. In terms of trying to get a sense of if innovation is the common thread across intellectual property arrangements, be it creative or scientific or technical, what role do the intellectual property arrangements play amongst the many factors that can influence innovation. So it was us just trying to get a sense of if government's looking at the intellectual property arrangements as purely the only lever of encouraging innovation to occur, then what role might it play in different sectors. Indeed that's why we have different rights within the current intellectual property arrangements. Investing in a patent is very different to investing in a new breed of plant and thus we have different tailored rights. So it was just for us to get that sort of sense of how important it was within those different sectors, but as I said, that was just one sort of component part.

30 On your other comment around our more prescriptive recommendations, I guess looking at the patent system and whether or not the current settings as assessed against our sort of framework were getting that balance right and based on the evidence base that we received and some that we established ourselves and also in terms of trying to assess the quality of patents, it became clear that we did have a large rump of low-quality patents. So we then were mindful of looking at where's the threshold for patentability in Australia today. These are the other jurisdictions. Have we fallen below that? So we were mindful that the government had already done the raising of the bar, which had improved things.

45 But then when we looked internationally and we looked at the EU, it seemed that there was a gap around the obviousness test. So that's why we did make such a prescriptive recommendation there which the Commission does in many of its inquiry reports when we have it in mind

that we want to get to a certain threshold. So, I guess, if we go to that issue in itself and certainly in your draft report and post-draft report, you seem to sense that there isn't any need to adjust the threshold to align it to what occurs in Europe.

5

MR HAMER: I think that's correct. We don't see any need to change it because, in fact, the principles are very similar. There are differences, I think, in detail as to precisely which art is considered and so on. But the idea that you take a single piece of prior art and you add to it the common
10 general knowledge and then you consider whether that's obvious to the skilled addressee are basically the same. To the extent that the detail of the administrative test, which is not the legislative test in Europe but the administrative test used by the patent office right at the moment in Europe, should be written into our legislation seems to be a concept
15 fraught with difficulty and doesn't seem to be helpful.

Well, I'd need to give you some, I suppose, historical context too. I hesitate to sound like the previous people. But in the 1990s there was a period when the Commissioner was required to grant patents unless they
20 were clearly invalid. So a lot of patents were granted in the 1990s which would not be granted today because the rules - that rule was reversed and then later we had the raising the bar provisions which further increased the level.

25 So it's not at all clear to me, as a general principle, that the issue of lots of invalid patents is still true today as a general issue. Then dealing with the specific issue of obviousness, it's not at all clear that our law, which states the test in very similar terms now after raising the bar to Europe, needs to be amended to align us in general with Europe.

30

Certainly it's not my experience that you see patents that are found to be valid in Europe, sorry, valid in Australia and not valid in Europe. In fact, I've just had some recent experiences with precisely the opposite, i.e. where the patent is valid in Europe and not in Australia. So, I think this
35 concept that Australia has a much lower standard, or even significantly lower standard of patentability than Europe is no longer right.

MS CHESTER: Richard, are you familiar with the work of Professor Andrew Christie in the patents area?
40

MR HAMER: Yes, I know him. I used to work for him.

MS CHESTER: There you go. Obviously well trained. So Andrew has been very actively involved in submissions and roundtables and was here
45 at our public hearings yesterday.

MR HAMER: Yes.

5 **MS CHESTER:** So he's just one example of evidence that we've
received from other people expert in the area that suggest that there is a
gap between the Australian threshold and the European threshold,
regardless of whether it's via legislation or administrative decision. But
they've done some analysis around the scope of the patent that's approved
10 in Australia versus other jurisdictions, because the scope is very important
in terms of effectively the underlying quality of the patent itself.

MR HAMER: Yes.

15 **MS CHESTER:** That would suggest that Australia is much broader than
Europe and the US in terms of how our patent examiners apply the
threshold.

20 **MR HAMER:** Well, so we were previously talking, I understood, about
the inventiveness threshold. You're now talking about scope of the patent
and that - - -

MR COPPEL: It's the breadth of the claims.

25 **MR HAMER:** The breadth of the claim, and that - - -

MR COPPEL: So an indicator of quality of the - - -

MS CHESTER: Yes.

30 **MR HAMER:** The breadth of the claim, and that is the issue that was
very specifically dealt with. It was, I think, fairly an issue, and it was
specifically intended to be and, I think, has been dealt with as far as I'm
aware, and as we've pointed out the raising the bar amendments have not
had time to go through. But those amendments were very specifically
35 directed to the breadth of the claim and ensuring that the claim was based
on, and no wider than, the disclosure that was conferred. So I haven't
looked at what Andrew said about that, but I – to the extent that we're
talking about that issue, those provisions are very closely aligned now, I
believe, to the European provision.

40 **MS CHESTER:** I think the area where we felt that there was still a
disparity is that even with the raising of the bar, we can still grant
inventions of patent here when the innovator is led directly as a matter of
course which is disparate to what's required in Europe, as we understand
45 it.

5 **MR HAMER:** The specific wording is different, although the wording of the legislation, remember, is not different really at all. So there is a difference in the way this is applied to some extent. But I'm not sure to what extent that makes the formulation of words that people use actually makes a difference in terms of outcomes. I've seen no evidence of substantial difference in outcomes.

10 **MS CHESTER:** Okay. Is there an evidence base that you can point to there, because we've – I guess, it's the wonderful world of - - -

15 **MR HAMER:** I can talk to my experience, but I can see if we can find some evidence. But I can certainly point you to patents that have been granted in Europe and are invalid in Australia, for example.

MS CHESTER: Yes.

MR HAMER: So it may be possible - - -

20 **MS CHESTER:** Because we're getting evidence from academics which is conflicting with that saying that there is a disparate threshold issue that still remains even after raising the bar, and some of the issues that we're trying to deal with in our report in terms of any potential, sort of, misuse of the patent system, we felt that the most direct way of dealing with that was to make sure that that inventive threshold was as robust as possible.

MR HAMER: Yes, look I can certainly see if I can – if there's some way of getting together that data for you, if that's helpful.

30 **MS CHESTER:** Okay.

MR HAMER: But in terms of actual – which patents are granted where, I think you'll find it's the grant of patents is very similar in Europe and Australia.

35 **MS CHESTER:** Okay. The other area that's caused some consternation and conflicting views amongst the legal practitioners, justices and legal academics, is around the relative merits of an objects clause. Indeed, this was a matter that was subject to some consultation by IP Australia a couple of years ago. Now, I think maybe the Law Council's position on this has evolved over time. It didn't seem, previously, that the Law Council took umbrage to the idea a few years ago by IP Australia of having an objects clause in the Patents Act, but now it's causing some consternation. So it'd be good if you could just elaborate on that.

45

5 **MR HAMER:** I'm not sure about the – I can't recall the position in relation to the IP Australia provision – the IP Australia proposal. But it's pretty clearly been, in my recollection, the Law Council's view that an objects clause is not a good idea. And that's simply because it simply causes confusion and disputes about the construction of the legislation when you've effectively got one piece of legislation sitting over another. So instead of carrying out the exercise of construing a clause, you're having to look at what some – how some other clause impacts on that. That's one element which is just a general principle. I think I'm right in saying that's a general Law Council view, not just an intellectual property one.

15 **MS CHESTER:** Okay. So that's across the board for any objects clause in legislation?

MR HAMER: I believe that's the case. I'd better check. I'll confirm that for you to make sure I'm not misstating it.

20 **MS CHESTER:** Okay. That'd be good because - - -

MR HAMER: But, I think more importantly, the sorts of things that were proposed to be put into the objects clause, such as social benefit, would be things that would be very difficult for any patents office, but even a Court, to determine and would be things that are liable to change. Something as a social benefit one day may not have a social benefit later and vice versa. So they seem to be principles that are very awkward to apply in any case and certainly a long way from clear, simple, straightforward provision is understandable, which is, in our view, what legislation should be where possible.

30 **MS CHESTER:** Yes. We also appreciate there's a difference between something that's in an explanatory memorandum accompanying a piece of legislation through the Senate versus an objects clause in legislation.

35 **MR HAMER:** Yes.

MS CHESTER: But, I guess, when we hear from the Office of Parliamentary Counsel and from some of our Federal Court Justices that, at a high level, explaining the underlying purpose of the legislation, which is what we were trying to capture with the idea of an objects clause that that actually does help them over time in their interpretation of the legislation, which is what we're, sort of, really trying to get to, given that we want that legislation to be as adaptive as possible in terms of its interpretation. The other area that would be good to touch on is pharmaceutical patents, is that an area that you're able to talk about?

MR HAMER: Sure.

5 **MS CHESTER:** Your submission notices that if pay for delay were
monitored guidelines should be published and, indeed, that's something
that we've countenanced in our report that we felt that if the ACCC were
to play a similar role to its US counterpart in monitoring those
agreements, that there would then be guidelines around that. Does the
10 Law Council have a view about what, sort of, issues those guidelines
should cover? Is this an area where we should be given guidance on the
guidelines to the ACCC in our final report?

15 **MR HAMER:** I suppose I should say at the outset that, to the best of my
knowledge, pay for delays is not something that happens significantly in
Australia, but there might be other people with other information that, so –
because of concerns based on existing legislation, apart from anything
else. I'm sorry, having said that, I've now forgotten your questions.

20 **MS CHESTER:** So, if we were to give guidance – so we've said that it's
very difficult to get an evidence base around pay for delay because with
that, sort of, behaviour, unless the ACCC has access to those agreements,
we're not going to be able to identify it. So one of the things we've tried
to do is work out is there anything structural different about the Australian
25 market for pharmaceutical products disparate to the US and other
jurisdictions where there is evidence of pay for delay. So we do say well,
let's perhaps let the ACCC have a role for five years, that those
agreements be lodged with them, and that way they can be monitored so
therefore if the ACCC does detect any pay for delay arrangements within
those agreements then it can be subject to the competition laws. What,
30 sort of, key elements would you see in the guidance that would
accompany the ACCC having that new role from the Law Council's
perspective? Are there, sort of, a handful of things that you really want to
make sure are covered in that guidance?

35 **MR HAMER:** No. I'd like to take that on notice.

MS CHESTER: Okay.

40 **MR HAMER:** It's not something I've given thought to. No. We'd
considered that.

MS CHESTER: While we're on competition law - - -

45 **MR HAMER:** Sorry, you did raise a point which I, perhaps, can answer.
You said, were there differences between Australia and the US? I think

there is because of the US ANDA Scheme. There is a single generic competitor that comes in and there is a benefit, in a sense, in paying them off by a pay for delay settlement. In Australia, there's no similar scheme so you have potentially, usually, multiple generic companies coming in, so the idea of paying them all off is not – doesn't make the same sense as in the US. So there is a fundamental reason that's not associated with the competition law at all why pay for delay usually doesn't make sense in Australia.

MS CHESTER: Okay. That's the sort of issue that we're trying to get our head around as to whether there is anything that's structural different. So that's helpful, thank you. The other competition policy matter that we raise in our draft report, and it follows on from the Harper Competition Policy Review, is looking at the section 51(3) repealing that where licensing arrangements are not subject to the competition law under that current provision. I guess, the submissions and the evidence today haven't really given clear examples of licensing transactions that might be prohibited due to competition law.

MR HAMER: I'm not sure I can talk about them now, but I can probably send such examples to you. I think we did look at putting some together for the purposes of the submission. I think that would - - -

MS CHESTER: That would be helpful because this is an area where we're, sort of, lacking in an evidence base which then just takes us to principles, and if we would go to principles there would be no reason why not to repeal section 51(3).

MR HAMER: Sure. Sure. Essentially, the categories would be the categories that you can see in, for example, the US block – sorry, the EU block exemptions. I don't know whether the EU still exists, but it's present - - -

MS CHESTER: We're near the latest tally.

MR HAMER: But the EU block exemptions which give examples of the sorts of licence provisions which they were concerned would be caught by the competition law, but for the exemptions and, like you said, putting in place those exemptions.

MS CHESTER: Yes. I think, the government has already addressed the issue in its response to Harper in terms of some of the things that might be inadvertently captured if you repeal section 51(3) so – and that was what was underpinning the original hesitation of the Henry Ergas Report in this

area. So if those issues have been resolved, the repeal of section 51(3), we still can't identify whether there'd be any inadvertent - - -

MR HAMER: Capture.

MS CHESTER: Yes.

MR HAMER: If that would be useful, we could put together a list of those things which are certainly matters that have concerned members of the audience Law Council.

MS CHESTER: That'd be great. It was wonderful to see in your submissions that you did talk about governance in institutional settings, because it is what we think could be a very enduring element of our report, getting the governance settings right for policy around intellectual property arrangements. You cite the example of the UK where there's been a consolidation of the responsibility for IP policy. We note in our report, indeed we spent about half a chapter on it, that we do have disparate allocation of responsibility across government departments for IP policy with the Department of Communications with copyright, Department of Industry, Innovation and Science with, sort of, the industrial intellectual property arrangements, and then you have IP Australia which is the rights administrator and, for all intents and purposes, probably the major heavyweight in policy advice on IP matters.

MR HAMER: Yes.

MS CHESTER: It'd be good if you could just elaborate a little bit more on, firstly the issue of the merits of consolidation of IP policy advice, and then the other issue around what role would be appropriate from a governance perspective of the IP rights administrator in the policy advice.

MR HAMER: Yes, okay. We gave a number of examples, but there are many where you have overlapping intellectual property rights. So I know one of the issues I wasn't intending to talk about unless you wished to, on software patents, and I know other people have talked on that – about that issue, for example. But that's an example where you have copyright in code and you have patent rights co-existing and you may also, in association with the same equipment, have circuit layouts and, in other words, you – a whole lot of different intellectual property rights are combined in relation to the one product.

Similarly, trademarks and copyright are often associated. There's trade mark and copyright in the labelling or in the logos, and so on, or there can be trade marks on goods that are protected by other rights. So

it's very common and indeed the norm that there are multiple intellectual property rights covering any particular product. So in that context it's a bit bizarre that different aspects of the intellectual property should be dealt with by different departments.

5

Certainly the feedback that we've had – I'm not sure that I've got anything I can give you in terms of hard documentation, but the anecdotal feedback we've had from the UK is that the consolidation into a single department is – has been beneficial in terms of ensuring cooperation and coordination between the various intellectual property rights applying to any particular product.

As far as the role of IP Australia, I think – I do think there is perhaps an issue which, I think your – well, I do think there is an issue with the body that is administering the patent and trade mark system also being the body that's deciding policy. It does seem to me that there is some sense in having a ministry that is responsible for the policy and for the non-regulatory procedural intellectual property, like copyright, overseeing IP Australia, which would then have a responsibility for the actual administration of the system and, no doubt, would have involvement in the policy decisions but wouldn't be the policy decision maker. I would see that as being an appropriate structure and it makes sense.

MR COPPEL: If I'm not mistaken, the UK model, both the administration and the policy, are in the one agency. I think there may be a separation between – well, clearly there is a separation between those that administer the applications and those that work in the policy area.

MR HAMER: Yes.

30

MR COPPEL: If there is a separation within a single agency, do you think that is sufficient to overcome some of the potential tensions between a regulatory and a policy maker in the one institution?

MR HAMER: Yes, I think that would be an acceptable, alternative way of achieving of what I think I'm saying. I think that'd be acceptable. I think I'd prefer the structure where the regulator was an independent organisation.

MR COPPEL: Thank you for your post-draft submission because it's extremely comprehensive. It covers, virtually, every aspect of the draft report. One area that's come up in the hearings relates to designs and it's particularly an issue with respect to registered designs for furniture. It has been suggested that a grace period would be one mechanism that could help, particularly furniture design, protect their intellectual property. I

45

note in your draft-report submission that you think the notion of a grace period is not one that you would endorse. If you could then elaborate on the thinking behind that position?

5 **MR HAMER:** I'd probably prefer to take that on notice, actually.

MR COPPEL: Okay.

10 **MR HAMER:** That was part of the report that I didn't draft, and I would be – I have my own views about that, but it might be better to provide that separately.

MR COPPEL: Sure. Okay.

15 **MR HAMER:** So I'll make a note on that.

20 **MS CHESTER:** Related to that is the issue of fees for patents and design rights. In that sense, and it could reflect multiple authors as well of your submission, there was a suggestion that where we landed in our draft report about calibrating the fee renewals to – as a bit of an incentive to make sure that people are taking patent renewals out for the right reasons, good commercial reasons as opposed to, sort of, strategic misuse reasons. Much of your submission argued against that, but then, I think, in the design area there was a suggestion that the renewal fee at the 10 year stage
25 should be increased with a view to providing an incentive to renew for only those registrations having sufficient economic value.

MR HAMER: Yes.

30 **MS CHESTER:** So we were just a little confused as to whether there was one in-principle position on calibrating fees for the right type of renewal conduct or not?

35 **MR HAMER:** I think part of the reason for the difference in approach is that design – you're looking at very different fees for designs and patents. So in patents the sort of renewal fees that were being proposed would've been very substantial for small to medium business. I don't think they would've achieved the result you're talking about because if someone was filing or maintaining patents strategically it's usually because there's a lot
40 at stake and the costs, however high you make them, are not going to deter them.

45 **MS CHESTER:** Okay. So it was less an in-principle position that your anti-calibrating fees against strategic behaviour - - -

MR HAMER: Well, they are calibrated already but - - -

MS CHESTER: Yes.

5 **MR HAMER:** Yes. But it's just making - - -

MS CHESTER: As opposed to the starting point for designs was so much lower than the starting points for others?

10 **MR HAMER:** Yes.

MS CHESTER: Okay.

15 **MR HAMER:** Exactly. Yes.

MS CHESTER: Okay. All right. No, that helps. Anything else?

MR COPPEL: Yes, that's fine.

20 **MS CHESTER:** No. Richard, thank you very much. That covers all the questions that we wanted to – and again thank you very much for such a comprehensive post-draft report submission.

MR HAMER: That's all right. I've got some homework, apparently.

25 **MR COPPEL:** Yes.

MS CHESTER: There's a little bit of homework. We appreciate that.

30 **MR HAMER:** Yes. Okay.

MS CHESTER: Thank you. I'd like to welcome our next participant, Alex Orange from Qualcomm Incorporated and I think you're joined with somebody as well, but we'll find out who that is when you join us up at
35 the table. Welcome, gentlemen, and thank you very much for joining us this afternoon, and thank you also for your post-draft report submission to us. Perhaps if, once you're comfortable, if you wouldn't mind each just stating your name, the organisation that you represent, for the purposes of the transcript recording. Then if you'd like to just make some brief
40 opening remarks. I'm not sure if you heard me earlier, I have an imaginary debating bell which will ring at five minutes. Okay.

MR ORANGE: Okay, thank you. Thank you, Commissioners, and thanks for allowing us to come and be present at this hearing. My name is
45 Alex Orange. I'm Director of Government Affairs for South East Asia

and the Pacific for Qualcomm International. This is my colleague, Mr Phillip Wadsworth. Phil has over 40 years of experience in patents. He's worked with companies such as Motorola, IBM, and Qualcomm in the US. For Qualcomm he was the chief patent counsel and for 10 years
5 headed the global patent policy at Qualcomm. Myself, I've been with Qualcomm for the last seven and a-half years and I bring to the table almost 20 years of experience in international best practice around telecommunications regulation. I guess, it's indicative of the importance that we hold with respect to your draft report and the consultation process
10 and the hearing, in that I've travelled from Hong Kong to be here. My colleague, Phil, he's travelled from New York to be here. We came precisely for this hearing.

