



**Australian Government**  
**Productivity Commission**

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**PRODUCTIVITY COMMISSION**

**INQUIRY INTO INTELLECTUAL PROPERTY ARRANGEMENTS**

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

**TRANSCRIPT OF PROCEEDINGS**

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**MS CHESTER:** Good morning, ladies and gentlemen, and welcome to the public hearings for the Productivity Commission's Inquiry into Australia's Intellectual Property arrangements. My name is Karen Chester, I'm one of the Commissioner's on this inquiry and I'm joined by my Commissioner colleague Jonathan Coppel. Just by way of background, our inquiry started with the reference from the Australian government in August 2015 and that reference asked us to examine Australia's intellectual property arrangements, including their effect on investment, competition, trade, innovation and consumer welfare.

15

We released an Issues Paper in early October 2015 and we've talked to a large and diverse range of organisations and individuals with an interest in these issues. We've held a number of round tables with groups of interested parties to inform the inquiry and we received around 150 submissions before we released our draft report in late April this year. Our draft report did include some draft recommendations, some draft findings and a number of information requests.

20

Since our draft report, and unsurprisingly to this group I'm sure, we've received a large number of submissions in response, with the total number of submissions now well over 500. We are very grateful to all the organisations and individuals that have taken the time to prepare submissions, to meet with us, to participate in our round tables and, indeed, to appear at these hearings. The purpose of today's hearing is to really provide us an opportunity for interested parties to provide comments and feedback on the draft report. I think most people are very happy to tell us what we got right, what we got wrong and what we missed out altogether.

25

30

Now, today is our final day of public hearings and this follows five very full days of hearings in Brisbane, Melbourne, Canberra and Sydney where we've heard from innovators, authors, designers, academics, legal experts, legal practitioners, publishers, businesses and consumer groups. We will then be working towards completing a final report, having considered all the evidence presented at the hearings and in submissions, as well as other informal discussions. Our final report will be handed to the Australian government later this year.

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Now, we like to conduct all our hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken and

45

for this reason comments cannot be taken from the floor. But at the end of today's proceedings, time allowing, we will allow anybody to make a brief presentation, if they would like to.

5        Now, participants are not required to take an oath but are required, under our Act, just to be truthful in their remarks. The transcript will be made available to participants and will be available on the Commission's website following the hearings. Submissions are also available on the website. For any media reps who join us today there are some general  
10 rules of the game and my colleague, Dominique Lowe, has those for you.

To comply with the requirements of the Commonwealth Occupational Health and Safety legislation, or just good old common sense, you are advised that in the likely event of an emergency, requiring the evacuation  
15 of this building, that the exits are located in the stairwell just outside left and left and the emergency assembly point is in Hyde Park, a couple of blocks that way. If you do require assistance please speak to one of our inquiry team members here today. Participants are invited to make some opening remarks, but if you could limit those to five minutes that would  
20 be appreciated. This allows us an opportunity to really get in and discuss matters with you. You are more than welcome, also, to comment on the issues raised in other submissions to our inquiry.

I would now like to welcome to the first of our participants here this  
25 morning, from the Australian Society of Authors, Juliet Rogers, Garth Nix and Olivia Lanchester. If you could each just state your name and who you represent, just for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks.

30        **MS ROGERS:** Thank you. I'm Juliet Rogers, from the ASA.

**MR NIX:** I'm Garth Nix, an author and member of the ASA.

35        **MS LANCHESTER:** I'm Olivia Lanchester, from the ASA.

**MS ROGERS:** Good morning everyone. We're here today on behalf of our more than 3000 author and illustrator members from across Australia who each represents a small business, a livelihood under threat from the recommendations of this Productivity Commission report. These creators  
40 make a rich contribution to the culture of our community and copyright is the mechanism by which they make a living. As such, it's not an impediment to the consumer but rather the means by which consumers can enjoy a range of locally produced books that reflect their family's lives and those of their communities.  
45

This review is grappling with the challenge of how copyright legislation can be flexible, robust and relevant, in the face of a rapidly changing market. We understand that dilemma and appreciate that there is room for improvement and simplification within copyright legislation.

5 But to quote writer, as I would, of course, Ellen Glasgow, “All change is not growth as all movement is not forward.” This report is written under a predetermined position that considers change to be positive and necessary, simply because it is change not because it means progress. What problems are your recommendations solving? We struggled with the tone

10 and the rather provocative content, such as the 15 to 25 year term of copyright, but it’s the lack of evidence and failure to quantify the benefits of the proposed changes that are most disturbing to us.

If parallel importation rules were removed the proposition appears to be that the consumer would benefit through better prices, availability and range. While these are fair and reasonable benefits, they are all available, at the moment, under the current arrangements. As an individual consumer of books I can buy any book from anywhere in the world, find the best price on any number of comparative pricing sites as well as

20 having access to some of the best book shops on earth. As a bookseller I can buy my major international titles and all my Australia books through my local publishers at a good discount with the protection of full sale return and localised promotional support. I can buy any other title in bulk from anywhere in the world, unless my local supplier has made it

25 available within Australia, within a very short window from this first international publication.

Most authors collect of their income by licencing their rights in markets around the world, just as their colleagues in the US and UK are able to do, without risking their local sales being devastated by the importation of overseas remainders. Publishers can manage the considerable risk and investment of their Australian lists by licencing international titles which they can actively promote, on an exclusive basis, within Australia, in the same way that their colleagues are able to do

35 throughout the world.

These activities all underpin a vibrant and successful creative industry that stands on its own two feet, without relying on government subsidy. So I ask, again, therefore, what problems are your recommendations solving? Prices of major new titles are driven by competitive market

40 forces and are comparable with international pricing, once the complexities of exchange rate, local taxes, different formats and supply chain dynamics are taken into account. Books, in the very long tale, are largely not subject to exclusive licences, but the intricacies of exchange

45 rates, international shipping, less advantageous discounts and firm side

purchasing all stand in the way of booksellers purchasing direct from overseas.

5        So our concern is if the recommendations made any difference to  
price it would be in the importation of low value, poorly made, mass  
produced fodder, which would most likely be in the areas of early learning  
children's books or non-fiction titles as, with a little help from Wikipedia,  
such books can be assembled without proper authorship and at low cost,  
10       or any of the books that have failed to sell to their expectation in the  
original market.

      Where is your evidence that this is what the current consumer wants?  
Because our evidence strongly suggests that parents do not want their  
children to start calling them Mom. They want Australian books that  
15       embody our humour, values and idioms. Why place the publication of our  
stories at risk in exchange for piles of failed books that no one has actually  
asked for or actually want? Why change a system that 15,000 people have  
signed a petition to support?

20       Finally, the great misnomer, fair use. Fair does not equal free and  
while consumer interests are important, so are the interests of our creators.  
The Commission clearly considers that the current fair dealing provisions  
are insufficient in terms of the consumer, but haven't you taken a sledge  
hammer to crack a nut by proposing a change that almost ignores the  
25       creator all together? Why does the Commission consider the writer's  
ownership of and recompense for their creative work is so much less  
important than the consumer's right to unfettered access? How does the  
Commission propose that the average author develops the skills, contacts  
and financial resources to act as the sole gatekeeper to their own rights in  
30       an environment that will be close to a free for all?

      Everyone has their favourite book, that book that takes them back to a  
time and place that's special to them. From Possum Magic to The Power  
of One these books help to define who we are, both individually and as a  
35       nation. No system is perfect and our authors are more than willing to  
work with all sectors of our industry to continue to improve the way in  
which we work together and deliver the best value and service to the  
consumer.

40       Indeed, there would be no better time to do so, given the  
unprecedented unity across the industry that your report has ironically  
elicited. But there's no escaping the fact that these recommendations  
place a system that delivers high quality, locally made, relevant and  
accessible books at considerable risk, without producing evidence of

harm, in the present system, or quantifying the benefits of the new. This is unjustifiable, illogical and downright wrong. Thank you.

5 **MS CHESTER:** Thanks very much, Julie for those opening remarks. I might just begin with just a couple of points of clarification and I think there's been some interesting media reporting of what people think might have been in our draft report. I think the first point that might be helpful is we don't make any draft recommendation with respect to the term of the copyright. Indeed, there's many pages of our report that explain why we  
10 would not recommend that, given the obligations we have and given, indeed, our terms of reference asked us to be mindful of those obligations.

**MR NIX:** May I just say, there is a draft finding in a box, on the page  
15 which many people saw as a recommendation.

**MS CHESTER:** I was just about to get to that, Garth.

**MR NIX:** If you didn't intend for that to be anything of a recommendation, why is there a box draft finding?  
20

**MS CHESTER:** I was just about to get to that, Garth, thank you. So what we did, in our draft report, was our terms of reference asked us to say are we getting the balancing act right at the moment. In doing that, we did some analysis, based on ABS statistical evidence, where the ABS had  
25 done quite a lot of work about the commercial life of creative works in Australia and it was based on that evidence that it suggested that the commercial life of most creative works are about 15 to 25 years, so we were contrasting that to the term of copyright at the moment, which is life plus 70 years. Don't worry, we realise that that's caused a great deal of  
30 consternation and concern with people.

**MR NIX:** It's an extraordinarily flawed way to - books are not average products, every book is a unique product. Trying to find the average life of a book is very dubious statistically. I haven't actually seen the  
35 methodology of that ABS study, but how do you account for a book that has a life of - take one of my books, for example, has a life of three years and disappears for two years, comes back in a second edition, it has a life of five years, it sells a certain number of copies, goes away again. Books come in and out of print, new books bring older books back into print  
40 again. How do you arrive at 15 to 25 years for an average book when there is no such thing as an average book?

**MS CHESTER:** I think we appreciate that - a couple of things. Firstly, the ABS statistical base hasn't been challenged by anyone, nor their  
45 methodology, based on any evidence that we've received. One of the



challenges we've got is under our obligations and the way that copyright term is framed, it's kind of like a one size fits all and we know very well that it's not one size fits all. You can have book that might have a life of a year, you might have a book that has a life of life plus 70. So we were  
5 looking at the evidence base, in terms of what it told us the averages were and the spread of 15 to 25 years. Anyway, it's not relevant, in terms of the draft recommendations, we're bound by those international obligations.

10 The other point of clarification that I thought might be helpful is around parallel import restrictions. A first blush reading of our terms of reference might suggest that we've been asked to do a holistic review of whether or not to repeal parallel import restrictions and, indeed, that's  
15 how some people have misinterpreted our terms of reference. It did require us to take into account the government's response to the Harper Competition Policy Review so we have to look through to that response to interpret our terms of reference and in that response the government has accepted and said that they'll proceed to remove parallel import  
20 restrictions and they were asking us to look at transitional issues. So that was what very much was the focus of our report in looking at parallel import restrictions.

So that kind of takes me, maybe, to the first question that I thought would be good to begin with. In our report we identified a couple of the  
25 transitional issues, as we saw them, and, indeed, a lot has happened since we did our earlier report on books, in 2009. Prices have come down but we're still trying to get a handle on what the real number is there. Secondly, the Australian dollar is in a very different position, in terms of managing the transitional issues that would come from removing parallel  
30 import restrictions. We also know that some of the concerns that have been raised previously and now about the potential to dump books of whatever quality, or remainders, on the Australian market, the government's introduced some more changes to Australia's dumping arrangements, which apply to all other sectors of the economy. So they  
35 were a handful of the transitional issues that we identified. Are there other transitional issues, in your thinking, from the perspective of your members, that we need to be mindful of, as we finalise our report?

**MR NIX:** Can I just say I think your leaping ahead that parallel  
40 importation restrictions should be abolished, based upon the Harper Review. Looking at your report here, I mean this draft sentence here, which is on page 129, "By raising book prices PIRs adversely affect Australian consumers, with little or no change in the incentives for producing works by authors, notwithstanding claims to the contrary."  
45 There's absolutely nothing to support that sentence. If that was in a Year

7 essay it would fail. There is nothing in there. Is there going to be something more in your later report that actually says, “Notwithstanding claims to the contrary” six words. Now you’ve received hundreds of things saying, “Yes, there are actually many things to the contrary.” I also  
5 wanted to ask, “Little or no change - - -

**MS CHESTER:** Sorry, we’re trying to ask some questions of you, so the question I asked, and I’m not sure I’ve had a response to, is are the changes - - -  
10

**MR NIX:** Because you’ve leaped ahead. You’ve leaped ahead to transitional issues after PIRs are revoked, but we need to say that PIRs should not be revoked. So why are we leaping ahead to transitional issues?  
15

**MS CHESTER:** So two quick thoughts there so that we can get on and try and speed up and answer some of the questions we’ve got for you.

**MR NIX:** So we’re not meant to ask you questions?  
20

**MS CHESTER:** So the public hearings can be a discussion but we’ve got a number of questions that we need to get in evidence based from yourselves and that’s the purpose of today’s hearing.

**MR NIX:** So the purpose of this is to actually not hear from - - -  
25

**MR COPPEL:** We’ve heard many people say that the work that we did in the 2009 report on parallel import restrictions is now out of date. We’ll be updating some of that analysis for the final report. We judge that for  
30 the draft report, given that the terms of reference asked us to look at transitional arrangements, that updating of that work was of lower priority than other areas of the report, which are quite expansive. But we will be doing some further work to look at some of the evidence that was presented in 2009 and what it looks like today.  
35

**MS CHESTER:** So that way when the government gets our final report, albeit we’ve had to work within the terms of reference we’ve got, they’ll have that updated information on pricing. We’ve had some evidence provided by some publishers who’ve tried to be helpful and looked at  
40 some excerpts of price lists, but unfortunately to do it full justice we’re going to do the comprehensive pricing update.

**MR NIX:** All on pricing, not looking at any other issues? Not looking at any of the other issues that have been raised in many, many of the  
45 submissions? Because it’s not all just about pricing, of course. You

brought up dumping provisions, which is very interesting because, of course, if we do remove our parallel importation restrictions, which is really just surrendering our Australian territorial copyright, many of the books that come in will not be officially dumping. It won't be a situation  
5 where they could even be described as dumping, under various international arrangements, they'll just be a by-product of the international scheme of how books are sold because the Australian market is not a separate entity, it's part of an international copyright market, which is one of the things that most disturbs me about this is that we're suggesting  
10 change to our Copyright Act and our market as if we are somehow separate from the world.

**MS CHESTER:** So, Garth, one of the things we have been doing, over the last six days of hearings, is asking for some further evidence from the industry, from publishers, particularly the multinational publishers, around  
15 practices and the extent of remainders, particularly in the US market, given that that's the primary area of concern.

But given that you sell and licence internationally, it would be good to get your sense, or from any of you, about is there any difference in the US model? We've heard a lot about the risk sharing in Australia, across authors, booksellers and publishers, with respect to royalties, with respect to taking back unsold books from the booksellers and with respect to remainders. Is that disparate from your experience in the US?  
20

**MR NIX:** There's lots of commonalities between all three markets. The one that particularly disturbed me, of course, and I've just come back from the UK where I discussed these proposed changes with my British publishers who were - I actually had a conversation where they could not actually believe what I was telling them. They could not believe that our  
25 government would be stupid enough to remove our territorial copyright. So I had this almost Cathegeresk conversation, which I've had before, but this was with somebody new, where she found it hard to believe what I was telling her and I had to keep repeating, "Yes, it would be an open market that their editions of my books could also come here."  
30  
35

What greatly disturbs me is not dumping of remainders, which would certainly be a possibility it would be actually giving them our market. My British publishers, my American publishers have both said, openly, that if  
40 this becomes an open market they will compete here and they will print for it.

One of the things that disturbs me about this report is the lack of understanding on a very basic level of publishing business. Everything is  
45 based upon reports and studies of very big scale stuff, without any

evidence of understanding of how publishing actually works on the ground level. So, for example, the very basic thing of economy of scale, in print books, and print books are still between 50 and 60 per cent of the market, sometimes more. In America it's about 50/50 with eBooks, here  
5 it's probably 60/40 the UK is probably 80/20. So print books work on an economy of scale where the more you print the cheaper they are. For both the Americans and the British, having Australia as a market where you could print an extra 5000 or 10,000, on top of your normal print run, makes all of your books cheaper, greatly improves your bottom line in  
10 your home market, the US or the UK. You could print an extra 5000 specifically just to sell them in Australia.

Say, with my books, for example. I'm an Australian author, I'm here, my books are published by Allen & Unwin, an Australian publisher,  
15 Australian owned, independent publisher, but if they have to compete with Bonnier(?) in the UK or HarperCollins in the UK or Scholastic and HarperCollins, in the US, who publish my books, who simply decide to make their bottom line better by publishing more and sending the books here. Due to the intricacies of publishing agreements, it's quite likely they  
20 could also distribute their books here at a much lower royalty.

So I would have books coming here which have been specifically printed to improve the bottom line of American and British publishers, in my own country driving out books published by my Australian publisher,  
25 under these proposed arrangements. This could not happen to an American author or to a British author, you can't go the other way. This is one of the things that gravely disturbs me is that we're just giving them an opportunity and, in fact, in a way we're going back to 40 or 50 years ago where this happened all the time, there were not separate Australian  
30 editions.

**MS CHESTER:** So just two comments that would be good to get your sense of. Firstly, we've heard from the industry that publishers locally have been quite lean and mean since 2009 and the price differential  
35 doesn't really exist between books published here in Australia and offshore, and we're still waiting to get an evidence base around that. So if that's the case, and you still have the advantage of no transportation costs, the point that, Juliet, that you made in your opening remarks, why is it that there would be a flood of books into the Australian market, remainders set  
40 aside, Garth. I'm just trying to understand.

**MR NIX:** It's a good question. Because there would be an opportunity for the American and British publishers to force out local players. As I'm saying, they can print the extra books to improve their bottom line. Those  
45 books are essentially free for them. They are something they can then use

as a lever. So they can use it as a lever to get into our market, they can price them at a loss, as a loss leader, and sell them here, simply to then kill our local publishing. If they could, over time, put Allen & Unwin out of business, for example, then there is no competition, they can put the prices  
5 back up again. It just creates an opportunity for them which doesn't exist if we maintain our copyright territory. So they could do very predatory pricing and there's nothing anyone can do to stop them, that's the nature of it.

10 **MR COPPEL:** This scenario is a scenario that could play out in any other sector, which do not have parallel import restrictions, what makes the book sector so different from those other sectors to have these restrictions?

15 **MR NIX:** Well, what other sectors would you have absolutely identical products?

**MR COPPEL:** I don't know if you have to be absolutely identical, but can you - - -

20 **MR NIX:** No, but that's what I'm saying, the books are identical products.

**MR COPPEL:** Can you explain then, is it just because books are  
25 different from every other sector that parallel import restrictions are justified? What rationalises the prevalence of parallel import restrictions in the book sector and not in any other sector? I put the question back to you, in a sense?

30 **MR NIX:** Yes. I think you'd have to look at history. Regardless of why they are there, they do exist, they exist worldwide. There is a worldwide system of copyright. This is how the international system works. Why it is there, why are other forms of international arrangements, why do they exist?

35 **MS LANCHESTER:** Book are different because they're not substitutable, like an appliance might be, for example. So there is something about a creative work which is inherently not substitutable. So the restrictions might not exist in other sectors because the nature of the  
40 product is different in other sectors, whereas there is an added interest in a creative field to have uniquely Australian content.

**MS CHESTER:** But the music industry doesn't have parallel import  
45 restrictions and they would see themselves very akin to books. Anyway, just coming back - because I want to get onto fair use, and I'm very

conscious of time. Just coming back to the point about these arrangements exist everywhere else, I think it's important that until Friday's Brexit decision it was quite different for the UK, compared to Australia, because territorial copyright applied to the entire EU.

5

**MR NIX:** That's not actually true. In practice it's not true. I mean in practice Europe - Brexit will change how English language books are sold in Europe, it won't change how English language books are sold in the UK and Northern Ireland. I think it's important to differentiate that from looking it as a whole, particularly in terms of Australian books, of British, Australian, American books.

**MS CHESTER:** Publishers and legal academics might choose to disagree with you because that's an area where we're getting conflicting evidence. I think the other thing, though, is that the US, which has a slightly - originally arrangements for parallel import restrictions with first right of sale, that's now being unbundled by some court decisions where -

**MR NIX:** It's been temporarily unbundled by Cassai(?) but that's very temporary. Again, when I was in the US, in February, talking to a publisher about this, there's already a bill before Congress or was about to go before Congress which will close that first sale loophole. So once again they will have complete territorial copyright. In practice it will be very - apart from Cassai importing those John Wiley text books, I don't know of any example of a non-US publisher successfully importing books into the United States. I'd be curious if you can tell me if there is one.

**MS CHESTER:** Well, we have received submissions, in evidence, to suggest that's the case.

**MR NIX:** The American publishers I asked actually could not name any successful examples of that. Certainly I'd be very interested in an example of an Australian publisher being successfully able to export copies of books to America, where there is already a US edition of that book.

**MS CHESTER:** I'm conscious we need to touch on fair use as well this morning, given the concerns that you've raised there. It's interesting, one of the participants last week suggested to us that fair use wasn't getting a fair deal, and I think what they were suggesting there was that a lot of folk have described fair use as free use. It would be good if you could just talk us through your understanding of what it is about the four fairness factors and the illustrative examples that would result in fair use being free use,

because that's not what we understand, based on the previous work of the ALRC, the view of legal academics and practitioners in the field.

5 **MS LANCHESTER:** Because fair use would operate as an exception to copyright infringement. So, therefore, if it's an exception to infringement there is no requirement for pay for information.

10 **MS CHESTER:** Maybe if you give us some tangible examples of what you think is remunerated today, under fair dealing, which is kind of fair use but through a prescriptive exclusions list, what would be remunerated today, under fair dealing, that wouldn't be remunerated under a system of the four fairness principles, and the illustrative examples?

15 **MS LANCHESTER:** When you say the four fairness principles, are you referring to the principles the Australian Law Reform Commission recommended or the principles that you have recommended, or the US principles?

20 **MS CHESTER:** Let's start with the ALRC, because I think they've, rightly, pointed out to us our attempt to stray a little bit from their principles would potentially raise some issues about importing some jurisprudence experience from the US. So just looking at the ALRC fairness factors and illustrative examples, can you give us some tangible examples of what's remunerated today, under fair dealing, that wouldn't  
25 be remunerated under fair use? Mindful, as well, that we have made no recommendations to change licencing and statutory licencing for education.

30 **MS LANCHESTER:** But education, I guess, is an obvious one, because the Australian Law Reform Commission recommended that education be an illustrative purpose. So that would be an area where we would say remuneration would slow or stop.

35 **MS CHESTER:** Of what? Because when you look at the fairness factors, if something's commercially available and it would impact that market for it to be made available without remuneration of copyright then that wouldn't get through the fairness factors. So we're really struggling to understand why people construe it as free use.

40 **MS LANCHESTER:** But the very purpose of bringing in a fair use exception is to allow free use.

**MR COPPEL:** But fair dealing is an exception as well, it's just one that's prescribed fair use as more driven by principles that a user needs to

be comfortable that are consistent with those principles, in order to be able to avail itself of that exception.

5       **MS ROGERS:** I guess the worry is that where there is fair use in  
America is that there are many, many cases where the person who used  
the material felt it was fair but the copyright holder very definitely did not.  
So that amount of litigation that surrounds this area is due to that lack of  
clarity and our concern is putting that onus back on authors, who are not  
10       well-resourced, on the whole, to prove their case will make it extremely  
onerous on them and there are many large organisations who may well, in  
their own minds, be able to justify that use, under one of the principles,  
have resources to defend their use and the author is there trying to say,  
“No, I didn’t give permission and I do require payment.”

15       **MS CHESTER:** I think, Juliet, this comes to the issue that’s been raised  
about which of the systems, fair use or fair dealing, is more certain, no  
legislation is certain, but we’ve actually received a lot of evidence from  
users, libraries, archivists, educational institutions that fair dealing,  
because it’s set in time and it’s not technologically neutral, actually gives  
20       rise to greater uncertainty about what’s fair or what’s not, because there’s  
a certain list of what’s prescribed is in or out. Whereas fair use, because  
it’s principles based, similar to what we’ve done with our Australian  
consumer laws, for example, we’ve moved away from detailed,  
prescriptive legislation to principles based legislation because business  
25       models and technology and things adapt. So they’re saying that fair use  
provides them with greater certainty because it does adapt, over time, to  
different forms of technology, in terms of how copyright material is made  
available.

30       **MS LANCHESTER:** But at any certain time the assistance or guidance  
from the courts, which would require extensive litigation to get there, and  
we’re saying, on behalf of writers, they are not well placed, as a group, to  
run litigation to the order to get guidance. We would question that even in  
jurisdictions where fair use has been around for a long time, like the US,  
35       that there is settled understanding even there. It seems to me confusing to  
propose that fair dealing, with a list of prescribed purposes, is less certain  
than fair use, with an open, non-exhaustive, ever evolving inflexibility.  
That just does not make sense.

40       **MS CHESTER:** So there’s a couple of ways in which the uncertainty of  
the principles based legislation can be addressed. We’ve identified those  
in our draft report and, indeed, we can look to international jurisdictions,  
like Israel, that has transplanted the US fair use system into their economy  
and publishers and creative industries are thriving there under it.

45



5 So, firstly, if we don't stray from the ALRC wording we can actually leverage the US jurisprudence. The industry and the users in the US have effectively issued a whole bunch of guidelines in different codes, in terms of providing useful guidance to users on how they should interpret the fair use principles. So there are a whole range of ways in which that uncertainty factor is being addressed, without requiring local authors or local publishers to have to go through the courts. We can draw on leverage off that, those uses.

10 **MS LANCHESTER:** I think when you hear another commentary on fair use its appeal seems to lie in the fact it's deceptively simple. We've got this one, broad category of exception and we can apply that and we've dealt with all of the challenges to copyright and it's flexible and every evolving. Great. But we say that it's danger is in its very breadth and it's  
15 as though fair use is identifying a netball court sized challenge and throwing a blanket, the size of a football field, over that challenge and ignoring the fact that all the extra space you've covered represents lost remuneration for our writers.

20 **MS CHESTER:** That's where it would be good to get some evidence from people about what they think won't be remunerated, under fair use, that's remunerated today, under fair dealing.

25 **MS LANCHESTER:** Off the top of my head, what about if you had a situation where a writer has written a book and the book is out of print, or a poem, and that poem is used as the basis for a song. Under fair use there could be an argument that, "Well, there was no commercial availability of that work at the time and there's been transformative use because it's been made into something new and different," and there might be, on behalf of  
30 the author of the book, a real uncertainty about whether or not they can litigate, particularly if you are not well placed to run litigation anyway, due to cost.