MS CHESTER: Okay, the debating bell's gone under the table. You can
15 take a bit longer.

MR ORANGE: Thanks very much. I guess, just one more note before I turn over to Phil for our introductory remarks, is that Qualcomm is a technology development company. It's core technologies are central to
20 the ideas of - or to the delivery of 3G, 4G and 5G communications. It's fair to say that without strong intellectual property rights regimes that those core technologies could never be commercialised and those technology ecosystems could never be developed. So with that I'll turn over to you, Phil.

MR WADSWORTH: Yes, yes. Thank you very much for inviting us today. If I may start with a prepared statement, hopefully, give you some more insight to our perspective and where we're coming from.

30 Our fundamental business objective is to be the leading technology enabler for wireless communication devices around the world. To achieve this objective, our business model has two primary components, namely the development of leading edge chip sets and supporting software that provide the core functionality or brains of the mobile telecommunications
35 devices on the market today. As noted in our submission, we are the largest (indistinct) semi-conductor developer in the world. The other key component of our business model is that we openly licence our patent portfolio to any entity that wishes to manufacture mobile devices for end-users anywhere in the world.

40 We refer to our business model as a virtuous innovation cycle which includes risky and expensive R & D to continue to stay on the leading edge of technology development, the integration of the inventive and innovation fruits of our R & D efforts into our chip sets and software the
45 sale of which generates revenue for further R & D, and protecting

inventions resulting from those same R & D efforts by obtaining patents in countries around the world, and licensing those patents to generate royalty revenue. We use a significant amount of those sources of revenue, approximately 5 billion every year or about 20 per cent of our total revenue, to invest in ongoing R & D to maintain our competitive edge in the market place.

However not all of our extensive and expensive R & D is the subject of a patent, and not all of our patents become the basis of a product or a licence because it's not always possible, even in a very sophisticated R & D environment to make the correct calls every time. However, the risk associated with billions of dollars invested in R & D over more than 30 years now at Qualcomm are mitigated somewhat by the existence of robust and - patent systems with certainty in most countries of the world which ultimately enable a reasonable return on those investments.

A robust patent system creates a check and balance for brought unsupported claims, ensures that enabling knowledge is made available to all, and ensures that even a granted patent is challengeable. As can be seen, patents form – form a critical part of our business model. So, as sophisticated and reasonable users of the global patent system, we are keenly interested in sharing our expertise and knowledge relating to developments and patent law in all jurisdictions around the world.

With regard to Australia, Qualcomm currently has 795 active filings, which include granted patents, allowed and pending applications, and new inventions instructed to be filed in Australia. With this in mind, and primary focus on the points raised in our submission, we look forward to a fruitful discussion with the Commission members this afternoon. Thank you again for inviting us to attend this and we look forward to your questions, thank you.

MS CHESTER: Great. Well, thank you very much, Alex and Phil. We do appreciate how far you've travelled. I didn't need to worry about the debating bell because you kept it pretty concise anyway.

MR WADSWORTH: Yes.

MS CHESTER: Thank you for your post-draft report submission because it did give us a bit of an idea in terms of the issues as they confront your business model globally. You've already touched on what forms of IP you use within your business model to protect your intellectual property.

5 If we go to one area first, perhaps, business methods and software
patents which was, I think, one of the key points of contention in your
post-draft report submission, it would be good for us to get a sense firstly
of – for software, what role of different IP protections play? So we know
copyright has a role over coding, patents have a role over the software and
the business methods involved around it. We also know trade secrets play
a role. We also know where it's the shorter commercial life, first
advantage mover plays a role. So it'd be good to get a sense of across the
business model of Qualcomm, the respective roles of those different forms
10 of IP protection.

MR WADSWORTH: Sure. If I may premise that a little bit on our view
on the section on business method and patents, which we hope could be
addressed maybe going forward in the future. There seems to be a
15 conflation of the discussion of business method and all software, and then
converging on a conclusion that goes across both those areas of
technologies, if you would.

20 We think that there should be a separate discussion between business
method and even, maybe, some more granularity in the discussion of
software patents because many jurisdictions in the world make a
distinction between non-technical software patents and technical software
patents. We think that, for the efficiency of time, your time and
development of the report, I think the business method issue is pretty
25 much moot because across the world now it's almost impossible to get a
patent on a business method. In the US, with the Alice case, which I think
that former speaker mentioned, I doubt that we'll ever be able to get a
business method case again.

30 So on the patent side, there's been a phenomenon over the – since
Qualcomm started its business way back in (indistinct) because our core
technology, which is still used in 3G technology, was originally
implemented fully in hardware semi-conductor devices and we had no
trouble getting patents on that functionality. That's a key thing, I think, to
35 keep in your back of mind what we're getting protection for are inventions
related to the functionality of the product, no matter how it's
implemented.

40 What's happened over the last 30 years is that now because of the
efficiency of actually distributing new functionality, correcting technical
errors in the functionality and things like that, software has been the
development and implementation vehicle of choice, so to speak. So what
we had 30 years ago in our core technology implemented hardware is now
fully implement 100 per cent in software, but it's the same exact
45 functionality.

5 So we advise caution in trying to jump to a conclusion that there's a big difference between hardware because there isn't in our case. Key to that is that the R & D expenditures that are made are developing new functionality that keeps our product competitive in the marketplace, and then afterwards it's decided whether to implement that - those new inventions in hardware and software and, as I said, most of the time it's software now.

10 So it seems a little illogical to us to come to a conclusion that if you implement otherwise patentable inventions in software it's not patentable but if you implement in hardware it is, because that doesn't really reflect the commercial viability or commercial realities today. So we think if it was like ATWAY(?), that would be true and the paper does allude to that a little bit by recognising that software pervades many, many different sectors of the economy nowadays.

20 I think the conclusion is very limited in that it assumes that all there is to developing software is what the programmers do they sit down and write the code. But like I said the R & D expenditures are really up front in developing the new technology inventions. Just for example, our original products were about 11 million lines of code in 2009 and now each product has about 25 million lines of code in it. So you can see that's doubled over just a few years and we shift from 330 million lines of code total in 2009, now it's 3.3 billion lines of code. So software is really a critical form of getting our technology into the marketplace. So we really that's an important thing to recognise.

30 That's why, I think, the first line of protection that we always look to is patents because again it protects functionality and so anyone that uses our inventions, no matter how they implement it, would be infringing our patent. Whereas we do realign copyright because what our business model is that we sell chip sets to customers who manufacture the cell phones, for example. But along with that we also provide to them all these lines of code that they load into each chip that allow it to perform all the functionality that's included in the software. So there is a copyright component.

40 But copyright is very limited and around the world it's becoming more and more easy to avoid copyright infringers, just because of the way the copyright's law has evolved with regard to software. So number one, it saw the copyright law only covers really literal infringement of the text which is rendered either in the source code, which is human readable form. So someone copies verbatim program source code, then you might be able to make a case of infringement. The law's evolved so much that

there's a granular review of each module and the software to see, well maybe this was already in the public domain, or maybe this is a well-known algorithm that's being implemented. So there's a lot of ways for alleged infringers to get around it. But nonetheless, it's still valuable, in some cases if there is an exact literal infringement.

Then, of course, because we licence a lot of our software, trade secret is very important to us. But trade secret is quite dubious, I think, because you're relying on the integrity of your licensee that you provide the code to that they're going to agree to keep that code in confidence. Difficult to police. In some areas of the world, not Australia necessarily, there's a lot of concern about the integrity of some of the new players in the field, so. Yes?

MR COPPEL: I was just going to ask you, because you mentioned chip sets, does Qualcomm also rely on circuit layout rights as a form of intellectual property protection?

MR WADSWORTH: No, we don't rely on that. I was involved with that a long time ago when I worked for IBM when the law was first passed in the United States and because it was new we just, to make sure we protected ourselves, we did what we could to try to protect our chips in IBM.

But, I think, over time for our business model it's – you have to weigh the cost benefit, I think, and it's pretty costly to – the materials and provide them to seek the protection, and then there's an issue of confidentiality too. I mean, when you do file you're allowed to black out some of the circuits to try to prevent total disclosure. But in the long run, we decided not to do that.

The product cycles in that regard do play into that analysis because our chip designs, our product designs evolve pretty quickly over time, so the circuit layouts will change quite frequently. So that's kind of a – it was a business decision not to seek protection there. Generally, my understanding is that it hasn't been used a lot in many jurisdictions, even though the rest of the world kind of followed the US after the US implemented its Act. So it is available in many parts of the world as well.

MR COPPEL: Our draft report has an information request on circuit layout rights where we've asked inquiry participants if they have any views on what would be the consequences of repealing the Australian Circuit Layout Rights Act and it's partly based on the same point that you've made that very few people are actually making use of circuit

layout rights as a form of protection, apart from that period at the very beginning when they were introduced.

5 **MR WADSWORTH:** Yes. I think that bears out in the US. I'm only aware of maybe two or three law suits where the Act was actually used, so.

10 **MR COPPEL:** Would you have any comments vis-à-vis that information request? Is that something that you could talk on? Do you think if - - -

MR WADSWORTH: In a follow up sort of thing?

15 **MR COPPEL:** If circuit layout rights were to be repealed in this context, it would be in the Australian jurisdiction, do you think it - - -

20 **MR WADSWORTH:** Yes. Well, I mean, another pragmatic fact, I guess, is that we don't have any semi-conductor chip manufacturers in Australia right now. So it probably wouldn't be too helpful. But at some point if there were and – because of the way that our products evolved so fast, I'm not sure that we would do that just – the administrative cost of keeping up with that and gathering all the materials and submitting them is pretty significant.

25 **MS CHESTER:** Phil and Alex, also underpinning some of evidence based narrative around computer software and patents was the commercial life of the underlying IP. We've had some sort of – and it is a very, sort of, diverse range of IP that we're talking about though.

30 **MR WADSWORTH:** Yes.

35 **MS CHESTER:** We do understand the difference between apps and something that could be quite enduring. But it would good from Qualcomm's experience across your intellectual property embedded in certain products what, sort of, is the average commercial lifespan?

40 **MR WADSWORTH:** Yes. Yes, I recall that aspect of the report. I think there was a conclusion that because product life cycles are only five years that that may bank for a shorter term for patents. But product life cycles are – no matter what the term is, don't resolve in an entirely original different product from the product that it replaces, and that's especially true in our case.

45 We embed in the technology that goes into 3G devices called CDMA and our original patents were granted way back in the 80s, some of the core ones that are really important to even have the technology work.

5 Today, that technology is still in our products, so the product life there was 30 years. So some of our core patents have already expired that would still cover that, so that – and some of the other ones that were filed in the 1990s, or 1996 even or a little bit afterwards are still in our products today. So I think it's important to consider that and recognise that the products are not discrete and distinct in themselves as far as patentable functionality.

10 So we think that the 20 year term is reasonable, especially when you're looking at trying to obtain a reasonable return on your investment because, I suppose, if you shortened the term then that could have some unintended consequences of driving up royalties because now you're trying to recover R & D expense in a shorter amount of time. So we think it's important to keep the present 20 year term as well.

15 **MS CHESTER:** Yes. We weren't looking at altering that, given we've got international obligations with respect to term. But I guess the issue was, if we're looking at software as an eligible form for patents, then if commercial life has reduced across the broad range of software for patents, then the relevance of a patent is very different in terms of first mover advantage might be a more relevant commercial form of protection of that IP, i.e. you're in the market first and if it's only got a life of four or five years?

25 **MR WADSWORTH:** But again, I think to some extent, we need to talk about the copyrights separate from the patents because they're two distinct rights that protect two different things. As I said before, the copyright is of limited value because it only protects the literal code, whereas patents cover inventions and those inventions, no matter whether the code changes or not to implement those inventions, would still be covered by the patent. So that just looking at the aspect of the product life doesn't necessarily tie into how long the term of the patent should be because follow patents may still have those same inventions in them.

35 **MS CHESTER:** Okay.

MR WADSWORTH: I hope I answered your question.

40 **MS CHESTER:** No, no, you did. I guess it would be quite remiss of us not to, given how far you've come and your post-draft report submissions, to better understand if our draft recommendations were implemented, what impact or what – how would that change Qualcomm's business model and licensing approach in Australia?

MR WADSWORTH: Okay. I can talk about a few things, I think, that we briefly touched on, I think, in our submission and I think you discussed it with the previous speaker. I guess, the object clause, trying to look like we're trying to add another point of analysis for whether should be patentable by looking at social value or whatever, that's the way I read the report anyway.

But we think that would just add another level of ambiguity, subjectivity, and confusion to the process. I mean, it seems to me you could look to the US constitution as to what a – if you really want an object that's helpful and that's to ensure the progress of science and inventors will be given a limited period of exclusivity in return for disclosing their invention to the public. So the object is that continue the progress of science in return for that limited period of exclusivity and the sharing of the information, which allows people to build on it. Having said that, I don't think you necessarily need to have that written in the patent law. I think, to me, it's become axiomatic to all patent laws that that's a fundamental premise for a patent system and I think it's borne out to be true time and time again.

Patent fees, raising patent fees to discourage filing, again, seems to be antithetical to the object I stated anyway, and again, it may have unintended consequences. I think when we look at the economies around the world, especially the innovative aspects of economies that the main drivers of R & D and job growth are small and individual entities. I've been told and that's true in Australia too that a large portion of the economy is driven by small entities. So they're already strapped with limited budgets to begin with. So, I think, that raising those types of fees may have the unintended consequence of stifling innovation and having maybe a negative impact on Australian R & D and job growth.

Normally the maintenance fees that are charged are factored into the equations, I think, of most patent offices of trying to recover costs, most of the patent offices having pretty rigorous economic modelling now. We had an analysis to try to make that come true. The maintenance fees at the end are really used, I think at the end of the day, to try to perhaps have the opposite effect that seems to be a question and import of making the upfront fees lower so that there can be more participants in the system to get the initial patent.

Then once it's granted, if it no longer has value - and I think that's a point to some extent, the existing patent system already is self-policing from the standpoint – with existing maintenance fees and post-grant fees because if the patent is not being used or not getting revenue or not allowing parties to maintain their exclusivity in the market place then

those fees are already high enough to discourage continuing to maintain them over time. So I guess I'd just advise caution in maybe raising fees to try to discourage participation in the patent system.

5 In that regard too, I think, we have heard a lot of rhetoric around the world that there's too many low value patents, but the data doesn't seem to totally substantiate that. I guess anyone that gets sued for a patent infringement is going to say, "Well, that's a low quality patent anyway". So - - -

10 **MS CHESTER:** So in our report we did have a go at trying to come up with some proxy measures to profile the quality of patents in Australia. It did suggest that we did have a large rump of low quality patents. I understand from some work by some academics in Europe it wasn't too far disparate from the analysis that they had done. I don't know, and I don't expect you to have read this, it's not a best-seller but it is a door stopper.

20 **MR WADSWORTH:** Yes.

25 **MS CHESTER:** I don't know if you had a chance to have a look at the methodology that we used there and whether or not you had any thoughts on its appropriateness, because it's very difficult to do and we used six or seven measures?

30 **MR WADSWORTH:** Yes. No, I didn't have a chance to get into that – some of the – but again perhaps one area where that's already being mitigated, and we discussed briefly, is the business method area because now most of those types of patents or patent applications are rejected for not meeting the patent law subject matter requirements. We have a lot of experience in the US patent office in the appeal process. Now all the business method patents are being found invalid.

35 I think that's where most of the litigation was by NPEs, which I know aren't really a problem in Australia, thank goodness, just because the NPE problem is somewhat unique to the US because of our litigation system, it's so expensive and costly that it kind of triggers some of this behaviour because it's cheaper to settle than it is to go through the litigation and the evidentiary process.

40 **MR COPPEL:** Does Qualcomm licence its technology in other countries?

MR WADSWORTH: Yes, global. We have licensees in all the industrial countries and all the emerging countries in the South East Asia region, China, India, Europe. So - - -

5 **MR COPPEL:** Yes. Are there difficulties in licensing your technology in other countries?

MR WADSWORTH: No.

10 **MR COPPEL:** Is this an area where there are obstacles?

MR WADSWORTH: No, not really. It really went back on our former protection in essence or our licence agreements are forms of protection in their own right too because they set forth the terms and conditions of use
15 of the patents and if those – any of those terms and conditions are violated then we can enforce the patent rights against the breacher of the contract. So it's not a traditional IP right but - - -

MR COPPEL: Is it prospective licensees that come to Qualcomm or do you proactively seek to licence the technology and hunt down potential good parties to reach an agreement with?
20

MR WADSWORTH: The short answer is both because, I think, our portfolio, the quality of our portfolio is recognised throughout the world and people realise it's necessary to get a licence with us to make mobile phones and introduce them into the market. Having said that there's companies out there that don't come to us first. So we have a program to try to identify new prospective licensees and approach them to take a licence. So we really haven't had any litigation in a long time where
25 we're the plaintiffs so - we've been more defendant. So because we have an open licensing policy we don't try to stop manufacturers from making products, but if they are without a licence then we'll approach them for a licence and we've been very successful in getting them to sign up agreements.
30

MS CHESTER: Yes. So, Phil, just getting back to my earlier question because I think you began with some commentary giving us further feedback on our draft report and some of the relative merits, but I'm still a little unclear about if our – the recommendations in our draft report were
35 adopted by the Australian Government, what impact would it have on Qualcomm's business model and licensing arrangements in Australia? I'm just trying to understand. Folk, like yourself, come and talk to us when we get something wrong, but also because it's going to have an impact on you.
40

45

5 **MR WADSWORTH:** Yes, okay. So we can talk about the patent fee issue again specifically in the context of Qualcomm. So I'll try to make it short too. Every corporate patent department has a budget, annual budget. So if the fees were raised that would just mean that we would probably file less patent applications in Australia. We already have a pretty rigorous program to try to identify the value of each individual invention and corresponding patents. So we would probably file those patents and we'd probably discontinue maintaining some of the lesser value ones in Australia. But I don't think we would totally stop our participation because Australia is, apparently, a large market for handsets and mobile phones. So we've got to make sure that we can protect - - -

15 **MS CHESTER:** And just so we get an idea of relative order of magnitude, given the size of Qualcomm, the number of patents that you have afoot in Australia at the moment, what's kind of the average annual cost of lodging and renewing for those patents in Australia?

20 **MR WADSWORTH:** I did not get that information but, I think, as I said we have 795 accumulative patents, pending patent applications and - - -

MS CHESTER: In Australia.

MR WADSWORTH: In Australia, yes.

25 **MS CHESTER:** Okay. I didn't know if that was a global.

MR WADSWORTH: No, no, that's just Australia.

30 **MS CHESTER:** No, I didn't think so.

MR ORANGE: But are you, sort of, referring to the total amount – total cost of - - -

35 **MS CHESTER:** Yes.