35 **MS CHESTER:** One of the other issues that you raised in your post draft report submission seemed to be some concern that we'd recommended changes to the educational and statutory licencing arrangements. Our draft report doesn't make any such recommendations so I'm just trying to understand where those concerns were coming from.

40 **MS LANCHESTER:** Sorry, can you point to me where? I don't think we raised that concern. Could you repeat that?

45 **MS CHESTER:** When you were talking about your concerns around fair use, I think it was in your post draft report submission, you had some concerns around educational use of fair use material, which seemed to

5 suggest that there wouldn't be the continuation of educational statutory  
licencing. We didn't make any recommendations in our report to make  
any changes. We actually see the licencing arrangements providing quite  
a valuable role, in terms of, one, reducing uncertainty for the myriad of  
education institutions, but also reducing transaction costs with dealing  
with the collection agencies directly.

10 **MS LANCHESTER:** I think you might be referring to where we quote  
an author, who is an educational writer, who is explaining a concern he  
has, "Why would I continue in educational writing if I can't expect  
remuneration?" So how do you propose that fair use, if it includes, in an  
illustrative purpose, education, how do you propose that that sits alongside  
the educational licencing scheme?

15 **MS CHESTER:** So the same as it sits alongside fair dealing at the  
moment. We've received evidence, including in submissions that you can  
have a look at, from the educational institutions and those that are  
currently in charge of doing those licencing arrangements, that they will  
continue. Because it's a way for them to manage the transaction costs, it's  
20 a way for them to manage uncertainty across the schools and universities.

**MS LANCHESTER:** Of course I know you've already been made aware  
of the concerns in Canada, when their fair dealing provisions wouldn't  
include education. But perhaps we'll leave that to the publishers to speak  
25 to you about because in Canada when fair dealing covered education there  
was a massive reduction of licence fees back to authors.

**MS CHESTER:** I think there's a lot been said about the Canadian  
example and whether or not it's relevant to Australia. In our draft report  
30 we spend quite a bit of time unbundling what really happened in Canada  
and how it's not a parallel to what's happening in Australia, given that it is  
fair dealing and given there was a change to the licencing arrangements,  
which we're not recommending any change to.

35 **MR COPPEL:** In your submission to advocate for improvements to the  
licencing arrangements, can you elaborate on what you see could be  
improved in that area?

40 **MS LANCHESTER:** Well, for example, we agree with the  
Commission's observations on licencing solutions, such as a copyright  
hub. So rather than introduce a vague exception to copyright  
infringement, in fair use, we would advocate for more work to be done on  
driving efficiency on licencing. I don't think it's something that the ASA  
has expertise in offering how those licencing solutions might be rolled

out, but that is where we see true value in going down that path, rather than a broad - - -

5 **MR COPPEL:** I guess a starting point would be identifying where there are problems, under the current licencing arrangements. Do you see any problems with the existing licencing arrangements?

10 **MS LANCHESTER:** No, we see problems with introducing a fair use exception. So we don't see problems with the current licencing arrangements, in fact we think that they that is the way to go, to ensure remuneration for creators by licencing.

15 **MR COPPEL:** I'm not quite sure I get the full logic, because you're saying that there are issues in where the licencing arrangements can be improved, but you're saying that they're all working fine.

20 **MS LANCHESTER:** The online environment might be an area where licencing is difficult so we see technology driven licencing solutions as having a very valuable role to play there.

25 **MS CHESTER:** I think we're probably going to hear about that shortly, we've got the Australian Institute of Professional Photographers coming up and they really struggle with those issues as well. Thank you very much, they're all the questions that we wanted to work through with you this morning, but we appreciate your submissions and we appreciate your attending our hearings today. I'd like to invite our next participant to join us, Chris Shain, from the Australian Institute of Professional Photography.

30 Good morning, Chris, and welcome and thank you very much for joining us this morning but also for your submission, following the release of our draft report. If you wouldn't mind just stating your name and the organisation you represent, for the purposes of the transcript, and then if you'd like to make some brief opening remarks, but just imagine I've got a debating bell here that I'm going to ring in five minutes. Thank you.

35 **MR SHAIN:** That's fine. I understand. My name is Chris Shain, I'm a working, commercial photographer. I'm here, in a voluntary capacity, representing the Australian Institute of Professional Photography, that has over 3000 members in Australia. I will make a reasonably brief opening statement.

40 Firstly, thank you for the opportunity to speak directly to you about the Productivity Commission's draft recommendations on intellectual property arrangements which are, from what we see, appear to be

ideologically driven and if implemented in any way would be very detrimental to the livelihood of our members.

5 I'm very happy to answer questions about our submission, obviously, and any general questions that you may have, but I'm here as a creative content producer and I represent 3000 others, who have to deal with the day-to-day reality of trying to make a living out of copyright. I'm not a lawyer, I have no legal, political or legislative background and if you do need to have academic and legal discussions, I'd be happy to forgo some of my time to allow my colleagues, at the Australian Copyright Council, to have more floor time, if needed, and we support their position wholeheartedly.

15 The Copyright Act works pretty well right now. Copyright is an important and economic imperative to creators. Consumers can make copies of their DVDs. School kids have pretty fair, and some would say it's too lenient, access to copyright material. What is the problem you are trying to solve? I'm a working professional photographer and a long term member of the AIPP and very involved with copyright and licencing issues since the early 90s, when I was involved in negotiating changes to section 35 of the Copyright Act.

25 Now, if there's one issue about copyright that fires up photographers today it's the very wide, broad proposals from all sorts of people, all over the place, about fair use and different fair use regimes and how good it will be. It's probably the one thing out of this, aside from the term issue that you've tried to explain to my colleagues here that it's a non-issue, but you've certainly flagged it as one, about the term of copyright is an issue, the other one is fair use, obviously.

30 Photography is a very widely used creative medium. There is an insatiable appetite for good quality visual material in the online world, the world, not just Australia, the online world that we all encounter. There are many, many, many examples of significant moments in history that are marked very strongly and effectively by a photograph that often carries with it massive emotion. I'm certain that everybody in this room, and you two I'm sure, could reel immediately, off the top of your tongue, a number of photographs that define a historic world event, way above anything else. Our society would be a much poorer place without them. It's not created, used or published with geographic boundaries that stop at the heads of Sydney. That content, the ownership of that content, the copyright on that content doesn't stop at our borders. Our members work, once online, is in a worldwide market instantly. Like instantly.

I'm sure now that everyone has iPhones, crowd sourcing of news imagery is a whole new source of images. But if our society, and I mean the whole range of society, wants to record something properly and effectively, everything from a shiny new billion dollar bridge for the  
5 Queensland government, this building, for example, that had a whole new top put on it some decade ago, if that wants to be recorded for the posterity of the community and the society and the Australian society, everything from that through to a still birth at the Whyalla Hospital, more and more now people are coming to a professional to get that done  
10 properly.

Sure, there are millions of pictures, you only have to go to Google, you will find images of this building that we're sitting in right now, there will be tens and tens of thousands of them. There will only be a handful  
15 that are published with kudos and with respect. Our member's work is what is making these images. From my personal experience, that is happening more and more and more. That, despite the fact of this insatiable appetite for imagery, there is a great demand for professional imagery. The only way the professionals have a way of controlling that is  
20 through copyright.

I'm a working professional photographer, I've been freelancing for 40 years and the basis of my income is the control of copyright by licencing my work, in one way or another, not always successfully, but that is the  
25 basis of I work. The ability, as a visual artistic creator, to be able to exploit that copyright is often, not always, but often the only way I can make money from my work.

The other thing that I'd really like to impart here is the distinction that  
30 we, as working photographers, often get bundled up with copyright owners and this sort of - I don't know if that terminology is used a lot through your report, but there is this sort of assumption that the copyright owner is this massive corporation who is trying to shut up the public. I am a copyright owner. I'm no massive corporation, I'm a single  
35 individual person working out of the boot of my car. Yes, I own some copyright, but I struggle like hell to control the copyright, as a content creator.

There is a big difference between copyright owners and copyright  
40 creators. Photographers and writers and publishers, we're sometimes strange bedfellows but we all - Rupert Murdoch and I get bundled into exactly the same category and I would urge the Commission, strongly, to have a really serious look at that, because we are miles away from the same category, miles and miles and miles away.  
45

It would appear to us that many of your recommendations are trying to give a consumer free and uncomplicated access to content on their TV screens. That seems to be, sometimes, the base point of the conditions of what I would see as pretty simplistic recommendations. As a small time, individual creative content creator I'm also affected by this. I just don't see any consideration, by the Productivity Commission, of the vast range of visual content, monetised by existing copyright law, that's created by a single, lone photographer, a writer, a painter, a musician and I'm sure I'm just - you must have heard this before, I hope you have, this is day five, or six, I'm hoping I'm not the first person to point this out but it is such an important point about how the small time, lone creative content producer is just being left out of a lot of these discussions, as we shouldn't be. So the two biggies for us really are fair use and the term of copyright. The fair use, I notice a couple of other submissions referred to Richard Prince, are you aware of those examples?

**MS CHESTER:** Yes.

**MR SHAIN:** One of our members particularly, I mean the Richard Prince v Patrick Cariou example of the Rastafarians is talked about most generally. A more recent example of that is the Instagram use that Richard Prince made of repurposed Instagram photos and they were professional photos. One of our members in Australia here was the subject - one of his photos was used in that exhibition. That is a really scary prospect for a small time individual creative photographer to try and deal with that, on a worldwide basis. It is very, very, very difficult. I'll conclude my remarks there.

**MS CHESTER:** Thanks very much, Chris, for those opening remarks and I hope the earlier comments that you were here to listen to around the term address that issue, at least in terms of what was in our thinking in our draft report.

**MR SHAIN:** You mean about the term?

**MS CHESTER:** Yes. So no recommendation.

**MR SHAIN:** Sorry, do we not have any recommendation on that?

**MS CHESTER:** No, sorry, we did not have any recommendation.

**MR SHAIN:** It would be really good to clarify that, I think, because that's big time out there in the public sphere. If you are not recommending that, please withdraw the comment about 15 to 20 years. Seriously, because the public, and this is the trouble where we're going to

5 get to in talking about fair use, the public are the one that read this on the front page of the Telegraph and that's the simplistic thing that I was referring to there in my opening remarks, there are these simplistic things put forward, "Let's just reduce the copyright term to 15 or 20 years, that will solve a few problems." It's just complete rubbish.

**MS CHESTER:** Well, it's not something that we said and agree it's complete rubbish.

10 **MR SHAIN:** Sorry, you do agree it's complete rubbish.

**MS CHESTER:** Sorry, we don't have control over what media print. So just you mentioned, Chris, that you think everything is working very well. I guess we did identify what we thought was a problem for your industry, and that is with the online world there is a huge amount of unauthorised use of professional photographer's images. Indeed, metadata being stripped out and folk using it in an unauthorised capacity. So one of the areas that we did spend a little bit of time on was trying to work out what other solutions there might be to this problem. Indeed, Jonathan and I were lucky enough to have several meetings, including a face-to-face, with the folk from the UK Copyright Hub, which has tried to, following the Hargreaves Report into the UK copyright arrangements and intellectual property. That was an initiative of industry and government in the UK. It would be good to get your thoughts on the merits - - -

25 **MR SHAIN:** I'm not sure that the industry was completely supportive of Hargreaves, but anyway, yes, in the photography industry.

**MS CHESTER:** Of the UK Copyright Hub.

30 **MR SHAIN:** Of the Hargreaves, sorry, did you say - I misunderstood. You mean there's industry support for the hub or for Hargreaves?

**MS CHESTER:** I wasn't asking for the views on Hargreaves, but on one thing that did come out of the Hargreaves Report that I think industry has been supportive of was the Copyright Hub. We had quite a bit of commentary about that, in our draft report, in terms of the potential for that to be rolled out in Australia, with the support of industry. So it would be good to get your thoughts on the merit of that extending down under and is that something that the institute is supportive of and what role would you see that playing, in addressing some of the online unauthorised use?

45 **MR SHAIN:** I think anything that would enable a photographer to be able to pursue, effectively, an infringement we would support

wholeheartedly and be very interested in having discussions about that. I think we mentioned, in our response, a little bit about perhaps a Small Claims Court and those sorts of issues, we'd love to see something like that. Because that is one of the biggest impediments or the biggest  
5 impediment, to be honest with you, is the cost of defending an infringement. Forget about if the law changes, right now I personally know in Australia I think of one or maybe two cases that have actually ever gone to the Federal Court and been prosecuted at all about photography, pure photography. So the cost is just absolutely prohibitive.  
10 It is absolutely prohibitive and we are dealing, again, I just need to keep reminding you, you are dealing with small time, local, Australian micro micro businesses that are struggling to make a living, in a way, and the basis of that living is copyright. So pursuing that against an infringer of that right is extraordinarily difficult.

15  
**MR COPPEL:** On that point, because you've made several points about the ease of someone illegally using a photograph, and that's under current arrangements so many of your points relate to enforcement or ability to enforce copyright. Can you give us a sense as to whether the proposed  
20 changes - is there any conflation of the proposed changes in the draft report to copyright scope, through things like fair use, with the challenge associated with enforcement under the current arrangements?