MR ORANGE: Both including fees and professional services to eventually have a patent granted? So you're talking about that total cost or just the - - -

40 **MS CHESTER:** No, no, just so if we changed the cost of renewal fees.

MR ORANGE: Okay, just fees.

45 **MS CHESTER:** I'm just trying to understand what's the denominator?

MR COPPEL: But if you have an idea of what the break up is between the attorney cost and the actual filing fees?

5 **MR WADSWORTH:** Since Australia is an English speaking country, thank goodness, the filing is only whatever the administrative fee is which I don't think is a – what, \$1500 or \$2000 for a patent. Then there's fees, of course, to prosecute the patent and they typically run between 3 and \$5000 depending on how much communication there is back and forth. Then the patent is finally granted. So I think Australia is like the US, like,
10 there's annuities, there's three years and seven years and 15 years or is that annual? It's annual so - - -

MR COPPEL: For sure. It is, but it also changes beyond the period, yes.

15 **MR WADSWORTH:** Yes, yes. So if they are raised, sure, it would have a fiscal impact but it's hard to quantify, I guess, the exact impact it would have on us because patents are so important to our licensing model.

20 **MS CHESTER:** The material impact of our draft recommendations to Qualcomm's business operations in Australia would be a response to potentially higher patent renewal fees and therefore you'd be doing some revisiting of the economic merits of those and some potential pruning of how many patents you lodge here and how many you renew?

25 **MR WADSWORTH:** Right, yes.

MS CHESTER: Okay. Are there are other material impacts on the Qualcomm business operations in Australia?

30 **MR WADSWORTH:** I think you addressed the inventive step pretty well with the earlier speaker and so, as long as inventive step is similar to international jurisdictions and somewhat harmonised, again that has a positive fiscal impact because as was said once we get a patent granted in the US or Europe then it's easy to just conform the final claims of those
35 particular applications with all the other jurisdictions. If the tests are similar then that should really limit the amount of cost in getting the patent granted in those other jurisdictions.

40 **MS CHESTER:** Yes. Just purely from a commercial perspective and given you are lodging patents globally, you would get a birds eye view sense of where the threshold of patentability is in reality in different jurisdictions. What's your pecking order in terms of who's the toughest threshold to clear, both in terms of you're seeing it holistically the legislation and also how the patent examiner comes to a landing?
45

5 **MR WADSWORTH:** Unfortunately, I think I agree with the previous speaker, if I understood him correctly, that it's probably Europe because they have a similar inventive step test, but the way the administer it and apply it is much more timely and very regimented, I guess, so that results in more process time and more attorney's fees sometimes to overcome it. But - - -

10 **MS CHESTER:** This is the EPO process because we actually went and met with them in Munich.

MR WADSWORTH: Yes, the EPO and some of the individual countries as well do that, so.

15 **MS CHESTER:** Okay. Well, Phil and Alex, that covers all the questions we were hoping to run through with you this afternoon. Is there anything else that you wanted to say that you didn't get a chance to cover in your opening remarks in our Q & A session?

20 **MR WADSWORTH:** Yes, just if I may because software inventions are really important to us and I know there was some comments, I think, that were derived from concerns from the open source community in the report. I don't think that at the end open source is a panacea for all software development because again we spend a lot of R & D money on developing proprietary functionality that we're not willing to share with our competitors so to speak. So for that type of R & D investment open source software just isn't a good business model.

25
30 But having said that, there's definitely a place for open source software. So we do use open source software solutions where it doesn't necessarily help to differentiate our key technology and allows us to stay competitive in the market place. You're probably familiar with the Android operating system that's used on many cell phones. We fully support that even though it's open source and we – open source software that we created that works in connection for that. But I don't think the concerns raised by the open source community reflect the realities of companies that are sinking large R & D investment into key functionality.

35
40 I think the other thing is that we, kind of, agreed that - I think there was a statement in here about perhaps abandoning innovation patents and having a stronger inventive step provision might go a long way to get rid of low value patents. But nonetheless the recommendation is it still makes sense to eliminate protection for all software patents – patent protection for all software patents. So we would encourage more deliberation on that and quashing it in going that far. Hopefully, what we shared with you today shows that it would have a dramatic impact on our business model

and many others that are using software now for their core technologies, implementation of their core technologies.

5 **MS CHESTER:** Okay. Great. Well thank you very much for joining us this afternoon and travelling from so far.

MR WADSWORTH: Thank you.

10 **MR COPPEL:** Thank you.

MS CHESTER: Thank you.

MR WADSWORTH: Thank you very much.

15 **MS CHESTER:** Okay, folks, we are going to take a short break for some much needed caffeine and a stretch of the legs. If we could aim to resume at 3.15, so if we could just take about an eight minute break that'd be great.

20 **ADJOURNED** [3.06 pm]

25 **RESUMED** [3.18 pm]

MS CHESTER: I'd like to invite our next participant, Michael Caine, to join us.

30 **MR CAINE:** Do I get to sit in a special place?

35 **MS CHESTER:** You do. Sorry, Michael. If you can join us up at the table. Michael, firstly, thank you for joining us this afternoon and thank you also for IPTA's involvement, very active involvement in this inquiry, both through some earlier consultation, an initial submission, the post-draft report submission and involvement in roundtables and the like. Just if you could say for the transcript your name, what organisation that you represent and then if you could make some brief opening remarks. But I do have the debating bell back and will be ringing it in five minutes, 40 so if you can keep your opening remarks as brief as possible. Thank you.

45 **MR CAINE:** I'm Michael Caine, I'm here on behalf of IPTA, I'm the vice-president of IPTA. I should also say IPTA is an organisation representing the Australian patent communities, both in corporate practice and in private practice, we're not lawyers generally, we're scientists,

we're engineers, chemists, biotechnologists and so forth. We work with inventors from the beginning, from the start of conception of an invention, we help them, we prepare patent applications for them, we work with them and their companies to get patents overseas and locally for them.

5 We also act for overseas companies in getting patent applications granted here in Australia, we also act for accused infringers and patent owners, both sides of the spectrum, we act for pharmaceutical companies, we act for generic companies, we represent them all. We're involved in the whole process of patenting from the start to finish.

10

I guess that's the key point, we are actually hands-on with the whole process and, if you like, we've got a vested interest in anything that sort of promotes innovation, so anything that's good for innovation is good for us and that's really important to understand from where we're coming from

15 because we feel that we haven't been given – that our views haven't been considered in the draft report, we don't get the sense that our message has got across and so hopefully, through this session now, I can perhaps provide some more information and perhaps more convince you to a greater extent that what we're saying is correct, because we are very, very disappointed with where the draft report is going.

20

I might also say just about myself, that I'm also the chair of the International Patents Study Group of FICPI which is an international organisation, over 7000 members, 80 different countries. I chair the

25 International Patents Study Group, we make submissions to different patent offices, different courts around the world on different issues that affect sort of patentability of inventions and IP rights in general. I have in the past been a member of the Client Liaison Board of the New Zealand patent office. I've visited the Japanese patent office, the Korean patent

30 office, the Japanese patent office and Chinese patent office and made submission to them, I've given presentations to Chinese patent examiners. I've been involved in this IP system for 27 years and I feel that I'm well-placed to sort of represent the views of our profession, particularly in relation to pharmaceuticals but not just in relation to pharmaceuticals.

35

MS CHESTER: Thanks very much, Michael. We have heard from other colleagues of yours who have got other expertise that complements yours, so in earlier public hearings. Thank you very much for those opening remarks and thank you very much for keeping them brief. I might begin

40 with, I guess, the overall objective of the patent system. One of our recommendations which we're getting sort of conflicting feedback on, that is the relative merits of having an objects clause. I know that IPTA was involved in IP Australia's 2013 consultation process around doing something very similar, it seems that your thinking has evolved since

45 2013. It would be good to sort of better understand how and why your

thinking has evolved on the relative merit of having an objects clause in the Patent Act, and then, secondly, there's some terminology that we have used in what we have suggested that is obviously causing some concern.

5 **MR CAINE:** I suppose our overriding concern is, if we do have an objects clause, I suppose our position is we don't think we need one but we could probably live with one. We don't think we need one, that's important to put on the record, but we could tolerate one or have one so long as it didn't impact on the job of IP Australia and I guess the job of
10 the courts in assessing patent, the validity of a claim. It's complicated enough, the whole process of examination, looking at novelty, inventive step, sufficiency, claim support, you throw does it meet the objects clause, I don't think examiners would be well-placed to sort of make any assessment of social value or these sorts of things.

15 **MS CHESTER:** Well, maybe if I could clarify that. It's not meant to be a guide for the examiners, it's based on advice and feedback we've had from both the Office of Parliamentary Counsel and some of the Justices, IP Justices of the Federal Court, it's just meant to provide a sense of
20 adaptive interpretation of the legislation to the judiciary by explaining what's the underlying intent, what's the policy underpinning what the following clauses are going to ask you to be interpreting over time.

25 **MR CAINE:** Yes, look, it's a fine line. I think that's why I guess, because until we see the clause we're not going to be keen to support it until we sort of see it. There is scope for it to be problematic if it is something that gets taken into account in every court action, every court action you've got to deal with the objects clause, not only prepare your case on all the other grounds, but what if the judges get caught up in the
30 objects clause and think my invention, this particular invention, doesn't promote whatever invention is meant to do and to have the patent rejected, that patent being rejected for somehow being in conformity with the objects clause. That's the fear that we have.

35 **MR COPPEL:** Is there any basis for that fear materialising, because my understanding is an objects clause is not something which would be used in the interpretation or decision, it's more like guidance and a bit of context for the purpose. I'm just trying to tease out a little bit.

40 **MR CAINE:** Plainly then we would be very comfortable, we'd sort of put the plain, vanilla sort of objects clause. But some of the suggestions I've seen for objects clauses, it's sort of going to promoting public health, I mean that's a bit too specific for an objects clause. I think it would just have to be quite sort of general and not specific enough to interfere with

individual inventions that could be taken into account to reject a particular inventor's patent.

5 **MS CHESTER:** Not meant for the examiners, just interpretation of the clauses over time.

MR CAINE: Yes.

10 **MS CHESTER:** The other area that there has been quite a lot of discussion is around we did our own analysis and we got a lot of evidence around the extent to which the current patentability threshold in the Australian Patent Act is appropriate or not. This isn't an area of perfect science, nor does it lend itself to quantitative assessment, but based on the analysis that we did it did suggest that there was a large rump of low
15 quality patents in Australia. But as we understand it from some academics in Europe, similar analysis over there comes up with a not too different result, a little less than here. So, it would be good if you could just run through your understanding of the threshold test in the Australian Intellectual Property Arrangements related to patents and those in Europe
20 and what's the delta between the two, both in terms of in a technical sense but also in practice.

MR CAINE: Well, I think pre-Raising the Bar Act, I think our law, particularly in relation to full description or sufficiency and claim support,
25 the threshold was very low for that. So, you could actually get away – and I shouldn't use the expression "get away", but the office would allow, and rightfully allow, a broad claim based on very little support and little description, so these broad claims that would be granted by IP Australia and completely in accordance with our legislation. If you talk about low
30 quality patent, is a valid patent a low quality patent? I mean it might be broad, it might not withstand scrutiny in a different jurisdiction but it meets our very low bar that we had prior to the Raising the Bar.

I mean, is a low quality patent a valid patent? I mean low quality in
35 the sense that perhaps not the sort of patent that would be granted in Europe, I'd accept that characterisation. I think this study that Andrew Christie is doing that's actually comparing claim scope in Australia with claim scope overseas, that's comparing the old law, as claims go, against the scope of corresponding patents overseas, I think that will be a very
40 useful study and I think it will show that claims in Australia are broader, so broader but valid I think, under the old law.

Our new law, and I know you focus on inventive step and you talk about sort of low quality patents, I know an academic, or Hazel Moir, has
45 sort of been pushing this barrow for a good while and I disagree with her

completely, I don't think our law on inventive step has been the problem all along. I mean we have amended our law with the Raising the Bar Act and we have raised the threshold for inventive step because we've now introduced a broader class of prior art reference that can be used to attack a patent, because we have removed the qualification that the reference had to be ascertained, understood and regarded as relevant, that language has been removed and also the common general knowledge has been expanded to include the common general knowledge in the art as a whole and not just in Australia. I think we have, with the Raising the Bar Act, increased the threshold for inventive step.

But we've also increased the threshold for description, this was more important than inventive step actually. When you talk about this study of Andrew's, it's not about inventive step, this claim scope, it's actually about description and it's important to understand that. Inventive step has never been the issue, even though Hazel Moir would disagree with me there, the issue has been full description here and that's been fully addressed. Our inventive step test now is comparable, I think, with the European test, the US Test.

MS CHESTER: I think this is where we struggle a little bit, and rest assured our views on the threshold were not informed by any one single participant, indeed we got a large number of submissions, and indeed we've heard from a large number of people at public hearings being very supportive of our recommendations around changing the threshold test. Our objective, and the way we've described it in the report, is to try to align ourselves more so with the EU. It would be good just to get your thoughts on, is that not what we're achieving with what we're recommending?

MR CAINE: I think we've achieved that already, so I think we're already very much aligned with Europe. I know I shouldn't say Hazel, but she would disagree with me on this, and I've never met Hazel by the way. But what they do in Europe, they create this artificial construct, this artificial problem, what they do, they look at all the prior art that's been cited and they pick one based on criteria that are not unlike criteria that we might apply in Australia, that would be directly led as a matter of course, these sorts of criteria are applied to single out one reference which is the closest prior art. The assessment in Europe, because the European patent office, they've got lots of examiners from different jurisdictions - sorry, different countries, different languages, whatever they need, they have very tight procedures and processes in the European patent office, and they do this by having a very rigid approach to assessing inventive step where they pluck out one reference, they don't want examiners looking at 10 references.

Australian examiners look at 10 references, I mean inventive step in Australia is judged against any number of reference, you can come at it from any which way and say, look, it lacks inventive step in light of this reference because of this, it lacks inventive step in light of this reference because of this. This is also why it's not appropriate for the inventor or applicant to be trying to say what the inventive step is, because what the inventive step is in Australia depends on what reference you're talking about, it's inventive over something because of a particular reason, because of a particular dissention. In Europe there's a single reference and they've got this formula for selecting it. Now, we've got a formula for assessing inventive step, but we can assess it against any number of references, we're not limited to one reference. I think when you look at the two processes, in the end, it would be very unlikely that you will get a very different result, inventive step hasn't been the issue for us, inventive step is not the issue.

I know they refer to that Omeprazole case saying, look, the Omeprazole case, that should never have got up, but that just shows a complete lack of understanding of the technology associated with Omeprazole. I mean, that's the trouble, the people who write these papers don't understand the technology, they just dismiss a formulation patent as, well, it's just a new formulation, it's just a new form, it's just a new use. But the amount of technology that goes into trying to deliver a drug to a particular receptor in the gut where the drug decomposes on contact with acid, the stomach, it's got to act there, so the way you get it into the blood stream, the way you get it into the blood, back to the stomach lining to be able to deliver it to stop acid going into the stomach, I mean that's quite sort of amazing technology and Omeprazole, the drug, without that technology would be useless. I know Hazel doesn't like that patent and she refers to that patent.

MS CHESTER: Well, rest assured, as mentioned before, our recommendations on patents do not rely on one individual submission or one individual academic's work. If we then turn to pharmaceutical patents, which is an area of your expertise, and in the area of extension of term. Sort of as part of our role and our Terms of Reference we go back and we have a look at, well, there was a policy objective underpinning the government's decision to move to allow the extension of term around pharmaceutical patents and that was with a view to encouraging greater R&D in pharmaceutical medicines in Australia.

The extension of term introduction didn't result in that, that increase, so it makes us then think, well, on what basis now could we justify a retention of the extension of term for the pharmaceutical patent given the

5 very substantial cost that comes with that, I think it's been assessed at about – for part of the cost, being about a quarter of a billion dollars annually for the Australian taxpayer. It would be good to get a sense of any examples that you've got of where extension of term for your clients has resulted in new R&D in pharmaceuticals occurring in Australia.

MR CAINE: Where to start with that. I mean I disagree with a lot of what you just say about the facts, that's the trouble.

10 **MS CHESTER:** Well, maybe we could just start with a specific question.

15 **MR CAINE:** Look, I'll just give you one example of why a patent term is important, I mean really important for local clients. It's really important for overseas clients and companies, to encourage them to bring us their drugs, I mean that's important, it's an international field, pharmaceuticals, everyone in the audience here would be using drugs that have been invented overseas and luckily the pharmaceutical companies have seen fit to bring it to a country like Australia which represents one per cent of the
20 market, so we want to keep encouraging them to do that and the patent term extension provisions are very important for that.

But for local clients, our local research industry here, very inexperienced, so I work with research institutes, universities, we sit down
25 with them, the first step is all this free clinical research that goes on, eventually they try to get some interest with a pharmaceutical company, they have business development managers in these universities, they go and try and get some interest because the money has got to come from somewhere, and either - - -

30 **MS CHESTER:** Michael, maybe if we could just bring it back to answering the specific question.

35 **MR CAINE:** Well, this is it, this is what - - -

MS CHESTER: Can you point to where an extension of term - - -

MR CAINE: I can, I'm about to say why.

40 **MS CHESTER:** Thank you.

45 **MR CAINE:** A lot of these inventions fall over because of lack of patent term, that's what happens because we take so long in the process. It's an iterative process everywhere along the way, you decide to do a toxicology study, for example, they cost money, you've got to gain some money and

it's all about how much term, where's the patents, what patents have you got, how much term is left as we go along, then you do a Phase I clinical trial, how much term is left along the way. Australians are not very good at running Phase I clinical trials, better to get a pharmaceutical company involved, but they still try because if they can add value they'll make some more money, Australian get greedy as well. They then try to go to Phase II, again, chewing up patent term while they're inexperienced, trying to get their drug approved by the FDA, this takes time. If something goes wrong with that Phase II clinical trial, which happens, then they've got no money left, they've got nothing to do but all they can do is sell off their IP, but if there's not enough patent term left no one wants it.

This is what happened to a very, very promising drug, and if you let me, two minutes to explain this particular drug. It was isolated from a Cone Snail grabbed off the Barrier Reef and it treats pain in patients that are no longer responsive to morphine or anything when they're in their late stages of cancer, pain, not responsive to morphine, this drug was just fantastic. The Phase I clinical trial, they had 20 patients, they gave the drug to the 20 patients and some of these patients who had been in bed for, like, months, were getting up, mowing the lawn, and it was lasting a couple of weeks, just from one dose, this was an amazing drug.

The trouble was the company got greedy and instead of doing a clinical trial based on cancer patients they thought, let's take healthy patients, let's see if we can come up with a pain killer to treat healthy patients. Now, if a healthy patient should need a therapeutic window, a huge therapeutic window, you give healthy people a toxic dose and a therapeutic dose, you need a big gap between them, right, for cancer patients it can be smaller, so they took a big risk. They didn't get there with their Phase II, but close, but not enough, they didn't have the money to continue it on.

The net result is that this drug will never see the light of day, patients will never get this drug and there is no drug that does what this drug would have done. It didn't get any backing because patent term ran out. Even with patent term extensions, I'm saying even with the current 25 years, and extra term that you get in Europe and the US, time ran out on this one. Time runs out on heaps of drugs. There already isn't enough patent term and patent term is an international thing, it's patent term internationally, it's not just Australian patent term, I don't think you'd be suggesting that Australia would expect the US and Europe and Japan to pay for all the research costs associated with new drugs and that we don't, we just free load, I don't think you'd – I hope you guys would not be suggesting that. The price to be paid for the billions of dollars invested in

coming up with these new drugs is the patent term, I mean that is patent term.

5 **MR COPPEL:** But in that example, what stops a pharma company, because it was an expired patent term, taking up the drug and continuing with the clinical trials?

10 **MR CAINE:** They won't have exclusivity because it's all been published, it's all been disclosed and they won't have protection and so a generic company can just come in and make it.

MR COPPEL: Or a generic company? You said it's lost.

15 **MR CAINE:** It's lost. The generic company won't do it because they're not going to spend the billion dollars on the clinical trials.

MR COPPEL: On the clinical trial.

20 **MR CAINE:** Yes, it's the clinical trial that is going to cost all the money. You need patent term in the end to justify the big expense.

25 **MS CHESTER:** I guess it's important that we actually bundle, so we now report, we do say that for pharmaceutical it is the arch-typical, archetypal, except that it does need patent protection because of the very large, upfront sunk R&D costs, I guess the example that you've just given us, the clock was ticking away so furiously because of poor commercial decision-making. I'm not sure why we should have an extension of term to reward poor commercial decision-making.

30 **MR CAINE:** It's not always poor commercial decision-making, it's often just the way things go, it's not predictable like the route to market. That's why it's not just you look at how much patent term you've got and you'll definitely go ahead and take the drug through clinical trial, it gets tested all the way along because there's all these milestones that you have to
35 meet along the way and it depends on when you get there relative to how much patent term there is left. So, in the end, knowing that there's that extra five years or extra four years or whatever it is, factors into the decision to actually go ahead and do the clinical trial.

40 So, lots of drugs, they don't get put through the clinical trials because, in the end, there's not enough term anyway. If you're talking about sort of taking that term back, getting rid of that patent term extension then there's even less term to recoup the profit that is necessary to encourage
45 companies to spend billions of dollars before they sell a pill.

5 **MS CHESTER:** I guess to go back to maybe the original question then, we currently have the extension of term in place which doesn't have any caveats attached to it, are you able to point to, across any of your client base, where R&D investment has occurred in the pharmaceutical space that would not otherwise have occurred without that five year extension of term?

10 **MR CAINE:** This whole question that you're putting to me is sort of very much a Hazel Moir question, I mean the patent system has got so much more to do than what you're just putting to me.

MS CHESTER: No, I'm actually just taking it back to the government's original policy objective and asking can you give us any examples?

15 **MR CAINE:** The Australian patent term, I mean, look, you can talk about patent term extension in general and patent term in general, look, I don't think anyone could argue, right, that because of Australia's five year patent term extension, that a Danish pharmaceutical company decided, yes, look, we're going to invest \$5 billion and come out with a new
20 diabetes drug because Australia has got a five year patent term extension that – no way. But along the way they will test where they're at with patent term as they're going through the clinical trial process and they'll look at patent term generally, including the Australian patent term, and they will decide whether or not to continue on based on the amount of
25 patent term left internationally, and Australia gets factored into that but it's not the sole factor.

MS CHESTER: We understand that, we appreciate that we're only two per cent of the market at the end of the day, so can it really be a tipping
30 point for a decision made in Europe. But I guess we then look – we're also very mindful in our report that because we do import a lot of our intellectual property that relates to pharmaceutical and medicines, that we have to be mindful of do we depart too far from other jurisdictions and their patent arrangements there, because that could then have a flow-on
35 effects of what medicines do come to Australia. If you could just talk us through whether or not – and our draft recommendation is not abolishing the extension of term, our draft recommendation is the original policy objective hasn't been achieved, so putting a caveat on that extension of term to any unreasonable delays from the TGA, do you see that there
40 would be any unintended consequences from that in terms of the decision, globally, for pharmaceutical companies to bring medicines to Australia?

45 **MR CAINE:** Yes, I think there would be a very – I think there's already lots of negative policies. I mean there's lots of things that would discourage a pharmaceutical company already, not just a small market and

5 whatever but the aggressive approach to pricing, the PBAC, two years to get them to agree to a price after you've actually got the drug approved to sell, that's the big disincentive, according to information I have, has involved companies just walking away, so we're not going to get certain drugs because of that.

10 Also, I don't want to sort of go into it in too much detail, but the government policy of going after unsuccessful patentees to claim under the undertakings as to damages, just because of the way that is set up and how it's absolute complete double-standards where the government actually profits from infringers and have gone and set up a system that allows them to actually profit from infringing, patent infringement, it's just hard to justify that to companies who want to deal in Australia, that we've got such a double-standard.

15 **MS CHESTER:** Michael, maybe if we could just bring it back to if you can talk us through the logic, so we can better understand it, to if there was the change that we recommend around extension of term, how would that impact the commercial decision-making of a pharmaceutical company, globally, to bring medicines to Australia? I just want to make sure I understand those links.

20 **MR CAINE:** Yes. Well, from my understanding, and we primarily deal with the overseas companies but we have got the local subsidiaries here, the local subsidiaries are absolutely dependent on the money that's generated during the patent term here, so they are so concerned with patent term. When you say what impact it would have if you were to get rid of – and although you're saying that you're not proposing to get rid of it I think that's what will happen if your recommendation is adopted, just dealing delays in the TGA, I think, effectively, that's getting rid of patent term extensions.

25 So, that means there will be sort of potentially five years less patent term, five years less to generate money in Australia for the pharmaceutical company. This Australian subsidiary is funded and supported and whatever by the money generated by selling pharmaceuticals in Australia, it's that function, that is, out there scouting around our universities and our research institutes trying to partner up, because none of these drugs actually end up on the market without a pharmaceutical company. We've got Bionomics with Merck, we've got the Gardasil, Merck, Cervarix with GSK, any Australian drug gets partnered up, even Spinifex is partnered with Novartis, none of these drugs hit the market without the involvement of big pharmaceutical companies.

5 We want big pharmaceutical companies and we represent the local biotech industry, they are really concerned, they want these pharmaceutical companies to feel favourably and feel good about dealing with Australian researchers and Australian research institutes. If these companies get the feeling that the government here has got no interest in what they do and does not actually appreciate what they do, which is what came out of the Pharmaceutical Patent Review report.

10 The two things which caused such a negative feeling towards Australia were that Pharmaceutical Patent Review because of the biased panel, there was not one person on that panel that had any experience whatsoever in research-based pharmaceuticals and there was no way they were going to accept anything that that panel recommended for that reason, from the start, that was a really big negative thing. You have 30
15 references in your report to that report, that report should not – the government who commissioned it didn't release it, the government who came in afterwards didn't release it, it was actually released because of an FOI request from a patent attorney, that's why it was released. 30 references in your draft report to that, that draft report, or that report as
20 a final report by Nick Gruen who was well-known to be affiliated with the generics industry, and you had Tony – I forget what his last name was.

MS CHESTER: I think we just need to be a little bit careful about the content of your evidence because some of it could be misconstrued as
25 defamatory, so let's just take a little bit of care.

MR CAINE: No, that was all in my written submission to that panel, exactly about the bias, how biased it was. No, they were good people to have on the panel, don't get me wrong, but have someone else on that
30 panel with that background, that was the submission that we made, so that was the context of the criticism of the bias of the panel, not those members.

MS CHESTER: No, it was just your commentary about someone and whether they're influenced by a particular industry sector. I'd just caution
35 you to take a little bit of care.

MR CAINE: Well, you can read reports on the ABC and whatever, you can hear what Nick Gruen has said in the past.
40

MR COPPEL: I just have one question which comes back to the filing process. In our draft report we had an information request to seek out more detail on the possible costs and benefits of a two-part filing process, of which one part was to put on the filer the onus to explain why the

invention was non-obvious, I'm wondering if you've got any comment to make on that or any information to submit on that information request?

5 **MR CAINE:** Well, just that I don't think that you don't have to do that anywhere else, in any other country you don't have to do that.

MR COPPEL: True.

10 **MR CAINE:** The reason is because inventiveness is judged against a prior art reference or a combination of prior art references, and until you see what is actually being cited against you it's very hard to actually then explain why what you've got is inventive over that combination of references, or that particular reference if something is inventive over
15 reference one for a different reason for why it's inventive over reference two, and it's a different reason again why it's inventive over a combination of references one and two.

20 You have to look at – it's just how it works, the system. The system works by the searches being done, the objections being raised and then arguments being put. They're either arguments that sustain and support inventive step, full description, support, novelty, whatever, or they don't, and it's up to the patent office to assess these arguments and decide whether or not to grant a patent, and if they do grant a patent then it's up to the court.
25

MR COPPEL: Yes, so that's how the arrangements work. But you could argue that the inventor is in a very good position to explain why it's not obvious because, (a) they made the decision to file for a patent, they've got some sort of sense that this is inventive, it's not a solely on the
30 basis of that that a decision would be taken, there would be independent assessment by the intellectual property office, but it would provide some basis for informing that assessment as to non-obviousness.

MR CAINE: Well, there is lots of information that has to be put in the patent specification now to meet – so you've got to disclose a utility, you've got to explain how it's useful, you've got to provide a full description of how to use it, how to make it, you've got to support the claim, we now have quite onerous description requirements so these specifications that you're talking about are a pretty good description of
40 this invention.

45 So, as far as trying to pre-empt what an examiner might cite, I mean it's very hard to pre-empt that until – so you've made a decision to file it, you think it's inventive, you think it's novel and the examiner gets to look at it. The time that the inventor goes on the record and says, "It's

inventive because”, is when the objection gets raised. I just can’t imagine what I would, if I was required to put something down before anything was cited against me, I’d almost have to raise an objection against my client’s application and then defend it and then raise another objection and defend it. We have a patent specification that is referring to all the relevant prior art and explaining why it’s inventive over each of them and combinations of them, it’s tough enough and expensive enough to be describing the invention, let alone going through this sort of exercise prior to any objection being raised, you might be pre-empting things that the examiner isn’t even going to raise or think is an issue. I just can’t see how it would work in practice without adding red tape and cost.

MR COPPEL: I think the process that you’ve just elaborated on, that you as a patent attorney would think of how it could be objected to, the idea that’s being put is that having a requirement for the filer to explain why it’s not obvious would be on the record and that could be a basis then for subsequent objections, that’s the idea that’s been put forward, I’m just curious as to it.

MR CAINE: Well, yes, I don’t think there’s a problem, I mean I don’t think this suggestion is in response to any sort of problem. I think if you’ve got evidence there’s a problem here with being able to work out what these inventions are about, I mean I don’t think there is a problem.

MR COPPEL: It’s all linked to the earlier discussion, how to ensure the quality of patents that are granted and it sort of comes in as part of this filing process and requirements that are needed.

MR CAINE: Well, the quality, you want a good patent profession dealing with patent office, you want well-drafted patent specifications and you want patent examiners that are well-trained and going a good job. If you’ve got that then we’ve got quality patents, I can’t see what more is needed. IP Australia, as far as I know, has gone through a rigorous training program with their examiners, I mean we’ve seen it there with the Raising the Bar Act, the objections that we’re getting now are far more extensive than we had in the past, I mean they really have gone to a great effort to train their examiners.

Let’s see how it goes, I mean give them a break, let’s give them 10 years, let’s do an assessment in 10 years and compare Andrew Christie’s results in 10 years and see whether what we did with Raising the Bar, which was all aimed at trying to improve the quality, when I say quality, quality relative to overseas patents rather than whether they’re valid or not, I mean if a quality patent is a valid patent then we had some valid patents that were of a very low quality internationally.

5 **MS CHESTER:** Michael, thank you, I think that covers off all the questions that we had for you this afternoon. We do appreciate your very active involvement, IPTA's very active involvement in our inquiry and the submissions that you have provided. Thank you.

MR COPPEL: Thank you, Michael.

10 **MR CAINE:** Thanks very much.

MS CHESTER: I'd like to welcome our next participant from The Text Publishing Company of Australia, Michael Heyward, Kirsty Wilson and Marcus – I know I'm going to get the pronunciation of this surname wrong so I'm not going to go there, you can help me out when you - - -

15 **MR HEYWARD:** Fazio.

MS CHESTER: Fazio, thank you.

20 **MR HEYWARD:** And Kirsty is not with us.

MS CHESTER: Okay.

MR HEYWARD: There she is, she is with us.

25 **MS CHESTER:** You're not going to opt out now.

MR HEYWARD: Sorry, I didn't see you sneak in.

30 **MS CHESTER:** Gentlemen, thank you for joining us this afternoon. Thank you for your post-draft submission to our draft report on Intellectual Property Arrangements. If you could each just state your name and the organisation that you represent, just for the purposes of the transcript recording, and then if you could make some brief opening

35 remarks and if you could limit those too, to five minutes, that would be much appreciated.

MR FAZIO: My name is Marcus Fazio, I'm a director of Text Publishing. I'll leave remarks to my - - -

40 **MR HEYWARD:** I'm Michael Heyward, I'm a publisher at Text and I'll do my best with five minutes, so just ring your bell in an imaginary way.

MS CHESTER: I will.

45

MR HEYWARD: I've been working in this industry since 1992, the company that I work for, Text, was founded in 1990 and became an independent publisher in 1994, our office is just around the corner, we have 22 people working for us and our revenues are north of \$10 million a year. I've been involved in all of these debates since I joined the industry, about territorial copyright, and in my experience none of the inquiries has ever come to terms with the cultural value of Australian writing, book retailing or book publishing. Publishing is a fantastic success story and my question is what is the value of this success.

I want to limit my presentation to you, I know you cover a number of aspects that affect books but I want to limit it to parallel importation arrangements. The debate, to my mind, has always been a debate about benefit versus costs, do the current arrangements bring benefits, if they do what are they, do they impose costs, if they do what are they. They're the terms that Harper found in his inquiry, that's the way he posed the question.

I was a bit surprised arriving here today, to learn that you are dealing only with questions of transitional arrangements and I think my question to you is, is the commission not able to discuss the whole issue independently, in three dimensions, while I understand that you also need to deal with possible transitional arrangements. The focus on transitional arrangements has seemed to me, as I've listened today, to be very narrow.

I'm also surprised at the suggestion, having been told for 25 years that we should abandon territorial copyright because our prices are too high, that now we ought to abandon territorial copyright because prices are no longer too high. This is my question, how did prices fall in real terms, not just foreign exchange terms, in spite of the supposed upward pressure of PIRs, how did prices fall in the context of continued industry success, they're interesting questions about our industry.

The success of our industry is due, in my view, to the 1991 reforms and the way they balanced the interests of all sectors of the industry and championed the interests of consumers. The reforms anticipated digital disruption and therefore applied downward pressure to price while encouraging an appetite for risk. In my view that's what you want, you want downward pressure on price and you want to maintain and encourage appetite for risk. Our job as publishers is to create and add value by working closely with our writers and our booksellers, the benefits we bring to the writer also flow through to the bookseller and to the consumer, those benefits include every aspect of the publishing and selling process, from intensive editing to book tours.

5 In this country the consumer wants quality and diversity, the consumer wants competitive prices, the consumer wants cultural value, the consumer wants innovation, book buyers want to discover new writers, they especially want to discover new writers who hold the mirror up to their own culture. To satisfy consumer demand requires investment and appetite for risk and comprehensive cooperation with booksellers, and that is the culture that has evolved in Australia.

10 A healthy market is defined by its diversity, by its capacity to encourage competition and by its resilience, we have a healthy market which has absorbed major shocks this century but our job is not yet done. We have made extraordinary progress but, in my view, we still have too few publishers in Australia to fully develop the potential of our writers, it's been an historical problem, we've made tremendous gains over the last
15 few decades but there's still a way to go, in my view.

The evidence of how much better we are doing is everywhere. Are books cheaper in real terms, are books more widely available, is there greater diversity of bookstore ownership and retail culture, are more books
20 and authors being published in Australia, are more Australian authors being published internationally, are more Australian authors becoming international bestsellers and prize winners, is the quality of editing and book production and bookselling higher, is the market share of Australian books greater now than in 1991, has the value of Australian book exports
25 increased? The answer to all of these questions is yes.

Our company, Text, is the child of the 1991 reforms, Territorial copyright has allowed us to take risks and behave entrepreneurially. Our authors have won just about every prize in the planet, but here are some
30 statistics I am especially proud of. One in every two of our debut authors, that is authors publishing first and second books, is shortlisted for or wins an award. We sell foreign rights for about one in three of those debut authors. We pay our authors more than \$4 million in royalties per annum and almost three-quarters of that goes to Australian authors, 6 in every
35 \$10 we pay our Australian authors comes from selling their foreign rights on their behalf. Under the current rules we can trade in rights knowing that the playing field with the US, the UK and Canada is level. Without territorial copyright this rights trading is at risk, there is a real danger that we will no longer be able to treat Australia as an exclusive market when
40 buying and selling rights.

I disagree with Peter Donoghue's evidence, to my mind, abandoning PIRs will diminish appetite for risk, and why would you change the law if you don't expect behaviour to change as a consequence of changing the
45 law. I think there's an idea around everything is fine, we'll change the

law, it will all be okay. If you change the law, behaviours will change, how they will change I don't think we know, but that is, I would have thought, the purpose of changing the law.

5 Australia's limited PIR arrangements mean we operate in a market which is virtually open. There are many, many titles on the market to which PIR's do not apply because the terms of the legislation or of the industry agreement, 14/14, have not been met. There is one category of books to which PIRs do apply and which will suffer disproportionate harm if they are removed, and that is books by Australians. Australia is the largest market in the world for books by Australians and our country will become the dumping ground for international editions of those books if the rules are changed. Dumping is, in my view, inevitable and I do not know how it can be remedied.

15 Australian authors will earn no money from the sale of foreign remainders of their books and low export royalties from other sales, it is inevitable that author incomes will fall if the rules are changed. Australian publishers who trade in these rights internationally will be punished for their entrepreneurial behaviour, and the last thing you want is for publishers to become (indistinct).

20 At the same time, abandoning PIRs will make life more difficult for many booksellers, the networks of cooperation that have evolved under the 1991 reforms will be put at risk, the culture of sale or return will be put at risk and the foreign exchange risk will be transferred from the publisher to the bookseller. The beneficiaries will be foreign wholesalers and retailers, there are many Australian booksellers who will be disadvantaged if the law is changed. Abandoning our limited PIR arrangements will cause the whole industry to shrink, my question is, how will abandoning PIRs benefit Australia's productivity.

25 New Zealand, I know we've talked about it a bit, is a really interesting comparison. We reformed our law in 1991, four years before Amazon, New Zealand reformed its law, threw territorial copyright out in 1998, three years after Amazon, both territories have been subject to the same forces of digital disruption, in my view, our precise forms of PIR, balancing the interests of all the sectors, have acted as shock absorbers so that during the financial crisis and when the eBook revolution was in full swing, they gave us continued incentive to invest and take risks. I mean I think if you could wind the clock back and you go, all right, it's somewhere in 1990-plus, am I going to go down the Australian route or am I going to go down the New Zealand route, how will we deal with this issue. I think, in retrospect, we made the right decision in Australia, the evidence out of New Zealand I think is comprehensively savage.