**MR SHAIN:** You mean things that will help?  
25

**MR COPPEL:** I'm wondering whether a lot of the concerns you have with the proposed recommendation for fair use, for example, which is the statutory exemption, are being conflated with existing problems associated with the enforcement of copyright, whether that be under fair dealing or  
30 simply pirating.

**MR SHAIN:** I would agree precisely with what the authors just said about fair dealing. Here is a prescribed manner where everybody knows exactly what the deal is. Maybe that needs some tinkering and adjusting  
35 and all those sorts of things, but the fair dealing provisions are prescribed, everybody knows what they are, the school kids can photocopy their books, we all get a little slice of it, from time to time, if we're lucky, so be it.

40 Under fair use that just gets completely blown apart and we come back to the front page of the Telegraph. I believe is the biggest problem is that the public, the user, just starts to - it sort of just keeps knocking another brick off the parapet, is how I personally see it. And from watching this happen over time, has the public think, "Here's a  
45 photograph, it's on the internet, I just right click and use it." I don't know



if you've done it, but I've probably done it, where you right click on a picture on the screen and save it to your desktop, you've breached the Copyright Act.

5     **MS CHESTER:** Which is, I guess, why we were looking at it from the perspective of a lot of consumer groups, like *Choice*, have done some surveys about piracy and unauthorised use. Part of the issue seems to be a lot of people actually want to do the right thing and to remunerate copyright holders, but difficult to identify who the copyright holder of the  
10     image is. That's why we're looking at things like the UK Copyright Hub.

On the issue of enforcement, that's another area, so we tried to look at things holistically, do the rights set the right balance? Can people enforce their rights and are we keeping transaction costs down for both consumer  
15     and creator so there's less likely to be unauthorised use and breaches of copyright. We identified, in our report, an example in the UK where they have the IP Enterprise Court, which is a low cost stream of litigation around intellectual property arrangements. So in Australia we've got the Federal Court, which is quite an expensive option for pursuing litigation,  
20     you then also have the Australian Copyright Tribunal, but there's kind of nothing in between.

**MR SHAIN:** I can assure you, both of those options are completely economically miles and miles away from anything that I would get  
25     engaged. I've been involved with a couple of cases, so I'm acutely aware of how that system works, it is incredibly expensive. Forget about going to court.

**MS CHESTER:** Is that the Copyright Tribunal or is that the Federal  
30     Court?

**MR SHAIN:** Trying to pursue a copyright infringement in Australia, for a lone individual creator, is almost impossible.

35     **MS CHESTER:** We've received evidence on what the average cost can be of pursuing a matter through the Federal Court, but through the tribunal itself, do you have a sense of what the cost is?

**MR SHAIN:** No. I'm a photographer.  
40

**MS CHESTER:** So with the IP Enterprise Court in the UK, it's a specialist stream with a judge dedicated to listening to those matters, and it doesn't have the open discovery and it's capped to two days of representation of hearing, so the legal costs are down. It'd be good to get

your sense of whether there might be some merit in pursuing something like that in Australia.

5 **MR SHAIN:** Definitely. A Small Claims Court would be a fabulous thing to see in Australia. I think there'd be lots of creators who would be very interested in having that option available. Because what happens at the moment, from my personal experience, is that if there is an infringement, if it's some small organisation or an individual or a school, and I'm aware of my personal work being infringed constantly. It is a  
10 constant, constant problem, and there's only so many - well, there's hardly any that you pursue, but there will be one where you go, "Actually, that's XYZ large corporation, I really think they shouldn't be doing that and I'm going to pursue it." The smaller things, at the moment, there's no financial incentive for you to do it, so it doesn't happen.

15 **MR COPPEL:** Do you know why photographs, metadata, are stripped out when they are loaded in the internet?

**MR SHAIN:** How long have you got?

20 **MR COPPEL:** Unlike music - - -

**MR SHAIN:** There's metadata in music, there's metadata in words.

25 **MR COPPEL:** Why are photos different?

**MR SHAIN:** Well, it's changing, but one of the great things that you will probably start to see, I think in our lifetime, is there will be technology developing around image recognition. So rather than the metadata of a  
30 picture that's online being the way to find out about what that is, what you will see is there will be technology that will look at if this is a picture of me, or here is a picture I came to talk about 10 to 15 years, but it doesn't seem to be relevant any more. So this picture ends up on the internet, instead of the metadata being attached to that, it will look at that, maybe,  
35 and will recognise all these things and that will be the defining mechanism to read that picture.

Now, that technology is still being developed. Getty and the large image libraries are very, very keen to develop that and the Germans,  
40 particularly, have a couple of mechanisms that are, or they almost have this right, then metadata just won't even be an issue. But at the moment, image recognition and I think the authors and writers have had some hope with this. We hear stories about university plagiarism comes up from that, rather than from the metadata, it's actually from the words themselves.

45

**MR COPPEL:** So when you hear “stripped out” it suggests that it’s there and it’s been taken away, is that how it works?

5 **MR SHAIN:** Yes, absolutely. Sometimes it’s done completely  
inadvertently. For a while Adobe, in their Dreamweaver and their web  
based products, it was just automatically stripped out. So if you put a  
photograph through some of their software that you wanted to repurpose it  
to put it on a website, it automatically stripped it out, for a whole lot of  
10 technical reasons. That’s changing now. One of the things that we are  
definitely encouraging, we’ve had campaigns about this with our  
members, is to make sure that you to attract metadata and attach metadata  
to your photographs. It’s a very important issue. Education is one of the  
massive keys about copyright that is such a boring, dull issue in the  
15 society that has a hip pocket nerve every now and then, but education is  
probably the key, education on all sides.

**MS CHESTER:** That’s something that you’ve raised in your submission  
to us and, indeed, we’ve looked at international jurisdictions where the  
Intellectual Property Office in the UK actually plays a far more stronger  
20 role, in terms of educating consumers, around copyright and copywrong  
and breaching and online piracy. What sort of model do you see might be  
helpful in the Australian context?

25 **MR SHAIN:** I think perhaps right now, through the collecting societies,  
or some of that might be a way to do it. I don’t know, I don’t know that I  
could offer a particular model, but we would be very interested in working  
with, and we’ve said this, we’ve made submissions to ALRC and now  
yourselves and other departments, as these sorts of things come up. We  
think that’s one of the keys, actually, is to educate probably the consumer,  
30 actually, about copyright and the importance of it. Going to the primary  
school system and having a module about respecting creators rights and  
artists rights, as a part of your education, and why it’s important for the  
society. I believe that the image making that Australian photographers do,  
it’s important to the build-up of Australian society. Forget about anything  
35 else, it goes to make the fabric of society work and how we record it is  
vitally important. So it’s vitally important that we encourage people to do  
it and to do it properly.

40 **MS CHESTER:** Chris, that’s all the questions we were hoping to work  
through with you this morning, so thank you very much for joining us.

**MR SHAIN:** Thank you for your time.

45 **MS CHESTER:** I’d like to call our next participant to join us. It’s John  
Lee from Aristocrat Leisure. Good morning, John, thanks for joining us

5 this morning. Also, thanks to Aristocrat for a pre-draft report submission, a post draft report submission and also allowing us to have a look at your operations here in Sydney to get an understanding of the business and how the different parts of the products use different streams of the intellectual property arrangements. That was kind of helpful for us early on. If you could just state your name and who you're representing, for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks.

10 **MR LEE:** Sure. Thank you. So, firstly, my name is John Lee, I'm a partner of the law firm, Gilbert & Tobin. I practice almost exclusively in patent litigation, across a range of industries, mining and resources, digital technologies, information technology, life sciences. I act for both patentees, plaintiffs and defendants. I'm here today to represent Aristocrat  
15 Technologies Australia. Firstly, thanks to the Commission for the opportunity to appear. I wanted to talk a little bit about Aristocrat and it's background and just to give some flavour for why Aristocrat is qualified and should have a voice during this inquiry.

20 Aristocrat is, essentially, a very successful start-up. It started some 50 years ago and it's grown into a global entity, ASX listed, employs a very large number of people in Australia and exports its products to many jurisdictions around the world. Technology and intellectual property is a critical aspect of the company's success. Innovation is the lifeblood of  
25 Aristocrat. We hear a lot of talk about innovation, it's a very overused word, I think, these days, but as we will see it is completely apt in relation to Aristocrat.

30 Aristocrat is a very significant Australian employer in the technology space, I suspect one of the largest. It has over 150 employees solely in its creative team. That includes mathematicians, software engineers and artists. It's one of the largest employers of artists in Australia. It expends a very significant amount on R&D and that's a growing figure. I think, in the private sector, again it would have one of the largest R&D budgets.

35 A significant part of Aristocrat's success and growth to date has been its reliance and its strategic use of the intellectual property system. That has helped Aristocrat to grow from a small start up to a global entity. Intellectual property underlines much of what it does. Aristocrat has a  
40 very substantial patent portfolio, I think it's the largest of any Australian entity. It has some 500 granted patents and about 1500 pending patent applications.

45 Aristocrat also is regularly involved in patent litigation. Again, it sees patent litigation at the coalface and is qualified to comment on a number

of the things that are the subject of the Commission's report. Importantly, it's involved in litigation as both the plaintiff and a defendant. This isn't a particularly pro-patent approach, it sees both sides of the fence.

5       The important things for Aristocrat, in terms of intellectual property, are having a robust IP framework and a robust judicial regime. It would like to see certainty, that's important, when it's making significant investments in R&D and technology. Consistency, again, is critical. As you know, we've had a lot of changes to our intellectual property regimes, 10 and I'm only focusing on patents, in the last 10 years or so. Consistency and certainty in any business is important. One of the things we've heard a little bit about this morning, you talked about the specialist courts in the UK and, as you've seen from Aristocrat's submissions, that's something that it's certainly interested in being investigated further in Australia. It 15 sees the existing regime as sound and robust, but not perfect.

      The Commission has made a number of recommendations in the patent space and there are just two today that Aristocrat would like to focus on. The first is the innovation patent system. As we all know the 20 innovation patent system was introduced to provide access to the patent regime for small to medium entities, developing small, incremental advances over existing technology, which may not be patentable as standard patents. This system has been in place for about 15 years and the two main criticisms seem to be that that intention of enabling a second tier 25 patent system for Australian SMEs to exploit has not been achieved and also there seems to be some concern about strategic misuse, shall we say, of the system.

      It seems, to Aristocrat, that both of those concerns are misplaced. On 30 the Commission's own statistics something like 66 per cent of innovation patents are filed by Australian entities. Of standard patents, that number is about 7 per cent, and I think the Commission picks that up as a concern, that a lot of the patent applications applied for and granted in Australia, over 90 per cent are to overseas entities. That's not the case with 35 innovation patents. Now, it seems to me that if you abolish innovation patents, that's going to make that issue worse.

      The second concern seems to be this potential for strategic misuse of innovation patents. Again, I think the numbers in the report suggest that's 40 not a concern. Firstly, you note there's a very small percentage of patents are innovation patents, about 5 per cent. Of those, only a very small per cent are every certified, so they're not enforced until they are certified.

      I don't think innovation patents will ever be a significant concern in 45 the life science sector, they only have an eight year term, it's not long

enough for a lot of those inventions, in relation to pharmaceuticals, medical devices and, to date, I'm not aware of an innovation patent being enforced in that sector. We don't have the same issue that exists elsewhere in relation to patent trolls. For a number of reasons, we have  
5 our loser pays system in relation to costs. We don't have the very significant damages awards that are obtained in other jurisdictions. So I don't think there's a current issue with patent trolling in Australia.

10 In Aristocrat's industry small incremental advances are very important. A lot of time and effort and R&D goes into developing small advances over existing technologies. Often these have a short lifespan. So an innovation patent with an eight-year term is perfect. Aristocrats' primary submission is that rather than abolish the system, which doesn't seem to be creating any significant concerns, two options: (1) to look at  
15 greater education and promotion of the system. And we've heard a little bit about that in relation to copyright. That the people the system is targeted at don't really know it exists and not in a position to use it. The second is if there is a perception of potential misuse, to look at reforms in relation to enforcement of innovation patents. There's been some  
20 submissions and commentary about remedies, injunctions requiring innovation patents to be certified earlier.

The second topic that Aristocrat wishes to address is the exclusion of business methods and software. The first point to make is that  
25 Aristocrats' concern – and we've seen this, I think, in a lot of the responses and the report itself – that it's perhaps an oversimplification to conflate the two. The Commission's definition of "business methods" that you've used in the report is incredibly broad, I think, and covers a vast array of technologies that go well beyond the scope of software.

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**MS CHESTER:** John, it might be helpful – I'm just conscious of time. Is there anything else in your opening remarks that is in addition to the submissions that Aristocrat have made, because we have read those submissions?

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**MR LEE:** Yes. So, essentially, the key factor in relation to business methods and software is the definitional issue, that if the Commission were to proceed with its recommendation, that would be enacted, that's going to create a lot of uncertainty. What is a business method? That's a  
40 very broad concept. The other thing is Aristocrat, as we've said, is interested in certainty, as all business is. In the current framework we think that degree of certainty is certainly being achieved. We have a number of recent decisions that the Commission is aware of, Research Affiliates, RPL Central, Myriad, all on patentable subject matter.