5 I should also say, even though we are about one per cent of the Australian book trade, that since 2008, during this period when being a publisher felt like driving through a blizzard to be honest, our own revenue at Text has grown by more than a third. I think that's because we continued to take risks in difficult conditions and we've continued to explore intellectual property, often with startling success.

10 I just want to make one last point, and that is in this debate, this time round, there is an effective consensus across the industry, among booksellers, authors, publishers, literary agents and printers about the widespread benefits of the current arrangements. These are the people who have worked to transform our industry into one of the most successful publishing territories in the world, the consumer has been the winner and we should keep it that way. Thank you.

20 **MS CHESTER:** Thanks very much, Michael, for those opening remarks and thank you for keeping them so brief, that's much appreciated. Perhaps it might be best if I begin with partly, a little bit of a point of clarification, but partly responding to one of your first questions, that was around why our focus on transitional issues in our draft report. We, effectively, undertake our inquiries based on the Terms of Reference we get from the government of the day, our Terms of Reference required us to, effectively, advise the government in our final report on transitional arrangements. It's not obvious from a first blush read of our Terms of Reference because it says that we're meant to be mindful of the government's response to the Harper Competition Policy Review, we then go and look at the source, the source then says the government will be repealing parallel import restrictions and will be asking the Productivity Commission to advise us on transitional arrangements, so that's what we've been asked to do.

35 **MR HEYWARD:** I understand that. My question is why is that the only aspect of our industry that you're looking at in terms of your brief from government?

40 **MS CHESTER:** Because that's what government has asked us to look at, the transitional issues that would occur with their decision to move to repeal parallel import restrictions, that's in our Terms of Reference, but we are very mindful that, in looking at transitional issues, that we need to do that from a contemporary evidence base. And while we didn't, at the time of our draft report, update our previous pricing analysis we did have some higher level commentary and metrics around what's happened to prices since 2009, what's happened to the structure of the industry since 45 2009, what's happened in terms of some of the key performance metrics

like the 14 day rule being followed and things like that. So, we did try to contemporise it and we will continue to do so for our final report, we will be looking to update the pricing data for government as well.

5 In terms of the transitional issues that we did identify, there were kind of four that we thought mattered, I guess I'll run through those very quickly because I wanted to see if there were any other transitional issues that we haven't identified. The first one was that if you're looking at it from a
10 transitional perspective, 2009 versus today, given where prices have come, and from what we've heard from the evidence base from submissions from folk like yourself, the industry has become far more competitive, publishers have become far more competitive locally on price point.

Also, secondly, in terms of the competitive dynamics of the timeliness
15 of getting books to booksellers, and we appreciate that that was very much a proactive initiative of the industry. I guess, thirdly, where the Australian dollar is currently, in a timing sense, if you were to look at removing parallel import restrictions there's some advantages to where the dollar sits at the moment. Then, finally, there's been some reviews more
20 recently of Australia's – and some reform to Australia's anti-dumping arrangements such that they've sort of gone through recent review and considered to be incredibly robust. So, they're the sorts of transitional issues that we identified, are there other transitional issues that we should be looking to?

25 **MR HEYWARD:** Yes, there are, I just respond perhaps to the last two. Now, in the time I've been a publisher the Australian dollar has been at 50 American cents and at 110 American cents, so right now we have a snapshot in terms of FX, but we're building an industry for the long-term.
30 We need to make sure that we have the conditions in place to allow our industry to thrive in the long-term because that is what is going to benefit consumers. If you're a consumer in New Zealand right now wanting to read New Zealand books, you're probably not getting what you want. We know, we have learnt, there is tremendous appetite and, as I said, I don't
35 believe we are yet able to meet it amongst consumers here for books by Australians. It's been a tremendous privilege to be part of an industry that has started to really speak to Australians with wonderful books. So, that's sort of the foreign exchange thing.

40 The dumping thing, I've had a look at the language about dumping, I don't know anything about remedial action in dumping, but when you've got books which will be coming into the country in a manner of ways, some of which we might be able to anticipate now, others which we can't, it's very hard to see how it would be anything but shutting the gate after
45 the horse has bolted. The compliance cost of trying to chase down

dumped books all over the place would sort of be ludicrous for an organisation of our size.

5 **MS CHESTER:** The current dumping arrangements apply to all Australian industry, Michael, there's no other arrangements that address the concerns around dumping apart from books and parallel import restrictions, so the rest of Australian industry does rely on the anti-dumping arrangements for that concern.

10 **MR HEYWARD:** I mean, imagine I'm a publisher in New York and I've bought rights or I have rights in a book by an Australian and I hear that the law has changed, my model, business model, anyway is about overprinting, the American market is a high remainder market, a high return market, particularly the hardcover market has always been like that.
15 I've got an author, I know this author is a bestseller in Australia, it's going to be really rational for me to overprint, I'm going to lower my unit cost, I'm going to increase my profits in the US and I'm not going to have to worry about what I do with my unsold books, I can sell them off at cost, below cost, I've already won. In my view, that behaviour will become
20 typical.

MS CHESTER: Maybe if we come to the - - -

25 **MR HEYWARD:** Sorry. Just in terms of other transitional issues, I have never seen any modelling by the PC, by the ACCC about what I've just tried to describe to you about our business model where a third of our revenue is coming through selling rights, I've never seen any attempt on the part of the PC to understand how that works and the impacts that
30 might be felt by a company like ours, our model is not to make money by distributing other people's books, our model is to make money by selling rights, and of course most of those rights are books by Australians.

35 We travel very frequently to international book fairs, we spend a lot of money promoting our books internationally, promoting our rights internationally, and I just don't know how those conversations about trading rights, where suddenly I'm the person trying to do it on an unlevel playing field, are going to go. Because it's very to anticipate, we've got a market out there of, what is it, 500, 600 million English speakers, just thinking about US, Canada and the UK, where the offers are going to start
40 being couched in terms of, well, we want non-exclusive Australian rights, the law has changed down there. At that point, my appetite for risk and my instinct to behave entrepreneurially has been shot out of the sky, because if I accept such an offer, I'm cannibalising my own market, my business model has eroded. So, that is a profound transitional issue from
45 our point of view.

5 **MS CHESTER:** We have heard a lot from publishers like yourself around that business model and the risk-sharing arrangement across local authors, local booksellers and local publishers. As we understand it, the main concern is the remainders, with the removal of parallel imports.

10 **MR HEYWARD:** The remainders is the concern that we can identify now. But as I said to you, if the law changes, people will change their behaviour so that their behaviour can be accommodated by the law. There is no doubt we will see out of wholesalers, out of retailers and out of publishers, different behaviours apropos of this territory than we currently see, because at the moment our territorial copyright is internationally respected. I'm not forecasting to you what those changes will be, I'm telling you they are certain to happen.

15 **MS CHESTER:** We've heard evidence that suggests that this sort risk-sharing business model that publishers, authors and booksellers have is, for many publishers here that are part of international publishing groups, does occur in the UK and the US as well. Given we've received evidence and advice that the US, in substance, is opposed to form, doesn't really have parallel import restrictions in place any longer, does that not suggest that that business model would still remain in place in Australia?

20 **MR HEYWARD:** I don't know the source of your advice, I assume you're referring to the Kirtsaeng case and the Supreme Court judgment. American copyright law has not changed, congress has not had a debate about American copyright law in terms of changing it and so there will be no changes, in my view, in market behaviour in the US if and until congress acts. So, in terms of my business transactions with the US, it's a closed market.

25 **MS CHESTER:** Well, I guess we've received evidence that parallel imports are now alive and well in the US and so I'm just trying to – it's very difficult - - -

30 **MR HEYWARD:** I would be grateful if you'd pass it on to me because it's news to me.

35 **MS CHESTER:** Well, happy to hear your evidence base as well. It would be good then for us to get a sense of the role of remainders in the market at the moment. In Australia, what percentage of book sales today are remainders?

40 **MR HEYWARD:** Australia has a very intermittent and anecdotal remainder market, it's not a significant part of our market. A publisher

like Text, I mean we have policy that we will not remainder Australian authors in this market, we don't want their works devalued, we don't want them sitting with shoddy covers in wire baskets out the front of newsagents, so we will pulp books for which there is no longer a market rather than remainder them. The US is entirely different, the remainder market is substantial in the US. At the moment those are, in terms of Australia anyway, those books are quarantined in the US, they can't come to Australia. If our law changes those books will come to Australia. It is an invitation to American wholesalers to become free-riders in this market.

MS CHESTER: Are there statistics that we can look to in the US to give us an idea of, one, the order of magnitude of remainders in that market at the moment, and then of that remainder market what percentage would be representative of Australian authors?

MR HEYWARD: I guess if I was trying to find that information I'd go to the American Publishers Association, maybe the American Booksellers Association, I'd ask the industry organisations.

MS CHESTER: Sure. No, I just thought you may know yourself, given your longstanding interest in this area. I guess one of the other issues that you raised earlier, Michael, was around, well, you wanted us to remove parallel import restrictions when prices were high, you want to remove them when prices are low.

MR HEYWARD: No, you want to remove them, it's not - - -

MS CHESTER: I guess perhaps if I could elaborate on that a little bit and it would be good to do so to allow you to sort of respond. I guess we're very conscious that one of the factors in play, or in the backdrop of a context to the improvements in Australian publishers sort of becoming the lean, mean machine that we've heard that they've become, is the competition, the "Amazon factor" as some people refer to it, with individual consumers being able to purchase online, and that's injected an ongoing competitive dynamic. I guess from the commission's perspective, allowing the removal of parallel import restrictions also provides an ongoing competitive dynamic to the industry and so when you're looking at it from the transitional perspective, if you were looking at introducing that change, best to commence it when the disparity is as low as possible because it would have less of an immediate disruptive effect.

MR HEYWARD: Well, I mean if you'd committed to making the change that's a form of logic that I guess you would find. If you go back

to 1991 and you say we've got to solve a problem, we've got to solve a problem about price and availability and we've better get a wriggle on and do it because Amazon is coming, you would have been entirely right, the 1991 reforms were very prescient. So, the Amazon effect is not an effect of the last six years, it's an effect since 1995, and Amazon was the darling of American publishers because it provided a counter-balance to the big box stores, to the superstores, to Borders and Barnes and Noble and so on.

You might remember that, back then, the great threat to independent bookselling in America was coming from the superstores. Then Amazon got bigger and bigger and bigger, I forget the numbers, but if you go back to 2000, Random House in the US would have been a \$3 billion company and Amazon would have been a \$2 billion company, obviously you look at Amazon now is a \$100 billion-plus company. This is the first time in the history of book publishing that retail has been in the hands of these mega corporation and it's an entirely new experience for us.

In my view, downward pressure on price incentive to risk have been – call one the Amazon effect and call the other the entrepreneurial effect, or whatever you want to call it, they have been constants in our market since 1995, at some points they become more manifest and at other points they become less manifest and there's complex factors which will influence that. But the '91 solution is a beautiful solution because it provides an incentive to publish while it also provides an incentive for highly responsible behaviour apropos consumers.

MS CHESTER: One other benefit of the improvements in the industry since 2009, Michael, is that we have seen what others have referred to us as a bit of a renaissance of independent booksellers in Australia, a lot more local content, indeed, I was talking to a friend recently and wanted to know my top five reads in the last couple of years and I looked back and thought, well, four of them were Australian authors, so that's a pretty nice thing to be able to see. But I guess the issue is, given where the - - -

MR HEYWARD: Can I just interrupt you there, just to say we have easily the best independent sector in the English speaking world. For my company, sales to independents on bestselling books, I'm not talking about books that are selling 3000 copies, I'm talking about books that are selling 80,000 copies or 120,000 copies, we can't do it without the independents and the independents may well be 30, 40, even 50 per cent of those sales. Our independent network is one of the most valuable things about our industry. The renaissance, to put it in longer historical terms, isn't about the last five years, I mean when the (indistinct) hit in 2010, that's when it hit our market, there were lots of people who

suddenly could read the future, miraculously clever people and they were prophesising that we would have no bookstores.

5 I'll just say one more thing, the renaissance in independent bookselling, with bookstores by Readings, independent bookseller of the year, there are many other stores I could name, is in fact decades old and it has enabled our publishing, the publishing that we do and many other publishers do. Because those bookstores are all about community, they're incredibly important to the shopping strips where they occur, they are places for
10 people to congregate, and the key thing in terms of our market, apart from all the social benefits, is that they are places, as you have, where people discover books. It's much, much harder, no one has really worked out the business model of discovering books on Amazon, but people go to bookstores to discover books, that factor of discoverability is critical, I
15 mean the independent bookstores are an absolutely essential part of the network.

MS CHESTER: That kind of leads to the point I wanted to raise with you, that is that the way it's kind of been described to us, and this
20 intuitively makes sense to me as a consumer in that part of the market, that actually the health and the thriving independent booksellers in Australia at the moment provides the local authors and the local publishers with a competitive advantage to the online world and to what I'd call different bookselling models.

25 **MR HEYWARD:** I would agree with that and I would also say the competitive advantage goes both ways, because we send our authors to these bookstores, they're welcomed there, we bear the cost of getting the authors out into the community and out into the bookstores, we spend
30 significantly to help bookstores with their promotions. The network that has evolved, as I say, is unparalleled in the English speaking world, though I must say, in the last few years, I mean I think the American independents probably got as low as 10 per cent but they have made a comeback in the context of Amazon, and there are some brilliant
35 entrepreneurial retailers running independent bookstores in the US right now.

MS CHESTER: Michael, they are all the questions that we had for you this afternoon. Thank you, both, for joining us and thank you very much
40 for your post-draft report submission, much appreciated.

MR HEYWARD: Thank you.

MR FAZIO: Thank you.
45

MS CHESTER: I'd like to ask our next participant to join us, Wendy Orr, an author. Hello, Wendy, welcome and thanks for coming along to join us this afternoon and thank you also for providing a submission to us following our draft report. I'm glad to see you've got
5 some hard copy books with you. Perhaps if you're comfortable now, if you could just state your name, for the purpose of the transcript recording, and then if you'd like to make some brief opening remarks.

MS ORR: I'm Wendy Orr. You can tell by the funny accent I was
10 actually Canadian born but I've been in Australia since I was 21. I identify myself as an Australian author and I'm internationally recognised as an Australian writer, and my books as Australian books. My first book was published in 1988 and I've been a full-time author and the primary income earner in my family since 1993. I write primarily for children and
15 young adults. Michael has actually really beautifully covered a lot of what I wanted to say about how a publisher supports an author through an apprenticeship and taking care of the risk; we gamble with our time significantly.

20 My works have brought in substantial money to the Australian economy, the film, Nim's Island, brought in about \$37 million, produced in Queensland, the Australian sequel was smaller of course but it still had a budget of \$6 million and has had substantial export sales. Several other titles are optioned or under agreement so they may or may not bring in
25 further money to the economy, but overseas publication rights in 27 countries for different books continue to bring in money, and will into the future. I guess my question is though, would I have been published if I was starting out in the climate that I believe would result with the removal of parallel import restrictions and also the Fair Use.

30 My very first book, Amanda's Dinosaur, was a full colour picture book, these were very, very expensive to produce, therefore risky when you've got a totally unknown author. It sold for 18 years in North America and Australia. But I doubt that it would have been published in
35 that climate, it had no particular moral or deep message, it was just a nice, little book. In 1994 Ark in the Park was published and it was a very unusual length, Harper Collins, after several years of deliberation, actually started a new format which went on to be successful, but they didn't know that it would. Peeling the Onion was considered a very dark, riskily dark
40 novel when it was published, hard to believe now, but it was at the start of the era of sort of dark YA books.

45 Now, both those books have gone on to win significant awards, significant overseas publication, they're still in print. But, again, would they have been published. I wrote a few smaller books in between and a

few educational titles that were too Australian to be exported, but that shows the type of apprenticeship that a publisher, as Michael described, gives to somebody who is living on an isolated farm, working part-time at first, for those first few years, and then just with no support other than
5 what my publisher could give me.

Even if a book like *Nim's Island* – say could I have sold it to the American market and Australia would have still got the film rights, I don't think it would have been published first in the US, I mean it sold I don't
10 know how many copies in the US, but it is a more risky book for the US market because the father is not an attentive enough father and several North American publishers objected that he was a bad model for a parent. Obviously a publisher is going to be more risk-averse to an overseas author as a buy-in first. I don't think that we really have the alternative of
15 seeking out overseas publishers as our initial publishers, I think that's a bad thing anyway, but that's just me.

My point is that I fear that some of these changes will – I think they'll be devastating for established authors, but I really fear that they will just
20 about annihilate up and coming new authors except for those very rare people who burst on to the scene like an Athena, fully formed, who have this amazing book and don't need any editing or help with it, I think that they're about as rare as Athena.

The Fair Use, I know that it's slightly different from the Canadian Fair Dealing, but I think the principle is very, very similar. I received an email from someone on the Canadian Access Copyright Board yesterday
25 morning because they'd just had the Writers' Union general meeting dealing with this, and the problem is that the schools and universities have all decided they no longer need a license, they no longer need to pay their
30 license fees. Because the rationale is that since they could photocopy 10 per cent of everything for free, the licenses were redundant because the licenses should cover the 10 per cent. So, they now are buying perhaps one copy for a class copy and photocopying it or making their own
35 anthologies by taking chapters from different books. The Canadian copyright fee paid to authors is expected to drop to zero, she told me, this year.

Of course the educational publishers are failing – I believe you may have heard this before – but the PWC's report and John Degan of the
40 Canadian Writers' Union says, "Nelson Education have sought bankruptcy protection, Oxford University Press and Emond Publishing, whose annual sales of high school texts dropped from \$1 million to \$100,000, have both stopped publishing textbooks for Canadian high

schools and teachers are now struggling to find Canadian content to teach”.

5 I would say, as a personal anecdote there, I was an air force child, I actually did a year of Canadian history, I spent in the United States and I studied Canadian history in an American school, at the end of the course I remember a child coming up and saying, “It must be awfully uncivilised up there with all those Indians and Eskimos running around”. Needless to say, our textbook hadn’t been Canadian.

10 I have to say, if we want our children to grow up knowing more about Australia than kangaroos and koalas – kangaroos and koalas will always be included, I don’t think that’s a problem, I can tell you from personal experience you can’t have goannas in an American book, but kangaroos and koalas are cute, we will have those, I don’t think we’ll have a whole lot more. The problem is much, much greater than the spelling change or whether it’s morally right to say “pinafore” instead of “jumper”.

20 Michael has said quite a lot of PIRs, and I will actually just repeat what a children’s author said to me, quite a successful children’s author, in a private email said, “Our industry has, effectively, ended. If I say I’m a children’s author people are really surprised and they say, ‘I didn’t think we had any’”.