45

5 The courts and the Australian Patent Office are grappling well now  
with those decisions and implementing them. The High Court at the time  
you issued your report, the High Court hadn't ruled on RPL Central. It  
dismissed that application for special leave in two lines. That sounds like  
10 complete certainty to me. So Aristocrat's position – and I think this is  
widely held – is that there have been these changes in technology, the law  
has caught up, the judiciary, the patent office are far more technologically  
savvy than they were perhaps 20 years ago. There is certainty. There is.  
To introduce a broad exclusion of business methods, we think, would be a  
15 significant step back in terms of certainty. Again, the only other thing I  
would emphasise is the point you picked up this morning, that Aristocrat  
embraces to investigate the possibility of specialist courts to deal with  
these issues. I think that's really the summary of the position on those two  
significant issues.

15 **MS CHESTER:** That's great. Thanks very much, John. Maybe I'll  
begin with a better understanding of how Aristocrat does use the patent  
system today. You mentioned that there's currently 500 patents. What's  
the split between standard and innovation patents for Aristocrat?

20 **MR LEE:** I would be estimating but I would say it's probably 90 per cent  
standard patents.

25 **MS CHESTER:** When you're advising Aristocrat on which of the  
patents to pursue, the standard versus the innovative patent, what are some  
of the factors that would influence that decision tree?

30 **MR LEE:** Term, the extent to which there's an inventive step in the  
subject matter of the patent. In other words, it's not obvious. And the  
general enforceability. So on each occasion it's a case-by-case decision.  
But often infringements arise late in the term of patent, in which case  
innovation patents have expired.

35 **MS CHESTER:** Of the intellectual property that's protected through  
patents alone for Aristocrat – and we were quite mindful when we did get  
presented on the products and the patent activity – and I think you touched  
on it in your opening remarks – that there is a lot of incremental  
innovation that occurs in that product range. Is there anything that really  
has a commercial life beyond the eight years of the innovative patent?

40 **MR LEE:** Anything within Aristocrat's portfolio, absolutely, yes. So  
there are patents being used and licensed and enforced in years '15  
onwards.

45 **MS CHESTER:** What products would they relate to? In terms of the

products that Aristocrat offers today commercially, what products would they link back to, at what percentage of the product range?

5 **MR LEE:** It's gaming technology, broadly, but implementations of different gaming systems, the hyperlink system, which is referred to in the submission is a significant one. But, broadly, it's different aspects of the overall system. That ranges through from player interface right through to the backend hardware. There are a whole range of technologies.

10 **MS CHESTER:** You rightly mentioned that things have changed, especially in light of some of the recent court decisions around Research Affiliates and RPL Central. What sort of flow through implications for a company like Aristocrat in terms of what had previously been patentable under a standard patent and what would be patentable going forward?

15 **MR LEE:** I think we're obviously all still grappling with that at the moment. But certainly the patent office has implemented some policy changes based on those decisions and the way it sees those as impacting on decisions they make about patentability. We're still in the early  
20 phases, but certainly we have a lot more certainty about what is and isn't going to fall on either side of the line. So Aristocrat will, over time, implement that into its own internal research development and patent filing processes. Certain things that may or may not have been patentable in the past now fall on one side of the fence or the other.

25 **MS CHESTER:** Are there any initial thoughts, have you got any advice that you've given to Aristocrat in terms of what might fall on the other side of the fence going forward?

30 **MR LEE:** Only on a case-by-case basis. I don't think there's been a broad review of the portfolio to date to assess where things might fall. But as things arise on a case-by-case basis and certainly I think Aristocrat's patent attorneys who are dealing with the patent office on a daily basis will be considering those issues and applying general rules and  
35 learning.

**MS CHESTER:** Would one possible strategy be for a future piece of IP that, in your legal view, is no longer patentable under a standard patent that, given those court decisions and the way the examiners are now  
40 interpreting and applying those, administering them, that Aristocrat would then look to using the innovation patents more often?

**MR LEE:** No, should not, because the decisions are about patentable  
45 subject matter and applies equally to standard and innovation patents. So that should not be a factor in terms of which path or route Aristocrat goes



down.

5       **MS CHESTER:** Your comments around the innovation patents, the government policy objective with the innovation patents was very much targeted at SMEs and providing a low-cost form of patent protection for them. Given your opening remarks, Aristocrat is kind of not in the SME category and IP Australia certainly did quite a comprehensive review of the innovation patent system against those policy objectives, and I'm sure you're familiar with the findings of that report. And we were able to leverage and benefit from that earlier work by IP Australia. Are there any aspects of that report that Aristocrat would disagree with that we should get some evidence on from you today?

15       **MR LEE:** The first thing is Aristocrat is not an SME anymore but it was, and it grew from a start-up through the SME phase to the entity it is now off the back of leveraging its intellectual property. There are many, many entities out there who are at early stage of their lifecycle, investing in technology, who would like to have access and use the patent system to springboard off that. We deal with them on a regular basis. The benefit of the innovation patent is that it's a shorter term, it doesn't require the same investment upfront in terms of expense that a standard patent does because you don't have to apply for examination and certification and go through that additional cost.

25       Then you have to get a patent attorney to draft five claims, whereas in a standard patent you may have 20 or more. So, yes, Aristocrat has moved through that phase, but it still sees and we still see the benefit of the innovation patent system to entities to whom it was targeted and based on the evidence who seem to be using it. The concern I have, and I suppose the response to the report, is what is the issue, where is the problem with the innovation patent system? I don't believe – and I deal with people on a day-to-day basis who are on this side of the fence seeking to assert IP rights or the other side seeking to defend their position.

35       I've never seen an entity in Australia of any size enter into patent litigation lightly. I don't think there's the degree of strategic misuse or enforcement that there seems to be the concern about. So the fundamental position from Aristocrat is that it has successfully used the innovation patent system, it will continue to do so and there just doesn't seem to be the clear evidence that there's some issue with it.

40       **MS CHESTER:** I think the key issue and the key concern was that the low threshold was just resulting in a large rump of low-quality patents and those low-quality patents were largely being taken out by large companies

as opposed to SMEs. I couldn't tell from the post-draft report submission or your comments then concerns that Aristocrat might have had about the work that was done by IP Australia when they sort of reviewed the innovation patent system on which we've drawn heavily.

5

**MR LEE:** Yes, look, nothing beyond what's set out in the submission. But the point I'd make in relation to low-quality patents, those patents have been filed, they're sitting there. We have evidence they're not being certified. Who's suffering? I mean, I just don't see the downside. If someone wants to go through the exercise of drafting some patent specifications and filing those, they're not ever enforced, what is the problem with it? In fact, there's a significant benefit of that for all of us because if they keep that as a trade secret, that remains secret for perpetuity, potentially. If you file an innovation patent, that is published.

15

Now, it will lapse definitely after eight years but often sooner because people don't pay their renewal fees. Anybody can then go and find, read that specification and implement that technology, whereas previously it would remain a trade secret. So, again, just coming back to this theme of why are we looking to make a significant change in terms of abolition of a whole class of patents when many other jurisdictions have a second tier patent system? We have since the petty patent system. We just don't see convincing evidence that there's a problem.

20

**MR COPPEL:** But the issue there is that the low inventive or innovative step for an innovation patent creates many more low-quality patents and that can have an impact on follow-on innovation through notions or patent thickets is the concern. Can I just ask one question and it relates to enforcement or litigation in the patent area. You mentioned in your opening remarks you represented both sides more broadly than Aristocrat. Can you talk us through some of the problems that are faced when pursuing litigation in intellectual property?

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30

**MR LEE:** The problems that are faced, I think the key issues are lack of certainty. It's often hard to predict the outcome of a patent case at the outset because there are so many variables. You're often dealing with quite complex technologies. The judiciary – and we do have a number of judges in the Federal Court who are very experienced patent judges. But, generally, judges aren't technically qualified and they may be dealing with quite complex chemistry. Some of the digital technologies, the telecommunications technologies, are very complicated. I think that does lead to uncertainty.

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When I'm sitting down advising a client on their prospects of success, whether they're patentee or defendant, we have to factor in all of those

45

elements. That's why, again, coming back to this prospect of thinking about a specialist court with specialist judges operating with a particular framework, not just the Federal Court framework, may enhance and add to that certainty.

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**MR COPPEL:** In this regard, our examination of the UK IP Enterprise Court, the novelty there is that IP is a dedicated list, and in the draft report we have an information request that tries to determine where would such an equivalent in Australia best fit. Is it under the Federal Court, which has a very high-cost structure, or would it be the Federal Circuit Court? Do you have any views on that?

**MR LEE:** Obviously you would need some consultation and think about where it would best fit and how it would best operate. But I think there's generally a will to try and establish such an entity and there are a variety of possibilities. I think the fundamental thing is to try and streamline the procedure, as has happened in the UK, so that we have shorter, more certain hearings, try and cut back on some of the extraneous issues such as discovery, which we're already seeing in the Federal Court. But, as you say, the Federal Court structure doesn't necessarily lend itself to fast and efficient resolution of IP litigation. I think while there are some issues with patent litigation in particular in Australia, we do have a robust regime. We have certainty. We have clarity of precedent. A lot of multinationals – and we know from our experience – choose to litigate in Australia for those reasons. So I think in terms of jurisdictions I have experience of, Australia is travelling very well. Cost and (inaudible) may be an issue.

**MS CHESTER:** John, thanks very much. We didn't have any other questions for you this morning but thank you for appearing on behalf of Aristocrat.

**MR LEE:** Thank you.

**MS CHESTER:** I'd like to invite our next participant to join us, Peter Treloar. Good morning, Peter, thanks for joining us this morning and thanks also for your post-draft report submission to us. If you'd just like to state your name and the organisation that you represent for the purposes of the transcript and then if you'd like to make some brief opening remarks.

**MR TRELOAR:** Thank you for letting me appear today. My name is Peter Treloar. I am a patent attorney with about 30 years' experience. I have been involved in a personal submission and a submission on behalf of my firm, Shelston IP. I've also been involved with the AIPPI

submission where I'm an Australian committee member on AIPPI. However, I'm not really authorised to speak on behalf of AIPPI. I think someone appeared in Melbourne on their behalf. I can probably speak on behalf of my firm. But the primary submission I'd like to speak on behalf of is my own personal one. You'd probably reflect on a bit of commonality of language in the three submissions because I drafted a substantial portion of each.

I am here today because of a general concern about the extensive report of the Productivity Commission. I sort of have had, as I said, 30 years' experience, primarily acting for what by any measure would be the leading edge Australian research companies seeking protection in the IP field that would be dominated by seeking protection perhaps overseas. I'm also responsible for a group of attorneys and internally within my firm, and obviously the Commission is aware that the Australian IP system is perhaps dominated by foreign filers into Australia. So that's a reality.

My concern with the report is a number of initial premises that I think have clouded some of the Commission's judgment. The objective of maximising the wellbeing of Australians and providing incentive for innovation that would not have otherwise occurred, in my experience, most Australian corporations are looking to an international global system and, in particular, looking for US protection is their first and most important patent. Australia is 1 or 2 per cent of their market, in some industries it's larger than that. I work primarily in the computer science software, hardware and optics and physics field. So a lot of the report is very relevant to those fields.

My concern is that if perhaps if the Commission's – if we take the (indistinct) Commission's objective, whether we would have a patent system in Australia because, as you can see, it's dominated by multinationals seeking patents in Australia and most of my clients want patents in the United States. They're not too concerned about – some of them file in Australia but not as their first port of call. So there is a number of the submissions, in particular, the Law Council have made the point that we're part of a comity of nations and if we didn't have a patent system, then – it has been tried in other nations, in particular the Soviet Union and I think Canada tried for a long time to – they had no – the live sciences were sort of banned for many years. The result is the whole industry has sort of disappeared.

But there are notions that we are part of a system, a global system, and if we choose to go a different path, then that's obviously going to have some international concerns. There are a few specifics which I'm

concerned about in the report. The objects clause doesn't seem to really fit what an Australian patent system should be about. The obviousness an inventive step as a practitioner on the day-to-day, the Commission seems to have sought the most difficult obviousness test that a practitioner  
5 experiences, which is the European obviousness test. Now, the Europeans do the best job of searching for their patents and I have the whole – without going at length into the jurisprudential nature of the obviousness test, it is disappointing that the Commission has chosen obviously the most difficult obviousness test that I experience as a day-to-day  
10 practitioner.

It's sort of a flavour of not allowing companies to have Australian patents rather than embracing what the patent system is all about, which is this come forth with your disclosure and the society will give you a  
15 reward. That's the initial premise of the patent system. Again, the renewal fees – discussion seemed to be targeted again at reducing the incentive to patent. Unlike many speakers, I'm not – an innovation patent, without an obviousness test, is a very dangerous thing to me. When it was introduced I was very concerned that it didn't have an obviousness test  
20 because it allows utilisation, as we saw in the Apple v Samsung case, of increasing the COT(?).

This is where my views differ from other members of my firm and other members of AIPPI. I am perhaps in disagreement with the  
25 Commission about the innovation patent or at least introducing an obviousness test and raising the threshold, which I think is what the patent office is seeking to do. One of the main concerns for me is the business method and software patents area, which, again, the Commission has devoted an extensive chapter to. I take somewhat heretical views that the  
30 RPL court sort of has looked to the US. The US system – we have a Supreme Court in the US which has adopted a certain test of abstract. The lower courts have very increased levels of difficulty trying to implement that test.

35 I personally disagree with the US Supreme Court. I'm sure the US Supreme Court is not worried about my views on the matter. But having abstract ill-defined tests brings the system into disrepute. If you go back to fundamentals, I am quite the other extreme, that we should have software patents, and I've made the point that being a computer scientist  
40 drafter of patents I now have to draft a patent that looks like a hardware patent just so it's (indistinct) test down at the office. I'm not too concerned about the Australian patent office because they are obviously taking the lead from overseas. I'm more concerned about the US patent office and the issues that are going on there and US jurisprudential cases

that are coming out as a result of the Alice decision, which I have to deal with on a day-to-day basis on behalf of my clients.

5 But they naturally have flown through to Australia. I realise time will be on my side is what I suspect and eventually these areas will open up being of extreme value and fundamentally patentable. It also goes for business methods. I mean, the courts can introduce various tests but as practitioners you have to adapt to those tests and if your client still wants protections of fundamental patents for their innovation, whether someone  
10 can put a business method label on it, it's up to me to make sure that is more difficult for them to put a business method label on it. So we're dealing with ill-defined tests that somewhat bring the system into disrepute as a general rule. I suppose my concern about the report and a lot of the issues is it's not really taking account of a global context of how  
15 the system operates. That's probably the gist of my submission.

**MS CHESTER:** Thanks, Peter, and I did resist the temptation to ring the debating bell because some of your opening remarks were answering some of the – partially answering some of the questions that we had for  
20 you. Maybe if we turn first to the global world and the global thresholds that exist in different jurisdictions for patentability for a standard patent, which we were very mindful of in our draft report. Indeed, we've had meetings with folk in Europe and we've spoken to folk in the US as well as two of the largest jurisdictions that we really needed to try to get a  
25 better evidence base on. What was really underpinning our draft recommendation around the patentability threshold was some analysis that we did around the quality of Australian patents to date.

We're yet to get sort of any evidence from folk about their views on  
30 the methodology and the data upon which we drew from IP Australia in doing that analysis. That analysis isn't too dissimilar to results from the work of academics in Europe, as we now understand it, albeit there seems to be a slightly larger rump in Australia of low-quality patents, albeit measured using some proxy measures in our methodology. So a couple of  
35 issues there. Firstly, you've obviously had a close read of those areas of our report. Did you have any views on the attempt to assess the quality of patents? If not, that's fine. Secondly, the changes that we've recommended are very mindful of what's happening in other jurisdictions and, indeed, trying to bring Australia into line with the patentability  
40 threshold in Europe. I'm a little unclear why you think our draft report isn't mindful of the global stage when it's, indeed, the global stage that kind of informed our thinking there.

**MR TRELOAR:** On the particular area you're talking about introducing  
45 a – sorry, the threshold test for obviousness is what you're discussing.

The European test for obviousness, the average person in the field sort of thinks, what is obvious, has a notion of what is obvious. It's very difficult to define. It does have some subjectivity nature to it. If you look at the old Australian cases and the US jurisprudential cases, they define obviousness and having difficulty grappling with it; there's no doubt. The European test for obviousness involves an unrealistic expectation of what the average person in the field would notionally define what is obvious. In Europe you're entitled to take any document that may exist anywhere in the world in any language and present it to the inventor and then sort of say, "Would you as the inventor be led from that document to your invention or solved your problems, problem-solution approach, as a matter of course?"

Now, that is a totally artificial construct. Sure, it raises a higher standard and more difficult standard to obtain protection. The Commission and the Australian Patent Office has chosen to adopt that test. And it is a test for major trading partner. But it doesn't really – it's devoid of any – what I perceive of is it's devoid of any notion of what should be considered to be obvious. If something is in Japanese and I'm an inventor, should I really be held to that standard of obviousness?

Now, if you look at the US test, it is somewhat more lenient but somewhat more subjective. So the Europeans have the advantage that it's all a mechanical test and the European Patent Office applies a somewhat mechanical test. But whether that should be considered as the obviousness test – and there's a famous sort of quote, just because you can find something on a shelf in a library, does that mean that it should be utilised against you in obviousness? That was the old Australian position in 3M. But the courts and the patent offices have moved it as – or are moving it in accordance with the European test.

My notion is well, should we not consider the US test, which dominates the world of the patent system? It's a more lenient test than what exists in Europe. So that's sort of the point I'm trying to make is that the European test is a tough test and if you want – the general notion that we don't like patents and we want to introduce the most difficult test, well, introduce the European test. If you're saying, "Look, we like the patent system because it encourages people to bring forth innovations that are beneficial to society. We are going to choose a more reasonable test," reasonable in the eye of the holder, of course, let's look to the US which has perhaps a more lenient test than Europe. I should also say these tests are all subjective as well when you're dealing with examiners on a day-to-day basis. In relation to your point about the Australian office, it's often the standard of examiners and the standard of funding those examiners have that influences the standard of the prosecution of the patents.

5 **MS CHESTER:** We're mindful of that as well. I guess our motivation is based on our analysis around the quality of Australian patents, that the rest is large percentage that appear to be low quality and thus, we looked to the threshold as the way of addressing that. Your earlier comments, Peter, around innovation patent, if we can just revisit those for a moment because it's not too often that we have a patent attorney share those sorts of views on the innovation patent.

10 **MR TRELOAR:** Yes, I think some of my colleagues – I don't speak for the firm, I suspect, the whole firm.

15 **MS CHESTER:** Given it is a substantively lesser threshold for the – you still get an eight-year patent term through the innovation patent. Are there examples of patents that you've seen go through the innovation patent system which you would sort of consider to be sort of strategic misuse, for want of a better description?

20 **MR TRELOAR:** I would refrain from using the word "strategic misuse", but I think if you look at the Apple and Samsung cases and Apple's utilisation of the innovation patent system – I'm refraining to use the word "misuse". They're entitled to. When the system was introduced I remembered within the firm I was then at saying, "Why wouldn't everyone apply for one of these innovation patents if you're going to go to litigation?" It makes it more difficult for the other side and if you look at  
25 the innovation patent cases, the Dura-Post case and there's one to do with fishing processing equipment – the standard put to the defendant is a lot more difficult, the hurdle that they have to get through is a lot more difficult. In my own instance, if a client wants to apply for an innovation  
30 patent, look, most of my clients are looking to an international global system.

**MR COPPEL:** On that point, in your submission you say that innovation will occur without a patent system in Australia.

35 **MR TRELOAR:** Without an Australian patent system, yes.

**MR COPPEL:** Can you elaborate on what you mean by that?

40 **MR TRELOAR:** Well, I think some of the notions – I, unfortunately, looked at the Productivity Commission's report as quite negative towards patents. The rest of the world is not too concerned about the Australian patent system. When I say that, if you look at the Indian compulsory  
45 licences or the Canadian experience with banning foodstuffs and chemicals, eventually they come back into line. So any of the



fundamental research around globally, it's not determinative of that research – I can get myself in a lot of trouble – whether Australia has a patent system or not. But if Australia didn't have a patent system it would be like the old Soviet Union Inventor Certificates. Well, the rest of the world will have to put up with it and lobby internationally and eventually the inventor certificates will go – it's like China has only had a patent system for 30 years, but China is now dominating the patent system of the world. Historically, if Australia was to do away with its patent system, I believe that in 50 years the patent system would be back in Australia, or 20 years or 10 years.

**MR COPPEL:** What about the commercialisation of an innovation in the United States, are you talking about – in that comment, are you saying that it would have no impact on the commercialisation of an innovative product or process in the Australian market?

**MR TRELOAR:** Look, Australia, GDP wise, is about – I haven't looked lately, but it's about 2 per cent of the world. If I'm Google in Silicon Valley patenting things around the world, I file a thousand patents in the US and I file a hundred or 50 in Australia. Australia is probably in the top 10 of Google's intent but Google's research and patenting will go on whether Australia had a system or not. It would just be that they would be mighty upset and the US Government would probably be mighty upset if we did away with our patent system. Then it's a comity of nations. If everyone does away with their patent system, let's all go back to trade secrets and keep everything secret for a thousand years. There's a great alternative. We have a patent system for a reason.

**MR COPPEL:** I guess my question is, would the commercialisation of international patents – of products protected by patents in other jurisdictions still occur in the Australian market or would they simply not bring that product to the Australian market?

**MR TRELOAR:** I don't think you can give a definitive answer to that. You look at the banning of chemical patents in Canada. The commercialisation of drugs still extended to Canada and then we still have this problem of the Canadian border being quite porous to US citizens because of – the whole Canadian patent system experience in relation to chemical patents – people are still going to buy drugs in Canada, whether or not they have a patent on those drugs and the commercialisation of those drugs – so there's the whole issue of the generic originator in Canada and there is volumes of material that you can find about the whole genesis of the exemption and then for the disbanding of the whole exemption in Canada for those issues. So in answer to your question, of course commercialisation is going to go on in Australia to a degree. We

5 have a system for a reason and the reason is that it's the best system there is. If Australia wants to walk away from it, then there'll be consequences. I believe those consequences will be severe and long term but Australia will come back into line, just like Canada has, just like the Soviet Union or Russia has, just like China has.

10 **MS CHESTER:** Thanks, Peter. We don't have any other questions for you this morning but thanks for appearing and thanks for your submission. Folks, we're going to take a little break to stretch legs and have some morning tea next door. Can I just get a sense, is anybody else cold in this room?

**MR COPPEL:** Yes.

15 **MS CHESTER:** Okay, good. We'll try to see if we can address that. I just wasn't sure if it was me not feeling the love. If we could resume our hearings at – we'll take 10 minutes. So if we can come back at 10 to 11, that would be great. Thank you.

20 **ADJOURNED** [10.42 am]

25 **RESUMED** [10.53 am]

30 **MS CHESTER:** We will resume our public hearing and I'd like to welcome to the table representatives from the Association of Australian Musicians, John Prior and Tim Williams. If you could both just say your name and the organisation you're representing, just for the purposes of the transcript recording, and then if you'd like to make some brief opening remarks, but we've got a bunch of people to get through, so if you could keep it to under five minutes, that would much appreciated. John?

35 **MR PRIOR:** My name is John Prior. I am the Secretary of the Association of Australian Musicians. My associate is Tim Williams. He's also a musician, a lawyer and a teacher, who is also on our Executive Committee.

40 **MS CHESTER:** Sorry, Tim, are you planning on speaking this morning?

**MR WILLIAMS:** Possibly, yes.

45 **MS CHESTER:** If you could just state your name. They need the voice match, thanks.

**MR WILLIAMS:** My name is Tim Williams. I'm a musician and lawyer and I am a board member of the Association of Australian Musicians.

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**MS CHESTER:** Thank you. Sorry, John, over to you.

**MR PRIOR:** Thank you. I'd like to thank you for the opportunity to address the Commission and then answer any questions you may have.  
10 I've been a professional musician for more than 40 years. I co-founded a band, Matt Finish, in 1979 and we've sold a quarter of a million records and performed thousands of shows to over a million people.

15 Every time we tour and release new products there's a bounce in our back catalogue sales and royalties from live performances and media plays and our songs are still being added to new films and compilation albums. So it would be wrong to think that music has a short life span. It sustains us and presents new opportunities throughout our careers. We generally earn very small amounts of royalties lots of times, if we're lucky. I might  
20 have a piece of music used in Europe and I might earn half a cent from it. I might do an ad that's played all around Australia for one year. I might earn \$300 in royalties, in addition to my commissioned fee. So royalties are not a lot but they really do add up and end up being probably a quarter to a third of composing musicians' income. Of course, they vary. Some  
25 people compose all the time and don't perform live. I'm a bit of an all-rounder, so it's a substantial part of my income and all of my live work, all of my recording and production work flows on from - well, in my case it flows on from the success I had as a young musician and Matt Finish.

30 I've produced thousands of soundtracks and commercial works now. I produced over 150 albums for local Australian artists. Our association is an industry trade group with a seven-member executive committee and a 20-member advisory committee. Our purpose is to represent the interests of all Australian musicians in all genres. Our members include some of  
35 Australia's most respected and accomplished musicians, including virtuoso violinist, concertmaster and composer, Adrian Keating, who is best known as the principal violinist at the Australian Opera and Ballet Orchestra. I use him in sessions with rock bands and jingles and soundtracks. He's a very active member of our music community.

40

Also on one of our committees we have guitarist, Bob Spencer, from the Angels and Skyhooks. We have jazz composer and band leader, Sean Whelan, acclaimed singer, Grace Knight from the Eurogliders. Over the past four years, we've operated an online musicians' forum called AIMA,  
45 which is the Australian Independent Music Association, which has a

membership of 7000 Australian independent musicians who are mostly sole traders and small businesses. Debate in the forum is focused on developing industry reforms because our industry is in turmoil and musicians are very concerned about the future.

5

There's a number of factors that always affected the music industry. There are factors that are new; for example, the old digital landscape. It's still a big challenge for big record labels right down to individual musicians. Copyright infringement is a major issue. I don't think the solution is to get rid of copyright because we all rely on it for our income. The mainstream media and major international recording labels support very little Australian music, usually less than a dozen local singers at a time are being promoted in the public view.

15

If you look at the record companies' rosters, you'll see dozens, sometimes hundreds of local artists' side. But how many are current, how many are being supported financially? Not very many. When you look at AirCheck, which is an Australian company that researches radio airplay, and they have a chart which shows the 40 most played songs on all radio in Australia last week every week. Consistently, that chart shows that almost no Australian distributed artists are ever on commercial radio, which means that the lion's share of the income is in one part of the industry which is the major labels and the commercial media.

25

Australian musicians are actually in a different industry. Our industry is musicians, instruments, teaching, performing local shows, working with local labels and distributors, and generally working with community media and only a very tiny little bit ever gets into the commercial mainstream. The commercial mainstream in the music industry is basically an American industry. They're international companies, I should say, that are based in America and based around American culture.