25 We’ve talked about price, but I do want to give an example, the US paperback edition of Nim’s Island is \$A8 in the US, retailers supplying it here charge \$14 compared to the \$15 for the Australian edition. As an author, for the American edition, after all commissions have been taking out, I receive 25 cents, obviously depending on exchange rate, the Australian I receive \$1 after commissions. That’s quite a big price difference for me for the consumer saving a dollar. I would like to point out that in the paperbacks the American edition is an inferior quality, I brought these because they were easier to see, with Peeling the Onion, it’s obviously a lot, lot smaller. If you were buying this online you do not know that this is not identical and you do not know that if you open it the papers will crackle and it’s probably a one-read book and obviously you have to be very young to see the print.

40 On the question of remainders, they do sneak in. I actually just Googled Nim at Sea, the UK did a huge print run, remaindered it and it obviously gets taken off but every once in a while – I just found it on Fishpond for \$10, I know that they offered a box to me, so the UK publisher offered a box to me at \$1.50 a copy, so I doubt that Fishpond will have paid an awful lot more. Obviously, my publisher and I don’t receive anything on that sale and therefore, Nim at Sea’s Australian sales

have dropped.

I'd like to say something now again about what happens if we really stop having Australian publishing for practical purposes, if Australian publishers become more like importers. When I arrived in Australia at 21 it was really important to me to read Australian literature, the first thing I did was to go to the library in this little country town and get out all sorts of things by Australian authors, just trying to understand this country.

Look, I realise that, from an economist's point of view, children's books can seem really frivolous, especially fiction, so my books very rarely teach hard facts. I am a passionate believer actually that fiction's truth is much deeper than that, it teaches wonder, it teaches a willingness to explore and to have curiosity and it teaches empathy and resilience. That is shown, I believe, in the letters that you get back from children who say, "I'm just like Nim because I'm a boy on a farm", which obviously Nim is a child on a tropical island. Children tell me that they are hoping to be as brave as Nim, people tell me they have got through the worst times in their lives, the number of people that write and say, "Your book saved my life", and it can be something that is heavy like *Peeling the Onion* or it might be Nim or something else. I will wind up.

But I think my example of that is not just the people who tell me that they were able to identify, from being sexually abused or some other trauma which is nothing to do with anything of my characters. A young woman wrote to recently, unfortunately to tell me that she had loved *Peeling the Onion* in school when she was 13 and she's now 28, she has bone cancer, the first thing she did on being hospitalised was to ask her mother to go and search for her high school copy of *Peeling the Onion* because she wanted her family and her doctors to read it, to understand how she felt.

Now, to me, that is the power of fiction and that sort of fiction needs time and support from our editors, the financial support from our publishers who, yes, take us to a festival and do that type of thing, but it's still a gamble because the only way that you can create really good fiction is to experiment and push boundaries, and the more you push boundaries the more likely you are to fail.

I've got a new book coming out on Monday – this is not a push, I do not have a copy with me – it's taken me five years of experimenting and two years of full-time writing on it, sometimes I think it's the best thing I've ever done, as we often do, sometimes I wish my friends would stop tell me I'm brave. Now, if it fails because the world hates it that is fair, I mean I'll be really disappointed but it's absolutely fair. But if it succeeds,

I should be allowed to reap that reward. If classes set it as class text, I would hope that that would mean they would buy 20 or 30 copies, not one and photocopy, and that they would not bring in a really inferior copy which actually doesn't pay me or the publisher who has taken the risk on a book that I'm sure they thought was probably quite a big gamble.

The point is, no matter how passionate I am about my work, it is a small business and my aim is to earn a living, and actually as good a living as I can, if I can't do that I won't actually continue to produce books because I do have to make a living somehow. Maybe I want to tell my children stories, my grandchildren if I get grandchildren, I'm not going to spend 60 hours a week working on a book, on answering fan mail if I have to sell five books to get one stamp.

So, I really hope that in the broader scheme of this transition, which I really think will damage Australian innovation in literature, I hope we can consider what it means for future generations if they don't get the chance to read Australian literature.

MS CHESTER: Wendy, thank you. I hope you might appreciate that I resisted any temptation to ring the imaginary debating bell, because sometimes it's better for commissioners to sit and listen than it is to ask probing questions. Listening to your story was worth not ringing the debating bell for, so thank you.

MS ORR: Thank you.

MS CHESTER: I just had two quick thoughts to share with you and then one question. I'll start with the question. The book that you're releasing next week, are we able to know the title and what target age group?

MS ORR: It's Dragonfly Song and I think it's probably 10 and up.

MS CHESTER: 10 and up, okay, thank you.

MS ORR: I was not going to do a promotional thing.

MS CHESTER: No, no, I was just wanting to know particularly the age group that you were targeting. The two thought I wanted just to share with you first is I know we're a bunch of dorky economists at the Productivity Commission but we do incredibly value literacy, we understand very much from the evidence based on social welfare and educational achievement gaps, that literacy is key, and early childhood literacy is pretty fundamental there, so rest assured we do get that. Having grown up in the 70s where I had to read really bad Golden Circle books

and now I look at what my kids get to read, and a lot of it is local authors, we do appreciate that.

5 The second comment I thought was a little bit more – and maybe partly to
allay some of your concerns around folk have drawn parallels between
what happened in Canada and what might happen here with the
introduction of fair use. You were right in pointing out that there is a
distinction in terms of Canada retained a fair dealing system but that went
with some additional exceptions, they also changed their approach to
10 education statutory licensing. So, in Australia, what we're recommending
is that we move from fair dealing to fair use, but we're not recommending
any change to statutory and educational licensing. That's not to say that
moving from fair dealing to fair use won't change what might happen
within the license, because it will inform the negotiations.

15 But certainly the evidence base that we have received from CAG,
which is the group that represents the educational licensing across the
different States and Territories has suggested that they don't see, if works
are still commercially available, that it's going to make a material
20 difference to what is licensed today. I just thought I'd mention that as
well. I didn't have any other questions for you. Jonathan?

MR COPPEL: Just one question, Wendy, because you're not the first
25 person to talk about the difference between the royalty payments that you
get for a book published in Australia and for the same book that's
published under license in another country. Are those differences ones
which are enshrined in the commercial agreement when a book is licensed
for publication in another market, and what degree of power do you see in
terms of reaching an agreement for the licensing of your works, you
30 mentioned you license a lot of works or a lot of the revenue you receive
comes from jurisdictions other than Australia, I'm interested in getting a
sense of how much scope do you have to change the conditions in those
licensing agreements?

35 **MS ORR:** Very little I would have thought. I usually give my Australian
publisher the publishing rights, partly because they have taken that
development risk and partly, quite frankly, because I believe that my
publishing rights sales is so good that I am probably better off to get my
75 per cent of what she sells it for.

40 **MR COPPEL:** That's in an international jurisdiction?

MS ORR: Yes, so if she sells it, so for Nim's Island, Allen and Unwin
45 sold the rights to Random House in the US, so Random House, they
negotiate that contract, obviously Allen and Unwin will be wanting the

best contract possible, I don't think there's an awful lot of leeway with the US publishers, and then Allen and Unwin take their sort of 25 per cent commission and I take 75 per cent. Now, obviously, if I negotiate that directly with an American agent instead of giving the sale to my publishers I will then get 100 per cent of the sale.

But what actually happens in the US is they normally publish in hardback first, they do a small – well, not a small, but they do a hardback run, so on standard publishing agreement, say for a novel, say you would get 10 per cent of that, then they bring out the paperback and then you only get 6-and-a-half or 7 per cent. Then paperback sales, as I said, Nim's Island in the States sells for \$US6, so \$A8, then your royalty percentage is then cut and of course if it's illustrated you get more, so it's because of the way they structure it. Whereas in Australia, because we tend to publish in a good quality paperback once only, therefore I get the straight royalty rate and that can go up after a certain number of sales. Very, very difficult to get the rising rate I found in the States. I mean the point is they have very big publishers, they have a lot of clout and I find it very difficult to negotiate, even with a US agent.

MR COPPEL: Thank you.

MS CHESTER: Thank you very much, Wendy, for coming along this afternoon for your submission.

MS ORR: Thanks.

MS CHESTER: Folks, we're just going to take a quick, five minute break, it's unscheduled I know, but we'll resume in five minutes which will be about 5 to 5. Thank you.

ADJOURNED

[4.46 pm]

35

RESUMED

[4.52 pm]

MR COPPEL: Welcome back. Karen has left the proceedings for this afternoon because she has a flight back to Sydney, which is where we will be reconvening the hearings next Monday. We have a couple more scheduled participants for this afternoon. We are quite a bit behind schedule, so I'd urge all of the remaining participants to keep their opening remarks as brief as possible. The next participant is Henry Rosenbloom from Scribe Publications. Welcome to the hearings. For the

purposes of the transcript, if you could give your name and who you represent and a brief opening statement. Thank you.

5 **MR ROSENBLOOM:** Sure, thank you. My name's Henry Rosenbloom. I'm the found of Scribe Publications. I suppose I'm also the CEO and the publisher. Scribe has been in business for exactly 40 years this year and three years ago we set up Scribe UK. So I suppose we're officially a kind of independent multinational. We employ over 20 people in Australia, many of them women with children, so they're part-time. We employ
10 four people in our London office. A couple of those are part-time as well.

I don't particularly want to repeat what's in my submission. You've got that and presumably it will become available publicly.

15 **MR COPPEL:** It is.

MR ROSENBLOOM: Already?

20 **MR COPPEL:** Yes.

MR ROSENBLOOM: Thank you. So if I can perhaps try to cut to the core of what I think my main concerns are. I think first of all there are a number of ironies that arise from the situation the publishing industry finds itself in a result of this inquiry and a number of irritations to be
25 frank. One of the ironies is that for years we were told that parallel import restrictions should be abolished because there was a big problem with price and there was a big problem with availability.

In the PC's most recent report, there's virtually no discussion of
30 availability as a problem and there's no attempt to discuss what current prices are vis a vis US prices or UK prices for comparable books. So all of a sudden the justification or the rationale for the abolition of PIRs has disappeared from the Commission's concerns. It doesn't appear in the report. It's asserted but it's not demonstrated. I know that the
35 Commission has picked up on this obvious weakness and is now talking about doing further research to establish what prices are, which is a case of sentence first and trial later. That's another one of the irritations and ironies of the situation.

40 The other peculiar problem I think for the industry is that in a sense we're being judged harshly or being punished for doing well. One of the extraordinary comments in the Commission's report is that, and I'm quoting, "In the light of subsequent developments, most notably existing actions by the publishing industry to improve its efficiency and a
45 protective effective or lower exchange rate, the Commission recommends

that the transition to an open-book market be quicker than previously recommended, no later than the end of 2017”.

5 In other words, because prices have come down, because the industry is more efficient, the industry is saying, “Well you can now stand on your own feet, can’t you?” This is the kind of reverse of the position of eight years ago, where we were being told the opposite. Because you’re so inefficient, because prices are so high, because bookshops can’t get hold of your books, PIRs should be abolished.

10 The clear implication to anybody with any sense is that the Commission has a pre-existing predisposition to want PIRs to be abolished, because it gets in the way of their understanding of how a free market should operate. I understand that and I appreciate that.

15 Intellectually, the existence of a PIR attends to the creation of benefits being appropriated by the players in the industry to the disadvantage of consumers. That’s a legitimate concern but it needs to be proven.

20 One of the great frustrations for this industry, and I can’t speak for the whole of the industry, is that it’s one of the most altruistic industries in the country, in fact, around the world. The people in it do it for the love of it. The pay is low. It’s essentially psychic income, not real income. There’s no corruption. There’s no special favours. There’s no deals that are done that consumers can’t see. It’s an industry that produces material that it

25 thinks is in the welfare of the whole community, and for that we’re being attacked and assailed every few years.

We’re being asked to do away with the foundation of our existence which is territorial copyright. It’s an extraordinary proposition. Nobody

30 thinks that the AFL Grand Final should be capable of being played on Channel 9 or Channel 7 simultaneously. No one thinks that a top-rating US television series can be brought from an American network and displayed in Australian television on two competing channels simultaneously.

35 Why does the Commission think that books can be bought and sold twice? Why on earth is there any kind of belief that this makes sense in any kind of market? The whole world depends on the acquisition of rights and the disposition of those rights and the exploitation of those rights.

40 Book publishing cannot exist without the disposition of territorial copyright. Whatever you say and whatever you argue, it is a sine qua non and it’s recognised as such around the world. It makes literally no sense to imagine a publishing industry which does not have territorial copyright in its own territory; it’s an oxymoron.

45

Michael was talking before about the importance of exporting rights and that's a very important argument. I'd like to draw attention to a kind of converse, the other side of the coin, which I mentioned in my submission. We're in a situation where people will know, we acquire
5 rights from overseas publishers in many cases. It's probably more than any publisher our size in Australia. What are we doing? We're acquiring rights within Australia to publish books that are originated in overseas territories.

10 If PIRs are abolished, all of a sudden the worth of the Australian right disappears or else is gravely endangered. We can no longer tell what that right is worth because we can be competed against from the people we buy the rights from, or from a third party exploiting the fact that Australia is an open market in this brave new world that's being contemplated. It so
15 happens that we acquire those rights for perfectly sound economic reasons because often those books are very well written, very well edited, very well presented and they turn out to be profitable. In essence, they underpin the profitability of our business. It's part of our business model and we're not Robinson Crusoe.

20 The same is true of the television industry. The same is true of the film industry. Why do they go to America? Because those products are so powerful, so sophisticated, so well produced and they deal with international themes which resonate with Australian audiences.

25 It's the same with book publishing. That acquisition, the ability to acquire those books, is essential to us. If PIRs are abolished, all of a sudden we no longer know whether there's any point in acquiring those books. That fundamentally but undermines the capacity of an Australian
30 publisher like us to remain an Australian publisher. It's not just that we no longer can acquire those foreign-sourced books but our profitability and our turnover is diminished. Our appetite for risk is diminished. Our ability to service our authors is diminished.

35 Now what is all this going to happen for? What is the reason? The reason is because you believe, you institutionally believe that PIRs, in principle, are a bad thing. Even if I agree with you, the argument has to be made, is it worth all of this trouble, all of these consequences for publishers, for authors, for booksellers, for the culture as a whole, for a
40 possible gain, for a problem that you can't even prove exists.

MR COPPEL: Thank you. Let me say that you're not the first who has made the point about the 2009 report from the Productivity Commission, where we looked at several thousand book prices and we established a
45 quite significant differential between imported prices and Australian

prices. It was particularly for certain types of books, text books. The reason that we drew on that report, but we didn't update that analysis in full for this draft report, was that we were asked in our terms of reference for this report to look at the transitional arrangements, following the release of the Harper Report and the government's response, which was a response that indicated that the PIR would be lifted and the Productivity Commission was to advise on those transitional arrangements. We have done that and we're interested in hearing whether you have any points on those transitional arrangements. Given your remarks, you probably don't accept the premise of that.

MR ROSENBLOOM: No, I don't. I understand your predicament though institutionally, I do.

MR COPPEL: The other point though that I'd like to make, and it's been made also before, is that we will be updating some of that analysis for the final report. We do recognise that there have been changes in the industry between 2009. A lot of submissions have made the argument that prices have come down and so that analysis will be looked at. You make the point that the industry would essentially disappear with parallel import restrictions removed. I would make the point that we do have the possibility for an individual to bring in a book from overseas. That is used to a certain extent. We're trying to get an idea of the extent to which it's used and that may be one of the forces that are acting on putting pressure on prices in the Australian market. So that's a second point that I'd like to make.

Let me put it back to you on the specific area that we've been asked to look at in the draft report, and that relates to the transitional arrangements. We've made a comment in the report that you've sighted that the industry is probably in a better position than it was in 2009, where the argument was made that there would be a longer transitional period, but if you could comment on that, that would be helpful.

MR ROSENBLOOM: I think the point I would make is that we're looking at different parts of the problem. You're looking at the consumer end and that's a terribly temporary matter. If the Australian dollar drops 10 per cent over the weekend, Australian book prices are suddenly going to become very cheap. The Australian publishers haven't done anything over the weekend to their pricing but we're going to look terrific. If the dollar rises 10 per cent, we're going to look not so good, but nothing to do with us.

Just putting that aside, that to me is the least important part of the problem. I am talking about the fact that if PIRs are abolished, you are in

effect dismantling the basis of Australian publishing. I'm not saying it's going to happen tomorrow. I'm not saying that all of it's going to happen in the near future. But it stands to reason that if you take away the basis of the industry's existence, it must be adversely affected, and I would say
5 severely affected. I'm not going to say it'll disappear. I think it will change dramatically in a bad way. That's probably the most simple way I could put it. It seems to me that it's an extraordinary position for an economically rationalist economic institution, let alone a political party or
10 members of a political party who are meant to be conservative, to contemplate doing massive damage to an industry without asking themselves whether there is a point to incurring that damage.

See you don't even know as an institution, first of all you don't know whether prices will fall if PIRs are abolished. Then if they do fall, you
15 don't know whether it will cause sales to go up. I argue, for instance, that in some cases prices will go up for books, because publishers will be damaged. They'll seek to recoup income from somewhere and what local publishers will do, they'll recoup that income by raising the prices of local books. I think that's what will happen. I can't prove it.

20 I think you're in an extraordinary situation where it's the opposite of the Hippocratic Oath, as it were, first do no damage. You're proposing damage and then you're proposing to find out later on what you might do about it in terms of transitional arrangements. Well by then it's too late,
25 mate. We don't have the bedrock of the industry. We can't function. There's no transitional arrangement you or a government can introduce if you take away parallel import restrictions. We are, by definition, an open market at that point.

30 As Michael said, all contracts will say that access to Australia will be made available on a non-exclusive basis. As he said, if we try to sell rights in our books to American publishers, they will demand the right to sell that book back in our market. If we sell the rights to an Indian
35 publisher they will demand the rights to sell that book back in our market. You might say, "Well, what does that matter? The consumer's got books available from two or three sources". Well, that's true but they won't have many publishers left to produce books for them.

MR COPPEL: I think this is sort of one of the points that's contested by
40 the different submitters on this issue of parallel import restrictions. People like yourself are saying that the competitive hit from the removal will be devastating. Others are saying forces like the ability to import a book will be more limited because there's a cost associated with it, there's time involved, and there will still be a competitive advantage from
45 publishers publishing in Australia and distributing in Australia.

5 You've also made and others have made the point that prices have
come down. They're probably comparable. So whether there's further
changes on prices vis a vis the full lifting of parallel import restrictions is
an open question. The others would say that there'd be fairly limited
effect there. So you could think of two types of effects; one is the effect
on price that sort of direct consequences for competitiveness. Then there
are a whole bundle of other impacts that have been suggested which is a
shift in the nature of the risks of the publisher or the bookseller or the
author. Can you give me a sense as to which of those two types of
impacts you see as being the more significant on price or on the sharing of
risk or on who bears the risks?

15 **MR ROSENBLOOM:** Look I honestly don't think I could. One of the
things about publishing which I'm sure you've come to appreciate, is that
everybody from the outside thinks they understand it, but it's a very
complex industry. It's a very complex ecosystem. It's terribly hard to
know how it will change when you eliminate a vital part of that ecosystem
or if you damage a vital part of that ecosystem. There'll be unforeseen
things which will happen; some will be good, some will be bad. I
appreciate what you were saying about other people are saying it won't be
as bad as it sounds, that there are these impediments to the drastic
consequences that I'm talking about. That may be and it will be the case
in certain circumstances.