35

It's difficult to know how many professional musicians there are in Australia. The Australia Council and ATO - well, Australia Council has collected data from Deloitte, Ernst & Young, ATO and in 2011, they estimated 12,500 professional musicians, up from an estimated 7000 in only a few years earlier. We believe these numbers fluctuate a lot. We guess more like 25,000 professional musicians. But as I say, the industry is in turmoil. Are there any professional musicians left would be the real question.

40

APRA is the Australian Performing Rights Association. They collect and distribute about a quarter of a million dollars a year in publishing royalties and distribute it to music publishers and 90,000 Australian writer members. They only become a full member when they earn royalties. So

45

these are royalty-earning Australian composers; there's 90,000. APRA say that 88 per cent of APRA writers are independent of the major international recording and publishing labels.

5           The live music industry generates about 2.2 billion dollars a year, according to Live Performance Australia. About half of that is more their area which is music theatre. The other half is more our area, which is  
10           pubs and clubs and festivals and other live music venues. The whole industry - again, it's very hard to know the exact figures, but we would estimate between five and 10 billion dollars annually. We believe that  
15           could be double if we could fix our industry with a few minor regulatory and legislative changes.

          We have recently prepared a policy statement that is a comprehensive  
15           plan to revitalise the Australian music industry, considering viability, sustainability and long-term strategic growth. We want to make the pie bigger and distribute it more efficiently. Our plan will create possibly 100,000 new jobs and billions in additional revenue and we welcome the  
20           opportunity to explain the details of our plan with you further. I'm not sure how much you'd like to discuss with it now but we'd like to give you a copy and hopefully we can discuss it in more depth in the future. We've  
25           actually worked towards this point for four years, since the bottom fell out of our industry.

25           **MR COPPEL:** Is it outlined in your submission to the draft report?

**MR PRIOR:** Some of this is, yes.

**MR WILLIAMS:** We've made reference to it. We'd be happy to hand  
30           up a copy of the statement. We would place on the record though that this document is written as a political campaign document and its original audience was not intended to be the Commission, or not intended to be this inquiry. We just want to make that caveat to it, that it is written in the context of the current election campaign and that is the intended audience.

35           **MR COPPEL:** Okay.

**MS CHESTER:** But the strands of it that are relevant to intellectual  
40           property arrangements are what you've touched on in your post-draft report submission?

**MR WILLIAMS:** Yes.

45           **MR PRIOR:** Yes, absolutely. You inspired us to add a few sections.

**MS CHESTER:** You're the first to say that, John, so thank you.

**MR PRIOR:** Yes. It inspired us to protect our industry. Humour. If I  
5 can just speak from my heart a little bit more, rather than reading all of  
these notes that are compiled. As I say, over a four-year process we've  
been running this online forum. It really does operate 24/7. We have  
7000 members. Musicians are very intense and passionate people. It is  
furious debate and the whole purpose is to find the forms that will make  
the industry better for Australian musicians.

10 We say there's 10 to 15,000. I struggled over those figures a minute  
ago. We estimate there's 25,000. Australia Council says there's actually  
220,000 semi-professional and aspiring hobbyist musicians. Where are  
the jobs going to come from in the future? This is a huge potential area of  
15 employment. Entertainment is one of America's biggest industries,  
biggest export industries. Australia's proven that there's great interest for  
our music all around the world.

20 The previous Labor government funded two organisations to address  
this problem; one is Sounds Australia. They are, I believe, primarily  
focused on creating events overseas to promote Australian artists, like Big  
Backyard. They work in association with the Trade Department, I believe,  
to also just create a great vibe for Australia around the world. It's not just  
selling the music; it's actually selling our culture and investment in all  
25 industries in Australia. The other organisation funded by the recent Labor  
government is called the National Live Music Office. John Wardle is the  
brainchild behind that. He's a very passionate and dedicated musician  
who's looked at all the problems musicians face with live venues.  
Councils inadvertently over decades have favoured newer developments  
30 that have impinged upon the live music scene. In a wonderful way he has  
solved a lot of those problems, got councils on side, realising that cultural  
events are one of the big reasons people move into an area but often might  
complain about the sound once they get there.

35 We fully support these two organisations; we think they're great.  
They both, I believe, get not only Federal funding but also funding from  
APRA AMCOS and PPCA and a number of other industry organisations.  
We believe they do a great job but they don't have the overview we do.  
John Wardle hasn't had 40 hit songs on radio like I've produced.  
40 John Wardle hasn't been in the biggest touring live band in Australia for a  
number of years in the 80s like I have. Matt Finish played to more people  
than anyone in the 80s in Australia. I don't think the people at Sounds  
Australia or the National Live Music Office have dealt with earning  
royalties internationally and the issues that are raised there. So we, in our  
45 view, have an enormous amount of experience in a number of genres:

rock, pop, jazz, classical, electronic music, soundtracks, children's music, teaching.

5 That's basically it from me. We offer this plan. The current Federal government has cancelled Sounds Australia and Live Music Office funding. As we know, they've reduced Australia Council arts budgets and we're concerned about the ongoing stability of the industry in that regard but we're not actually after grant funding. We just want a fairer, more level playing field for tens of thousands of Australian musicians, with the potential to make it hundreds of thousands.

15 The suggested copyright changes you have made, or suggested, sorry, would unfairly disadvantage Australian musicians on the world stage, which would reduce the value of music copyright in Australia and reduce investment in our music industry. It would reduce local innovation and drive a lot of creative people offshore, therefore reducing life of copyright and controvert the first objectives listed in page 2 of the draft report. Whereas increasing the life of copyright would result in increased innovation, increased investment and more productivity.

20 We recently ran an online straw poll with three choices for musicians. One was to stay with the existing arrangements of life of the composer plus 70 years. The second choice was to reduce copyrights 25 years after creation, as proposed in the draft report of the Productivity Commission. 25 The third option was to extend the life of copyright in perpetuity, same as if I bought a house, same as if I made the bricks and built my own house, like I do with my music. Ninety-two per cent of respondents or all musicians chose to extend life of copyright in perpetuity and we believe this would be a huge bonus to Australia. We believe that rather than a brain drain it would be the opposite. We would have people from around 30 the world coming to Australia with fantastic skills.

**MR WILLIAMS:** To work and to create here in an environment where their work is protected in perpetuity.

35 **MS CHESTER:** This might be a good juncture maybe if we jump into some questions.

**MR PRIOR:** Yes, please.

40 **MS CHESTER:** Otherwise we might run out of time.

**MR PRIOR:** Thank you.

**MS CHESTER:** We did know the results of that survey because it was in your submission to us, John, so thank you.

5 **MR PRIOR:** Thank you. I'd just like to make one other point, a very short point.

**MS CHESTER:** Sure.

10 **MR PRIOR:** We feel the same way about fair use provisions. There's already existing provisions for reasonable uses of copyright material and if they don't, people can always go and ask the composer or the creator of the work if they could use it for charity or education, which happens all the time. We believe fair use is just an invitation for people to breach our copyright quite simply.

15 **MR WILLIAMS:** As an association, we see no need to disturb the current arrangements.

20 **MR PRIOR:** I'd just like to point out that music is infinite. It's fully, fully infinite. There's a lot of elements of music that are accepted universally as public domain already. Led Zeppelin just won a case last week - Stairway to Heaven, one of the most successful songs ever in the history of the world. There's a descending minor chord sequence in the introduction that sounds very similar to a band that people said that they  
25 performed with very earlier on in their career. That band had harboured this desire to sue Led Zeppelin all their lives and the singer died and handed over property to his wife. His wife has got a new publisher who sued Led Zeppelin finally. This has been a massive effort for them. This chord sequence is patently obvious in compositions from the 16th century.  
30 I've used it in several pieces. Music is infinite. There is no fear that protecting copyright would stop other people from making music.

**MS CHESTER:** Thanks, John, for those opening remarks and the passion behind them.

35 **MR PRIOR:** Thank you.

**MS CHESTER:** Also, you've very importantly done what some other participants haven't done and that's really put your industry in the context  
40 of the broader ecosystem within which you operate. It's not just intellectual property arrangements that impact the health and robustness of industry; there's a whole bundle of factors and that's probably what the broader plan is about. That said, intellectual property arrangements are kind of core and fundamental as you would be the first to say.

45



**MR PRIOR:** Yes.

**MS CHESTER:** Let me just begin maybe with one point of clarification. I don't think you were here earlier this morning where I did clarify that  
5 despite some media reports to the contrary, we do not have any recommendation, draft or otherwise, to change the term of copyright. Indeed our draft report has many pages dedicated to why that's not feasible or possible because of the international treaties and multilateral,  
10 plurilateral and bilateral agreements that we're in.

**MR PRIOR:** Okay. We agree with that, of course. It's very complex.

**MS CHESTER:** There's no recommendation to do that and indeed our terms of reference required us to be cognisant of those trade obligations.  
15

**MR PRIOR:** So why was it such a big issue in your report, when we know that the Greens in England proposed this only a few years ago and it was shot down in flames immediately by millions of artists. Why was it proposed? It undermines - - -  
20

**MS CHESTER:** It wasn't proposed. It was what's called a finding or an observation. The government asked us to have a look at do we think the balance is about right. One way of viewing the term of copyright, and there's many ways of viewing the term of copyright, but one way would  
25 be what term of copyright would make sense if you looked across all the artists creative endeavours in Australia and what's the commercial life of those works. We make an observation that if "term" was linked to "commercial life", based on evidence from the Australian Bureau of Statistics where they've done this analysis across all of the rights holders  
30 in Australia and commercial times of life would be around 15 to 25 years. So it was an observation but not a recommendation, if that's helpful.

**MR PRIOR:** Fair enough and sorry if we weren't clear in responding to that. Just on that point, we formed Matt Finish in 1979 when I was 19. Musicians, basically if you don't get a break when you're young, it's very  
35 unlikely in the commercial pop world or rock artists, as opposed to a backroom guy running orchestral arrangements or whatever, it's very unlikely to have any success at all if you don't have that early success. I was lucky and I had that success and I've been able to expand upon it my whole life. But without that success, that's the bedrock of my whole  
40 career. I can walk into an advertising agency and go, "Hi, I'm John from Matt Finish" and they'll go, "Oh", you know, anyone over 40, I should say. We wrote those first songs for our first album in 1979, so they're 37 or 38 years old now and we just got a song on film. We just a song on an  
45 international compilation album by Warners. Wendy Matthews covered

5 one of our songs recently which created a boost in sales. Many musical artists will remaster, repackage and re-release their work later in their career. The Church have just done it. Midnight Oil have done it. All the bands do. So that is another argument for extending life of copyright and not shortening.

10 **MS CHESTER:** I think we all sort of recognise that the world of averages is very difficult when you've got copyright term which is an umbrella across all of the creative endeavour and it's difficult to cater for outliers, inliers and the middle that kind of matters.

15 John, just coming back to your concerns around moving from fair dealing to fair use and I guess we've had evidence from some of the copyright users suggesting that the fair dealing arrangements kind of haven't kept up with technology. A good example they've given is by the time the fair dealing arrangements which are sort of like a prescriptive list of what's allowable, as opposed to fair use which is applying fairness principles which you can adapt to technology over time, by the time the fair dealing caught up with the VCR they were all mothballed and in the attic. So we're sort of grappling with this issue of how can we make the system more amenable to ongoing use by consumers and libraries and educators if we remain with sort of the prescriptive fair dealing list versus the fair use principles. It would be good to better understand your concerns in terms of what would happen to your membership if we moved from fair dealing to fair use. What is it that you think would be non-remunerated today under fair use that would have been remunerated under fair dealing?

30 **MR WILLIAMS:** Any rapper who samples a riff, quite simply. If Kanye takes 10 seconds of something that John's composed and puts it in something else and makes a bucket of money out of it in America, where's his return on that creativity that was the original element for that work.

35 **MR PRIOR:** It's just a business. We make stuff and sell it, but because it's music, because it's in the air somewhere, a little bit harder to explain, why would you change property laws just for our stuff. Like why does everyone want our stuff for free and think that it's possible to do just by changing laws, when we know we can't just walk into Woolies and take whatever we want. People have to pay for it. People have to work for it. That's the basic gist of our argument, is it's just simply a product we make and it's a little bit more personal to us. I imagine farmers would care perhaps a bit more about their product than someone who just works in a sandshoe factory. Musicians are about as passionate as we can be about the music we make. If we don't convince people that we're honest and passionate about the music we make, people don't even listen to it. So to

somehow try and disconnect artists from their work, it's a head spin; it really is, and counterproductive. I mean just to talk about it for six months would harm investment in our industry.

5     **MR COPPEL:** Just getting back, you make the analogy with a product in a supermarket and no one expects people to come and steal that product and they have to pay for it. But if you pay for a product in a supermarket, it's gone. The ownership has shifted to the person that buys it. Whereas  
10    in the area of copyright, it's more or less inexhaustible. You can sell it to one person; you can sell it to another, and you can sell it ongoing.