25 All I can do is say to you that as a publisher who's spent decades
thinking and behaving internationally, signing contracts with international
publishers and agents, I have no doubt that if Australia no longer has
parallel import restrictions, pressure will build from year to year in every
contract that's written for access to be granted to Australia as an open
market. That will become an irresistible pressure because it will be the
fact in law. We will resist it for as long as we can. Everybody will resist
it. But the world is entrepreneurial. There will be third parties that will
spring up of a kind we haven't even thought of. There might be
somebody who will set up in Singapore, very close to Australia.
Australia's an open market, get the rights, print the book, ship them in.
India is full of entrepreneurs. It's a very low-cost country, very low-price
country. Ship books from India. Do it from the moon. I don't know.
They'll find ways of getting the books into here in ways that we don't
expect.

45 I understand that there will be some drag; there will be some
resistance. Of course bookshops will not want to take on the risk in a kind
of automatic way of acquiring books from overseas if they have to pay full
price for them if they can't return them. Of course, they'll have to think

carefully about it, but that's a pull factor. There are push factors from America, from England, from India, from wherever, and those are unquantifiable, I think.

5 Essentially, I really do think the predicament is the Commission is making a set of recommendations that would have been completely comprehensible 60 years ago when there was effectively no Australian publishing industry, when we were dominated by multinationals and Australia was a kind of post office or distribution centre. They were
10 bastards. They were exploiting Australia. It served their ends. They decided when they would publish a book, what the price would be, what the terms would be. They controlled the retail price. Australia was just a very nice little earner, thank you very much. These kinds of recommendations, doing away with PIRs, would have made quite a lot of
15 sense then.

 Unfortunately, since then, under the protection or the umbrella of the rules which have been enacted, an indigenous industry has developed, indigenous publishes, real publishers, world-class publishers. They guy
20 who spoke to you before, Michael Heyward, is one of the best publishers on the planet. He's got an international reputation. He's amazing. He's incredible. He's been able to build his business under the umbrella of the current situation. So have we and so have other Australian publishers.

25 We, in turn, have fed books into the Australian bookselling industry that would never come into Australia because we have insight into books that matter and books that work. That's what a publisher is. A publisher is essentially somebody who is prepared to take a risk on books they believe in. We do all those things. We bring authors into Australia for
30 writers' festivals. We give the media an enormous amount of material that they can fill the air with, that they can fill print space with. All of these things publishers are responsible for and we do it because we have been able to develop under the rules that exist currently.

35 As I said before, we're not getting subsidies. We're not an industry which is a mendicant industry. In fact, the amount of money that goes to this industry from the government is derisory compared to many other industries in the country. There's no deals. There's no sort of amazing stuff that goes on which means that there are conspiracies against the
40 consumer. It is what it is. You see what you get. It's in the bookshop. It's at a price. You buy it. You either like it or you don't buy it. We live on our nerves. We live on our judgment. All we ask is to be left alone. We're not doing anyone any harm. We're actually contributing something significant to the culture and all of us in the industry are doing it because

we care about it and believe in it. For that, every five or six years we're hit about the head and told to get out of the way.

5 **MR COPPEL:** You've made the point very clearly that in your view parallel import restrictions have been something that's contributed to the development of Australian literature, Australian publishing.

MR ROSENBLOOM: Absolutely.

10 **MR COPPEL:** We've heard over the last week of hearings that one of the advantages of this is that school-aged children are made more aware of Australian literature and people of my generation, your generation, growing up in Australia didn't have that opportunity. My parents I think
15 had books that they bought for me and my brothers that came from everywhere else in the world but not Australia, so there was a lot of diversity. That was still a period where parallel import restrictions existed and yet we've seen this positive evolution in the Australian publishing industry. It seems to suggest that there's something more than just the PIR that's been driving this and it may well even be despite the PIR.

20 **MR ROSENBLOOM:** I mean I can't argue against it; I can't argue for it. This is the problem with any point to find a cause and an effect and a mechanism. I would say that the evidence is persuasive it may not be foolproof but given that you've had the development of notable Australian
25 publishing houses in this environment, to me it's highly likely that it's linked to the fundamental architecture of the environment.

MR COPPEL: Thank you very much for your participation. I'm cutting
30 it a bit short here but we have two further participants and I know we I think have to leave the room at about six o'clock. Thank you again, Henry, and thank you for your post-draft submission as well. Our next participant is Nick Rennie from Happy Finish Design. Welcome, Nick. Make yourself comfortable and when you're ready if you could for the transcript give your name and who you represent and then a brief opening
35 statement. Thank you.

MR RENNIE: Yes. My name's Nick Rennie. I'm a designer based in Melbourne. I work with a selection of the world's top furniture
40 manufacturers and have worked incredibly hard to do so and pretty much have the most amount of products in production with these manufacturers than anybody else in Australia except for one other person. I apologise for not being as eloquently spoken as the previous speakers, however it is quite ironic speaking directly after them because, unfortunately, me as a product designer, I actually don't have the same rights as these writers do
45 or as these publishers do.

Unless I pay a fee in Australia for my work to be registered for a small amount of time, legally anybody can copy it. Anybody can produce it. I don't get a cent for it, and even worse, they can use my name and my image to promote that copy work. I guess for me the question that I've got here isn't so much about big business and millions of dollars. I know in the previous few days in other talks around the country other people have spoken about this, but for me it's quite the opposite.

My points are about creativity and who has the right to own it, especially in design. Why don't I, as a designer, have the same rights in creative protection as an artist, an architect, a musician, a writer? Why is it that my work is perceived to be of a lesser value that I do not have the same kind of protection. How is it that it's illegal to download music, movies, a book, yet it is legal to copy a design? How is it legal that someone can use my name to promote themselves with their copied product without my knowledge or agreeance, many times in slave-labour factories with unsafe work practice and hazardous material such as lead paint?

I guess the main thing I'm here for is to try and talk about the design laws and the fact they need to protect everybody, students, self-employed, small business. Without this protection there will be no innovation. As a separate issue, being that why don't we have any reciprocal rights between Australia IP laws and other regions? For example, Australia not having reciprocal rights or design law agreements with the UK for unregistered designs, for example, which oddly enough New Zealand does have in place and other countries very, very small in their turnover.

It's quite strange. Even though I live and work in Australia, I'm not protected here unless I pay a fee. Yet if I launch my work somewhere in Europe, I am protected there, however still not here. Does this encourage me to work in Australia? No. Understanding I am a designer, my designs are my intellectual property. This is where I feel the argument is getting lost. If, for example, I was to register all my designs each year, I would be up for tens of thousands of dollars. However, the registration may end before the product even makes it to market and also allow those trawling IP Australia website to see any innovation and rework it.

I might work on a project for a few years spending thousands of dollars prototyping and developing the design, however, it might still take years for it to be picked up for manufacture. For example, a lamp that I designed in 2002 and showed when I finished university was first put into production in 2014. That's 12 years of wasted design, 12 years before I

earnt any income for my work. If I had have paid for a registration, essentially that would have passed before I got a cent.

5 This discussion to me should also be about the value we as a nation put on creativity. Unfortunately, right now we're the laughing stock of the design world. To think that we have no protection for designing objects means that innovation here will end. Design courses will soon have to teach how copying another's work is actually legal and encouraged, rather than reasons for dismissal or plagiarism. How can a student be kicked out or punished when by law it states that it's legal to copy an unregistered design in Australia. This discussion needs to understand that the ones hurting the most here in Australia are the actual creatives. Please don't let this be the last generation of designers striving for innovation and creative integrity. Don't reward those that exploit laws that allow this to happen.

MR COPPEL: Thank you, Nick. Can I just ask a point of clarification and I think you may have given the answer at the end of your statement. You said at the beginning that anyone can copy your work.

20 **MR RENNIE:** Absolutely.

MR COPPEL: This is after the term of protection has expired?

25 **MR RENNIE:** No, this is if I don't pay a fee in Australia, anybody can copy my work. In the UK, in Europe, essentially - I mean the UK has recently changed their design laws for the life of a designer, which would be the same as an artist, same as a writer. So unless I actually pay a fee here in Australia and let's say it's around \$350 which doesn't seem that much but if you're coming up with 50 or 60 concepts a year and you fill in those forms yourself, that's a lot of money. That protection for me in Europe - I don't live in Europe. I don't do it but because the companies I work for are there, there is a period of unregistered protection. In mainland Europe it's not actually as high as the UK's just changed to but Sweden and the Scandi countries are different. With a registered design, yes, once that period has expired, then it's open season.

40 So essentially let's say any student, for example, that produces a piece, shows it at their university exhibition, legally anybody in Australia can then produce that work and actually write it down the designer's name. To me that's abhorrent. It goes against every single idea of artistic integrity to think that somebody that does not have one cent of effort or time or attachment to an object can profit off it from the designer, from the manufacturer.

45

Again, listening to the writers earlier, it was quite interesting hearing the fact that if they then sell their rights externally and if a book was produced in Australia I think it was \$1 or 25 cents for an external one. I don't get a cent. The manufacturer does not get a cent. The copy he
5 produces, they take it all.

MR COPPEL: Do you register your work in Australia?

MR RENNIE: I have and have some but I can't afford it. Australia is a
10 very, very small market in the world of design and, as I said, I'd probably be up for about \$15,000 a year to register my work and the majority of those may never make it to market. As I said on one, I would have only had three years left on the registration within Australia if it had have been registered here. It's been registered overseas and it's fine overseas but
15 locally, no. So yes, I have registered certain products because I know of people visiting factories where they were prototyped and they started shopping them around as their own designs, even though I hadn't shown it to anybody. I hadn't made it to anybody. To me, I think the industry as a whole does not register the products because they don't respect the
20 registration. It's an unreasonable amount. There has to be some form of unregistered protection here, similar to that for artists, writers and musicians.

MR COPPEL: You mentioned that you have many concepts that you
25 develop in a year and some of them you bring to market.

MR RENNIE: Yes.

MR COPPEL: Among those that you bring to market, how long are they
30 on the market for?

MR RENNIE: Some might be on the market for two years. If they don't sell, they're out. Others may be on forever. I think this is the argument that those copy design people put into perspective is, "Well these big
35 businesses have made all this money out of all these amazing companies from back in the 50s and 60s and they're rich and rich and rich". As I stated, other than Marc Newson, I have the most amount of products in production with the main manufacturers internationally. I barely make minimum wage. I cannot survive on royalties alone. One of the reasons
40 being is that the industry here in Australia, whilst it's taken huge leaps in the last 10 years, it still is very rare for companies to invest in production and generally they're owner operated manufacturers.

The majority of my work is protected in Europe and, depending on
45 what the protection is, so it could be anywhere between let's say five to 25

years, depending on how they've done it. The UK for example, because I'm not a resident of the UK I don't have lifetime protection there. However, if my work was launched in Europe, it is protected. Recently I had a legal issue that I was looking to resolve but because I was a resident
5 of Australia, there was no reciprocal rights with the UK. If I had have been from New Zealand, there would have been. I don't understand this. I'm not well versed in the points of law. It just comes down to common decency and the reality is the Australian government's losing out because they're not getting tax from me because of these sales. They're not going
10 to get tax from me or future generations of designers because there just won't be any opportunity for people to do that.

MR COPPEL: You mentioned when there are copies of your work that they're even sometimes sold with a photo of yourself.
15

MR RENNIE: Yes.

MR COPPEL: Which would suggest that there are other laws that could be used, passing off laws, to prevent that sort of activity.
20

MR RENNIE: I would have to register my name as a trademark in Australia and that way they couldn't use my name to promote the work, the same with certain images and things. I mean the irony of it is that I think a photograph taken by somebody should theoretically fall under
25 copyright laws, however these companies still use - they just take the photographs off the international websites and use them as their own products. Again, it all comes down to more money, more money, more money from the creative having to pay, whereas an artist gets it free. A writer gets it free. A musician gets it free. I understand manufactured
30 product is a separate entity, however, there still has to form some kind of protection for those that strive for creative integrity and strive for pushing the boundaries of creativity and design.

MR COPPEL: The instrument of registering a design in Australia is predominantly used for furniture but it covers a whole bundle of other types of designs in the shape of bottles, clothing, packaging for food.
35

MR RENNIE: Yes.

MR COPPEL: Are you suggesting that all of these items be treated in the same way as copyright?
40

MR RENNIE: I think to a certain extent, yes, because one company's developed the design. They've spent the time. They've spent the effort,
45 whether it's a company or a designer. They've got all of their intellectual

property into that specific object. Why then can anybody come and free ride off of that? In the case of furniture, I think it's definitely something that potentially needs to be addressed, that it maybe falls into a different category. However, then that's unfair if I was to design a pen or a Walkman or something. Then I could get patents on certain things. So I think there are different ways of protecting different components from a patent and other aspects. But from furniture it's very, very hard to get a patent on an actual chair or something like that.

10 The other issue being that the majority of these manufacturers, if they are based internationally, the product will be shown internationally before registration occurs in Australia, and so then they don't actually register it in Australia because we are such a small market. Again, that's great for the people that sell these rip offs but it's not very good for those that are actually trying to be a part of that market. It has adversely affected me. I've had companies say, "No, you're from Australia. We're not interested in working with you because of your laws". That's an awful thing to be told, that it's got nothing to do with you but because of the reputation that we as a country have internationally, especially in the furniture and lighting markets, that people have a perception of negativity towards the designer manufacturing sector here.

25 **MR COPPEL:** Can I just sort of come back to the whole group of registered designs?

MR RENNIE: Yes.

30 **MR COPPEL:** All of the intellectual property rights are based on the notion that a period of exclusivity is given to reward the initial effort in expression of the idea in terms of research and development to bring an idea to market. That is balanced against the intellectual property then being made known to the broader community and after that period of exclusivity, there's an ability for anyone to produce that particular good or draw on that idea. So there's an incentive also for what's called follow-on innovation or innovation based on others.

MR RENNIE: Yes.

40 **MR COPPEL:** It's an area where we've often be told that innovation is incremental and it sort of draws on the past. If you had a period of protection of terms such as copyright, what do you think would be the consequences of that for such follow-on innovation?

45 **MR RENNIE:** Two points to that; one would be that that's all well and good but why is it that Australia doesn't match the leading nations around

the world in that protection section. Directly answering the question that you had, to me it allows more risk because all of a sudden, if you know that you have protection for an item and, as I'm saying, free protection for an item or a longer period of time, that then allows you to invest your own
5 time and money, knowing that it might be purely speculative, knowing that it might take 10, 15, 20 years for a manufacturer to pick it up.

We only have probably six or seven Australian designers working with the top manufacturers in Europe. That's laughable. We have some
10 of the best designers on the planet here in Australia. However, because of these risks, people just don't take them. People aren't necessarily willing to take a punt and propose a concept, knowing that once it's been proposed or once that it has been put public, then it's gone and then you go on to the next one and the next one and the next one. So I guess, for
15 me, it's why would I invest my own time and money knowing that I then have to convince a manufacturer to put a concept into production, as opposed to a manufacturer coming and engaging me and paying me a fee to design something for them. So that's why I think it is incredibly hard to protect the entire system.

20 If you look at what the UK's done in the last few years and they readdressed it early this year, because they were in the same boat as us. It was a free for all, but they've been able to amend that to allow some sort of protection for creatives. I think as a result you're getting more people
25 from around the world moving back to the UK to be creatives which will then earn more income and make more business for the UK.

MR COPPEL: I've just got one final question. In the area of furniture you've mentioned, and we've had other participants mention, that there
30 are many prototypes and one of those prototypes is the one that usually goes to market. It's very expensive to register each of those, since only a small number would end up being actually developed. In Canada they have an arrangement for registered designs where it's possible to register a range, so one registration for a range could relate maybe to a series of
35 prototypes. Do you have any views as to whether such an arrangement would be of value to protect your intellectual property from the sorts of situations that you've found yourself in?

MR RENNIE: I think where we're at the moment, absolutely. In the
40 whole scheme of things, absolutely not. It's the same thing. I mean, as I said, if I'm doing 50 designs a year, those are 50 different designs, so I would then need to register each one of those and that's just for Australia, knowing that the majority of my work is sold internationally. So to think that it would be upon the progression of a design as it goes, yes, that
45 would be fantastic, but it still doesn't answer the main problem.

5 To me, a better possibility might be that a designer pays a registration fee, just the one-off fee, and that then, if they would like to proceed to process legal proceedings against somebody, that then allows them some form of protection. You would have to spend more money, I guess similar to a patent search or whatever, to prove that your design was original and that it actually had merit. But there is some kind of form of protection from the beginning, rather than knowing that every single time I have to come up with something. It's like, "Well, that's more money, so do I do it?" Probably not, but that one might be the breakthrough piece for a student coming out there.

15 As a teacher at university, all I do is encourage people to "just work, work, work". If they know that every single idea they have, they technically have to pay a registration fee here in Australia, otherwise they lose that, there is no incentive for them to come up with that next idea, that next idea.

20 It is, it's a very, very hard thing because I know the copy design people are mounting a massive argument. They're Robin Hood, "We're good. You're bad" thing. Trust me, they make more money off my work than I do and there's a big irony in that is that they have not one cent invested in it but they make money off it but I make minimum wage. I think if there was a way of somehow organising some kind of registration per designer or something like that which would be a databank and maybe Nick Rennie, he pays his fee and then I send all my designs to be put on record and they just get held away in a vault or however it is. Then if a situation arises, we access that vault and we see what's there.

30 **MR COPPEL:** Thank you, Nick, and thank you for participating in today's hearing.

MR RENNIE: Thank you.

35 **MR COPPEL:** Our final scheduled participant for today is Nick Gruen. If you'd care to come to the table, Nick, and when you're ready if you could give your name and who you represent for the transcript and a brief opening statement. Thank you.

40 **MR GRUEN:** Thank you, Jonathan. My name's Nicholas Gruen and I don't really represent anyone other than myself. You'll be aware of a submission that I made on the draft.

45 **MR COPPEL:** Yes.

MR GRUEN: I thought I'd come along and have a bit of conversation with you about that draft and focusing on international negotiation. So you have been good enough to quote liberally from a review of pharmaceutical patent arrangements that I was on in 2013. I might say
5 that when we spoke to the Department of Foreign Affairs and Trade as part of the process, I think it's a bit of a pity in some ways we were not taking a transcript as you are here, but I asked the representatives of the department who came to speak to us, and it was sort of an open session in some sense, I asked them quite open-ended questions along the lines of
10 what were their objectives when negotiating international agreements where intellectual property rights were under negotiation.

The representatives of the department were completely unable to say anything coherent, other than that they listen to everybody's
15 representations. The broad modus operandi that one can deduce from what they have said publicly on this is that the sort of default position we go into trade negotiations on intellectual property is that we don't want to change anything, whether it suits us or not, whether it's particularly well-crafted or not. Then we start from that position.

20 I'm sure that if everybody in Australia said the same thing to DFAT they'd be happy to represent that in their negotiations but the thing that perplexes them is that different people say different things, and that really stumps them. So what has always struck me as remarkable is that there is
25 no underlying strategic understanding of our interests. Again, this is in an area in which, unlike trade negotiation where reducing a trade barrier is presumptively a good thing, with intellectual property there is no such presumption. An intellectual property right may be too strong, too weak, in the right way or the wrong way and so on.

30 I think your report reflects that but it really doesn't make it clear enough that we are suffering from a very grave and very long standing lack of leadership from DFAT on this question, coupled with a defensiveness about the very sensible suggestions that the Commission
35 has made consistently on this matter. So the Commission has argued how remarkable that we should do cost benefit analysis before, during and after negotiation to see what is in our interests, and that has been parried at every possible opportunity. I've made a few notes. I thought I might go through some of these thoughts but I'm inviting you to jump in if you
40 would like.

MR COPPEL: Thank you, Nick. You've contributed through the various stages of this inquiry process from the outset, in one of the initial roundtables in a post-draft roundtable and also in a post-draft submission.
45 We thank you very much for your contributions. Let me pick up on these

governance arrangements as they relate to the negotiation of IP chapters in trade agreements. We did identify a lack of transparency and poor consultation processes as one specific area that may be one of the sources of dissatisfaction with some of the earlier preferential trade agreements that have been negotiated. I think the one that often comes to the fore as an example is the Australia, US Free Trade Agreement. The points you are making are more systemic than that. That's just an example of an outcome.

10 **MR GRUEN:** Much more general. Absolutely, it's completely systematic.

15 **MR COPPEL:** One of the specific areas that we suggested could be an instrument to improve the transparency of the way in which these agreements are negotiated, without revealing the hand of the negotiations, is through the use of a model agreement, the model IP Chapter Agreements. We've had different views on that in our consultations and we've put that in as an information request in the draft report to get a sense of whether that is something that would help or whether there are problems associated with such an instrument. I'd be interested in getting your views on that specific example.

20 **MR GRUEN:** Yes, okay. Well look, I'm actually not entirely sure what you mean by "model agreement". In box 16.10 you give examples I think. Are those examples the kind of thing you mean by a model agreement or are you talking about something different, because you talk about Congress constraining the President or imagining that it's constraining the President or the executive.

25 **MR COPPEL:** No, by a model agreement it would be basically a draft of what would be considered a good IP chapter of a preferential trade agreement. There are often examples of this with respect to foreign investment laws. They have certain provisions which are quite standard and bilateral investment treaties. A number of NGOs have put out what they consider to be a model investment law.

30 **MR GRUEN:** Yes.

35 **MR COPPEL:** Something similar for intellectual property.

40 **MR GRUEN:** Well, if it could be agreed, then I guess that sounds like a reasonable idea. I can't imagine it would be and I can't imagine that - I mean, again with investment agreements, there are presumptions that greater freedom is - a model agreement can set out a sort of "in principle" logic and I don't know whether that's the case here. I mean my sort of

feeling for this is that this is something which initially was the product of American interests saying "Here's a way we can promote our interests" and they have pursued that, and we are where we are as a result of that. There are lots of pretty unprincipled ambit claims and there's a sort of a chaos, a long period of chaos and fear, uncertainty and doubt, while it goes on. Then we have the big reveal. So if you can get some sort of model agreement, I suppose it could be a useful thing to do.

The direction that my thinking has gone has been to say - well, a few things. Firstly, just before I say that, I might just say that I think possibly a better course of action for you might be to actually address the DFAT arguments on their merits. Because if their argument is that it would ruin their negotiation to have some transparency about it, despite the fact that they boast about the transparency with which they negotiate, then you could, I would have thought, have every bit as much impact as you want by saying that all of that analysis should be present for the negotiators and published after the event. So that can all be taken in-camera during discussions and it can be published after the event.

The point is that people who are making stuff up as they're going along don't want that. They don't want that transparency. They don't want that discipline. You can, I would have thought, inject precisely what you're wanting to inject within the terms that they say is necessary, which is in some sort of confidential way during the negotiations.

Let me try and go through some sort of more general things. Well, unless you want to - I will say one other thing there which is that the Productivity Commission has typically supported the idea of cost benefit analysis. I think it rather overdoes that, because I think that these things are immensely complex and one can only model certain aspects of a cost benefit. What you need is some sort of strategic understanding of simple things and that is why my submission presents to you a set of principles, a set of negotiating principles, rather than the statement that you do a cost benefit analysis.

A cost benefit analysis doesn't give you a very good lie of the land when you're negotiating. You can spend a huge amount of time negotiating one little thing and then you want to know should we agree to this little change that Canada wants, or some country wants, and you don't know from your cost benefit. You've got to go away for another few months. I think that you should strengthen that approach with insisting that someone with an economic framework in mind is present and publicly accountable to inform that process if necessary confidentially and then after the event.

I will also just comment on one sentence from DFAT and this is quoted on page 453 of your report. “The government already has robust arrangements in place to ensure appropriate levels of transparency of our negotiating mandate, while protecting Australia’s negotiating position”. I was involved in endless DFAT consultations about the TPP and various other agreements and it’s a very Kafkaesque experience, very Kafkaesque. You’re invited into a room a bit like this and they say, “What are your thoughts?” and you say, “Well, what have you been negotiating?” and they say, “We can’t tell you”. You say, “Well, we came and saw you six months ago. These are our concerns. These are the things that we think matter and that hasn’t changed, so what are we talking about here?” It’s a very, very strange process.

On the report, and it’s all about this sort of stuff or most of it is, I think the PC makes a bit of a mistake that I made for quite a long time which is to make this idea of net importers and net exporters a fairly pivotal part of the analysis. I mean it’s quite obvious that we should be thinking of ourselves as a net importer of IP and there is really only one sure-fire exporter of IP. The reason why I think that is very inadequate is that the net exporter, the clear net exporter of IP, the United States, is not pursuing its own interest in any coherent transparent sense. It is pursuing the interests of certain rights holders and it is entirely happy to pursue the interests of those rights holders at the expense of the country itself, quite apart from the expense of us.

When Disney wants to keep Mickey Mouse safe from the prying hands of an end of copyright, the United States passes the Sonny Bono Act, keeps Mickey safe in the hands of Disney Corporation and then goes out to successfully try to negotiate to keep Mickey safe in Disney’s hands in Australia and everywhere else. That is certainly at the cost, not just of Australia, but of the economy of the United States. In an economy-wide sense, that’s obviously at a cost to the United States. Similarly, a range of other types of rights.

I think it’s important to try and present the picture of how this is happening, which is that certain rights holders see it as in their interest to pursue these things and we are not disciplining that process by saying, “Well, here is a set of principles against which we think it’s worth negotiating”. That is a point that I wanted to make.

You also talk about international agreements as lowering transactions costs. You say this is sort of an important motive. Now I think that’s an obvious motive for something like the PCT and there’s a whole lot of activity that seeks to lower transactions costs and does so in a pretty commonsensical way. I think it’s pushing the envelope a bit to say that

the terms in AUSFTA or the TPP have got anything to do with lowering transactions costs. They're argy-bargy about how much rent we can - they're about rent creating. I think it's important to try and make those distinctions.

5

MR COPPEL: I think we were making a distinction between some of the bilateral trade agreements and some of these IP-specific multilateral agreements.

10 **MR GRUEN:** Yes, but there's something like that Anti-Counterfeiting Treaty, or whatever it was called, and that's IP-specific and it's a rent grab.

15 **MR COPPEL:** This is another point and it comes up in the area of design. So there is a sort of draft treaty called The Hague Agreement and they often conflate arrangements which would facilitate the registration. So The Hague Agreement you can register a design in one country and it would be registered in all of the signatories to that agreement, but it also has provisions that relate to length of term. It's the combination of the
20 two.

MR GRUEN: Sure, you can get them mixed up, yes. I think it would be useful for you to distinguish between those two things a bit more clearly than you do in the draft.

25

I don't know whether you comment on this but we talk about expertise and the need for expertise in chapters 16 and 17. I think it's quite important to say that if we are trying to exercise policy expertise, expertise about what policy should be, that the expertise in some sense
30 needs to be essentially from an economic perspective. Now that doesn't mean that lawyers can't be expert at trying to get economically beneficial law. So people like Kim Weatherall, Rebecca Giblin and so on are doing that very effectively.

35 There are also lawyers for whom it doesn't really occur to them. They are sort of locked into a legal analysis and they would be good in a Court of law for a client and they would be good in making a judgment in a case as a Judge. But they're not people who seem to understand that if you're trying to think about what policy should be, there isn't much to be
40 said for a legal analysis, except insofar as it might be an analysis about what would make for efficient law and what would make for inefficient law. I think it is quite important to bring that out.

45 Another thing that I think is really critical and one of the things that's really struck me about this area is that there are areas in which there are

substantial gains to be made with virtually no losers at all. I think the classic example of that is manufacturing for export. But it is remarkable how - I mean we've lost something like two billion dollars' worth of pharmaceutical exports from the failure to allow one plant to go ahead. I mean nobody prevented it from going ahead; they just told them that wouldn't have the right to export the material. Nobody benefited from that. India benefited from it because that's where the facility was built and it has weaker intellectual property laws.

Another similar area is fair use. Again, there were comments made earlier that I saw where the author who appeared before you said that in Canada this would lose substantial revenue. If an important part of the test of fair use is is this undermining somebody's ability to exploit their intellectual property and if it does that, it isn't fair use, that's the test that enables you to try to focus on gains where the losses are minimal. So that seems to me to be an important thing too, to try and emphasise the opportunity to generate large gains without any costs.

Just one other thing I should have mentioned with costs, where costs and benefits I think are very out of whack, is that it's very hard to see benefits from software patents and it's very easy to see benefits from not allowing software patents, which effectively was the law until about 1980. We see software just all around us, built by people who wouldn't know where the software patents are and can't possibly know because there's half a million of them.

MR COPPEL: Can I just briefly ask you a question about the domestic governance and institutional arrangements? We make the point in the report that policy for intellectual property is a bit fragmented, part of it, and the Department of Communications part of it in industry and for all intents and purposes, IP Australia has an administrative role but also a policy role. We're seeking further information on how those arrangements could be made in a way that would improve an evidence-based approach to intellectual property policy. I'd be interested if you've got any views on those sorts of arguments.

MR GRUEN: Yes, I do. I believe we should do with them what you might be intimating in one of the boxes where you talk about what happened with competition policy. So competition policy is now right in the right place. It's an economy-wide instrument for trying to improve the efficiency of our economy and the productivity of our economy, and that's exactly where IP should be in my opinion.

MR COPPEL: Treasury?

MR GRUEN: Treasury, yes.

5 **MR COPPEL:** For the purposes, given it's close to 6 o'clock and I think it might relate to one of the points you were making and it's an area that's come up frequently in the hearings of this week relating to parallel import restrictions, in your post-draft submission you say, "Prohibiting parallel import restrictions is contrary to the global public interest in economic efficiency"; can you elaborate a bit on that what you mean?

10 **MR GRUEN:** Well you left out one word which was "presumptively" contrary. I said, "Encourage countries to prohibit parallel imports is presumptively contrary to their own interests and to the global public interest and economic efficiency".

15 **MR COPPEL:** Okay.

20 **MR GRUEN:** As we know, and as Henry appearing before you previously commented, I mean he didn't quite put it in these terms, but 60 years ago we kind of served ourselves up for the benefit of foreign publishers to maximise their profits by allowing them to monopolise our market. It's hard to think of a sillier arrangement. Now there are some domestic publishers working in that area and they enjoy the advantages that they tell you that they enjoy. It seemed to me that Henry reasonably accepted that prices were a bit high but not as high as they used to be but
25 that the big advantage - which is an interesting thing that he raises, the big advantage is the advantage on risk. So if that was the only thing to think about - sorry, I'll back up a bit.

30 I don't think that when it comes to culture that economic efficiency is the highest priority. I don't have a problem with subsidising culture. I don't even have a problem with subsidising culture somewhat inefficiently. However, if you look at parallel imports in Australia, the form of subsidy will be far more valuable to J K Rowling and her publisher than just about anyone else. So a large amount of the money
35 that is generated is generated for overseas publishers, for overseas writers.

I, at one stage, was preparing to do a media interview on this a few weeks ago and I wanted to just grab a few basic facts and I couldn't find them in here. They're in the 2009 report, no doubt, and they're a bit out
40 of date and I didn't have time to go through it all. A very simple table that says, "Here is the likely advantage of parallel imports. This is how much clearly goes to foreign publishers of foreign people. And then this is how much Australian publishers might be able to make from some importing of foreign writers and this is how much would go to Australian authors

and Australian publishers of Australian authors, given a range of different assumptions". I think that would be a useful thing to do.

5 The thing that disturbs me about these mechanisms and the politics
behind them is that they're so poorly targeted to the thing that I'm
completely convinced someone like Henry is absolutely passionate about,
which is Australian culture, and not just Australian writers but publishing
of taking risks to publish Australian authors, which is a much larger part
10 of the market than just funding people to write. I'm very happy to take
that very seriously and I'd love to have a chunk of money from the
government and have people like Henry with their passion support them,
and support them better than they're supported now. But I don't want to
do it for Jamie Oliver's cookbooks. J K Rowling's wonderful but she
doesn't need any help from us. So that's my view of that.

15 **MR COPPEL:** I'm going to wrap it up here. Once again, thank you for
your contribution today and your earlier contributions.

MR GRUEN: Good. Thank you.

20 **MR COPPEL:** Ladies and gentlemen, that concludes today's scheduled
proceedings. Is there, for the record, anyone else who would like to
appear before the Commission?

25 **UNIDENTIFIED SPEAKER:** If I could say something. I know it's
extremely late.

MR COPPEL: Yes, so if you could come to the floor.

30 **MR GRUEN:** Sorry to keep you waiting so long then.

MR COPPEL: We still have a transcript, so for the purpose of the
transcript, if you could give your name and who you represent and these
will be very brief interventions that follow the scheduled participants.

35 **MR DAY:** Yes. I'm David Day. I'm chair of the Australian Society of
Authors but I'm just here to speak as an author who's celebrating the 30th
anniversary of his first book. The ASA will be talking to you on Monday.

40 **MR COPPEL:** Yes.

MR DAY: We put in a submission and we'll be talking to that, but I
thought it would be more useful if I just talked about my experience as an
author and address those three things that particularly worry us. One is
45 the copyright period which I know is a smoke screen or flying a kite and

has no real force. But you know that book that I brought out 30 years ago in '86, it was republished in the 90s and republished again in 2001, I think, and then made into a dramatized documentary in about 2007, I think. So a 15-year copyright period would have killed that. It wouldn't
5 have had that third publication or probably the dramatized documentary either or it certainly wouldn't have accrued any benefit to me. It mightn't have happened because I wouldn't have been there pushing for it because it wouldn't have been a benefit.

10 The big thing, of course, or one of the two big things - just going back a bit, I've published nearly 20 books over the last 30 years, so been very prolific in terms of the non-fiction author. I've published with a range of publishers, including Henry, but Random House, Harper Collins, Oxford
15 University Press, Melbourne University Press, and both self-initiated projects, but also commissioned works for the government doing the Customs Department. So I know a little bit about dumping and how hard it is to actually enforce dumping provisions. Also a book on the Bureau of Meteorology. Five of my books have been published overseas.

20 It's really essential in my view to retain territorial copyright to allow that to happen. One of my most recent books is this history of Antarctica for which I had great trouble getting funding, research funding to do it. Random House Australia generously came up with quite a generous
25 advance and that allowed me to do all the international research, going to Norway and England and New Zealand and America, all the international research that was essential for getting that done. They were only confident enough to do it because they had the Australian rights.

They knew when I went off and sold the American rights to Oxford
30 University Press and then the British rights to Oxford University Press that those books wouldn't be dumped into the Australian market if there were excess copies. Otherwise they wouldn't have given me such a generous advance and the book simply wouldn't have been written. So this book is a physical representation of the advantages of parallel
35 importation restrictions or territorial copyright.

You've talked here about dumping and I know this is going to try and get through and we've come in here as a matter of form really because we don't figure that anything we say will affect the recommendations. We'll
40 take our arguments up elsewhere. But you talked about dumping and, as I said, books aren't cans of tomatoes. The cans of tomato case took years before it was finally resolved. A book has a relatively shorter life than a can of tomatoes. It would need people on the wharves checking pallets for books that were being dumped into Australia. That's not going to happen

as publishers have said they can't chase around bookshops looking for dumped copies of their books and then trying to stop them.

5 The third thing I wanted to raise was the fair use recommendation
that's been made. This is of incredible concern to us because we've seen
what's happened in Canada where a similar sort of exemption for
educational institutions was allowed and I think it was 40 to 50 million
was ripped out of the publishing industry and spelt practically the end of
educational publishing in Canada. In Australia, we'd rip probably 70 to
10 80 million out of publishing, the money that goes through the copyright
agency to publishers and to authors.

As you know, and as we've said in our submission, the average author
from their work gets less than 13 grand a year from literary activity.
15 Myself, if you don't know, I'm a prolific author, I did a little calculation a
few years ago looking at how much I've earned in royalties over the
previous 10 years and it was an average of 20 grand a year. So one can't
live on royalties. I've had books on the bestseller list in Australia and had
books published overseas. This will be coming out in China in a month.
20 Nevertheless, I couldn't make a living from writing alone. I've had to do
teaching in Tokyo and Dublin and take on commissioned work as well to
make a living. What the Commission is suggesting will undercut that and
I'm glad I'm sort of coming hopefully not to the end yet, but to the tail
end of a career, rather than at a start of a career, because I would hate as a
25 writer to try and start out now, if these proposals get implemented.

MR COPPEL: Thank you, David, and thank you for your patience in waiting until the end.

30 **MR DAY:** And it's my birthday.

MR COPPEL: And it's your birthday. Well, I wish you a happy birthday.

35 **MR DAY:** Thanks.

MR COPPEL: I thank you for putting those views to the Commission. We've had many authors participating in the hearings so far. We will be reconvening in Sydney and there are a number of other authors and I think
40 you're picking up several of the points that are particularly close to the minds and hearts of authors.

MR DAY: I mean it's more important than authors; it's about readers.

45 **MR COPPEL:** And publishers.

5 **MR DAY:** Readers wouldn't have this book, readers in China or America or Britain or Australia simply wouldn't have had this book without parallel importation restrictions, had I not been able to sell the Australian rights. It's a big issue and it'll be argued about for some time, I imagine.

MR COPPEL: I agree with that. Thank you very much, David, and happy birthday.

10 **MR DAY:** Thanks.

MR COPPEL: Is there anyone else who would like to appear before the Commission. There's only one person left.

15 **MR DAY:** I'll give you a copy.

MR COPPEL: Really.

20 **MR DAY:** And you can hopefully keep it in mind when you're writing your final report.

MR COPPEL: Do you want to inscribe something?

25 **MR DAY:** Look I will, yes.

MR COPPEL: Okay, thank you.

MR DAY: I hope I don't see it down in the second-hand shop.

30 **MR COPPEL:** I can guarantee you won't. Thank you very much. I now adjourn the proceedings and this concludes the Commission's public hearing for the IP arrangements inquiry here today in Melbourne. The Commission will reconvene in Sydney next Monday. Thank you all.

35 **MATTER ADJOURNED AT 6.13 PM UNTIL
MONDAY, 27 JUNE 2016**