**MR WILLIAMS:** You can also do that with a car and refrigerator and house.

15    **MR COPPEL:** But to multiple - - -

**MR WILLIAMS:** In the design of a house. You can assign and reassign and assign continually repeatedly.

20    **MR COPPEL:** I'm not talking about licensing to someone else who would then take ownership of that copyright. I'm talking about multiple use - - -

25    **MR PRIOR:** No, rather you're talking about the copyright issue of those products in Woolworths in the same way as music should protect - - -

30    **MR COPPEL:** No, I'm talking about potentially everyone in this room could consume your work and there would be a payment for each person consuming your work. That is one of the big differences between physical property and something like music.

**MR PRIOR:** It's easier to steal. Digital products are certainly easier to steal and that is - - -

35    **MR COPPEL:** That's true as well but that's not the point that I'm making.

**MR PRIOR:** Sorry.

40    **MR COPPEL:** The point that I'm making is that in essence it's inexhaustible. You're able to exclude someone else on the same music. So you can sell that music to each and every one of us. Whereas if you have a tin of tomatoes in a supermarket, you sell that tin of tomatoes, no one else can buy that tin of tomatoes. I don't think there's any other type

of asset where someone would propose an ownership in perpetuity like you're suggesting.

5 I also think if you were in a regime like that, particularly with our formalities, it could be extremely difficult. It's already very difficult with life plus 70 years identifying who the owner is. That may be one of the reasons why infringement is so high.

10 **MR PRIOR:** No, it's not. I've registered all my works with APRA. If someone else wrote music and didn't register it, well that's their problem. I register my works. That's not hard. It's easy to find my work, so that's not true at all.

15 **MS CHESTER:** But a lot of copyright's not registered and that's part of the difficulty.

20 **MR PRIOR:** Well, if after a certain period perhaps there should be considerations of that work to be in the public domain. If no one can find the owner, then that's a separate category to my work that I've put all my effort through my life into that.

25 **MR WILLIAMS:** That being said, of those works that are registered with APRA or any future collecting society that may enter the market, it's our view as an association that some copyright is vested beneficially in say, for example, APRA, who are friends of ours I might add, it should revert automatically, probably through some statutory mechanism, into the estate of the deceased artist. That way it's very easily found because, as a matter of law, it automatically reverts to its natural home. That is one of the positions that we advocate.

30 **MS CHESTER:** How do we deal with the issue of orphan works, where someone's tried to find the owner of the copyright and they can't?

35 **MR WILLIAMS:** That depends on how much weight you want to put on it and how much expectation you have about how people are going to try.

**MR PRIOR:** I don't think it's a major issue. I mean it would be for some people but it's not a prevalent issue that's a problem.

40 **MS CHESTER:** We've had a lot of evidence from even writers, musicians, librarians, educators, that orphan works is quite a material issue and indeed it's one of the issues that's sort of contributing then to potential infringement.

**MR WILLIAMS:** We don't have a formal position on that although I would suggest, speaking on the fly, that like any other orphaned item, it might become the property of the Public Trustee in the State in which it lives until it can be identified and sent home.

5

**MS CHESTER:** Coming back to the collection agencies, APRA is the key one for your industry. One of the issues that's sort of come up during the post-draft report submissions and in the public hearings, John and Tim, has been the issue of the governance around the collection agencies and kind of knowing that what they're collecting on your behalf is what comes through to, whether it's the musician or the composer or whoever, that they can sort of follow the money and know how it's all being sort of divided up and allocated.

10

**MR WILLIAMS:** We are indeed in favour of increased transparency with collecting societies. We don't have a particular beef with APRA I can say for the record. John's on a number of APRA committees. A number of our members are APRA members who receive the benefit of APRA services.

20

**MR PRIOR:** Yes, to answer what you said, APRA basically inform us what country it was earned in and how much it is.

**MR WILLIAMS:** Should there be a royalty return.

25

**MR PRIOR:** That doesn't help us in our future business. If I knew that a particular station in France was using my music for a kids' cartoon, that would inspire me to write more music and target towards their business. But, in effect, APRA, and it's not just APRA, it's the nature of international publishing, traced right back to 1926 when the publishing companies fought for copyright laws to protect their industry with the onset of radio. You know, that they were more concerned about perhaps losing some of their publishing business to performers, now that performers would be heard on radio, because before then it was just pieces of paper shipped across the world. Dad would buy a piece of sheet music on Friday and then spend the weekend with the family playing it around the piano. That is still the power base in our industry. It's very antiquated and those companies obviously have a desire not to share the information of where my music's played with me.

30

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40

**MS CHESTER:** Maybe coming back to the point, Tim, that you made.

**MR PRIOR:** Was that your point? Did I answer your point?

**MS CHESTER:** No, no, you did, but coming back to the point that I think you're both making around sort of the transparency and accountability, there is currently a voluntary code of conduct that applies to collection agencies in Australia. Our terms of reference also asked us  
5 to have a look at what might be international best practice in other jurisdictions and indeed we met with folk from the music industry in London. They pointed to - there's an EU determination that we've learned of and we've had a look at that's around the governance collection agencies in the EU, although I'm not sure whether that's going to apply to  
10 Britain going forward. It would be good if we could get your feedback in the not too distant future as to whether or not if you have issues around transparency and accountability, whether that EU determination is kind of a model that would address those issues and concerns.

**MR WILLIAMS:** I would like to learn more about that. I can assure you we'll be happy to provide comment on that and so forth.

**MS CHESTER:** Did you have any other questions, Jonathan?

**MR COPPEL:** No.

**MS CHESTER:** We didn't have any other questions for you. I think we've covered all the bases we were hoping to this morning. Thank you both for appearing and thank you very much for your submission as well  
25 to our inquiry.

**MR PRIOR:** Thank you. Can I just say that everything we've presented is in the context of responding to your draft report, but please have a look at our policy statement which, as Tim said, was geared towards the  
30 Federal election. You guys are the Productivity Commission and this is how we make the music industry productive and more profitable for Australians. Thank you and if you have the opportunity to have a look at that, we'd love to come back in and explain it, because it's in very brief form. There's just so much information condensed into a small area, so  
35 thank you.

**MS CHESTER:** Okay. Thank you, John. Thanks, Tim. I'd like to welcome our next participants from the Australian Copyright Council, Fiona Phillips and Kate Haddock. Good morning. Should I say welcome  
40 back; we've met with both of you previously. Firstly, let me just say thank you for the Council's input and help with our inquiry. We've met with you and one of you has been involved in roundtable as well and we do appreciate that and appreciate you coming along to our public hearings today. Maybe just for the purposes of the transcript, if you could each just  
45 say your name and the organisation that you're representing in the public

hearings today, and then if you wanted to make some brief opening remarks, but debating bell in five minutes. Thank you.

5       **MS HADDOCK:** Thank you. My name's Kate Haddock. I'm the chair of the Australian Copyright Council.

**MS PHILLIPS:** I'm Fiona Phillips. I'm the Executive Director of the Australian Copyright Council.

10       **MS HADDOCK:** I'm got a little five-minute timer here.

**MS CHESTER:** Excellent.

15       **MS HADDOCK:** Commissioners, thank you for the opportunity to address you this morning. As you know, the Australian Copyright Council represents the peak bodies for professional creators and the copyright collective societies in Australia and we've made two submissions to this inquiry and Fiona's participated in your roundtable discussions and we don't propose to go over the matters raised in detail in  
20       those submissions here.

      The first thing I'd like to say is in response to your press release and also in response to some of the matters that you've raised this morning. I know that there has been a very public response to the draft report,  
25       particularly from Australian authors, publishers, and booksellers. We represent the first two categories of those stakeholders. In a number of the pre-draft report discussions, including the one that we had, Commissioners, we discussed the fact that an inquiry such as this had the potential to be extremely divisive and that what we felt was needed was an  
30       approach of intellectual neutrality, particularly in the context of a number of reports and the inquiries that have been conducted in this field in recent years.

      Instead, with respect, what we've got, at least with regard to  
35       copyright, is a document that seems calculated to offend and I'm sure that can't be the case. It is extremely disappointing that a government body would choose to issue a draft report with "Copied not right" as a sub-heading for an area of industry that generates nine billion dollars a year to the Australian economy. Of course we understand that the Commission  
40       has not made a recommendation for a reduced term of copyright. Of course we know that the Commission understands Australia's treaty obligations and is required to take those into account.

45       There is a finding in this draft report that the optimal term for copyright protection is probably 15 to 25 years. That seems to act as a

signpost for the assumptions that then inform the recommendations made in the draft report, particularly with regard to fair use. So, from my perspective, it's hardly surprising that the country's most articulate and talented wordsmiths have felt driven to express themselves so compellingly in the press.

I would also like to comment on the Commission's acceptance of anecdotal and hypothetical suppositions in place of evidence from people working in the industry. It must not be forgotten that academics have a vested interest in reducing the amount of money paid under statutory licence fees. They have much to contribute to society but I think in a lot of cases, what has been put forward by academics in response to this inquiry is basically hypothetical. Rights holders have in good faith provided what evidence is available.

Any lawyer in the room will know that it is much easier to attack evidence that has been presented by the other side, than it is to actually present your own evidence. So what has happened is, rights holders have done their best to give you evidence of what is happening in the industry and to commission, at great expense, evidence of the economic impact of various proposals. What happens is that that evidence has been torn apart. We feel we might have been better off arguing on a philosophical level, rather than putting forward the evidence.

I would just like to quickly address three matters. Parallel importation restriction on books, the fair use proposal and enforcement and geo-blocking, which I have put into one little thing. The Commission has recommended that the limited parallel importation restriction on books be removed. It said that parallel importation restrictions have a tendency to increase the price of books available. I'm not going to talk about the comparative prices of books, but it should be noted of course that any individual is able to purchase physical and digital copies of books any time at whatever price they can get on the internet. That's not illegal. It's not a confusing aspect of the parallel importation provisions. It's a completely legitimate area of commerce. So even if there is a price difference, which I doubt, consumers aren't actually disadvantaged by that price difference.

The protection of borders is commonplace throughout the world. Parallel importation of books is restricted in America and it's restricted in Europe. Obviously between the member states of Europe there's a required freedom of trade but as the border of Europe, there is parallel importation restriction on books. In the Council's view, it's vital that Australian publishers and booksellers be encouraged to support local



writers. They can't do that if there's going to be dumping of products from those vastly larger territories.

5 In relation to fair use and fair dealing, you've said this morning that there is an issue about technological neutrality and fair dealing. In my experience, the fair dealing provisions under the Act have got nothing to do with technology. There's no technological references. They are completely technologically neutral. I'm not entirely sure what the Commission's concern is with that regard. If what the Commission is  
10 talking about is the Optus TV Now case which is not a fair deal and it wasn't accepted to be on a fair dealing exception but on a personal free use exception, I think that's a different issue. But it's unrelated to fair dealing which those exceptions don't refer to technology or restrict use in a technological sense in any way.

15 We have serious concerns that specifically what's been proposed doesn't comply with our treaty obligations for reasons that we've set out in our submissions. We also think that to introduce the fair use exception would create enormous uncertainty in the law and in the industry and it  
20 would interfere with existing licence arrangements. We think it's extremely problematic to import one isolated part of US copyright law without all the additional parts of that law. We don't have free speech in Australia. We don't have statutory damages in Australia. I think if you look at table 5.2 in the draft report, that is a very good encapsulation of all  
25 of the problems that would arise if we did introduce fair use because most of those things in the left-hand column are things that are currently remunerated under licences.

30 Finally in relation to enforcement and geo-blocking, speaking personally I've got 27 years of experience as an IP solicitor in private practice in Sydney. I've got extensive experience in the Federal Court and in the Copyright Tribunal and more recently in the Federal Circuit Court, so I'm very happy to answer questions about that. In relation to the safe  
35 harbour provisions, we've consistently rejected the idea that multinational corporations such as Google should get the benefit of the safe harbour provisions. They generate billions of dollars in profit off the back of some of the valuable content in the world. There's no justification for firms like Google to not have to do their due diligence and not put proper licensing  
40 arrangements in place and not be liable for infringements. I just don't understand why that would be seen to be a valuable addition to our law.

I also don't understand why the Commission would recommend that people be expressly allowed to circumvent geo-blocking technology. Circumventing geo-blocking either is or isn't an infringement of  
45 copyright, depending on how you do it. If a firm in the United States

can't prevent its offerings being accessed by consumers in Australia, there will be no incentive for any of those firms to set up local operations. They won't employ Australians. There won't be an Australian Netflix. There won't be an Australian Spotify, which will mean that Australian  
5 consumers will have less access to Australian content, but it will also mean that all Australians spending on that content will go straight overseas and won't be returned here, not to mention the people employed in those businesses here won't be part of that economy. Sorry, I did go over time.

10  
**MS CHESTER:** No, that's okay, and you've probably answered partially some of our questions that we had for you, Kate, in your opening remarks and some of the evidence, so thank you for that. I might just turn first to one of the issues that you've raised with respect to the evidence base and a  
15 couple of points of clarification and maybe one question there. So you're right in saying that some of the evidence that we received from parties pointed to cost benefit analyses and the like that were undertaken by consulting firms. We did critique the methodology and the assumptions. We were mindful at the time that Department of Communications, which  
20 now has responsibility for copyright, had actually commissioned independently a cost benefit analysis to be done by another consulting firm and we're hoping that we will have the benefit of that independently commissioned analysis to inform our final report. So we were very keen to try to garner the evidence bases as much as possible.

25  
The other part of the evidence base that I think you might have had some issue with was with respect to commercial life of copyright materials, which was what underpinned our finding that's caused great consternation amongst the industry, we understand. We were sort of  
30 stepping back from the economic framework that we were asked by the government to bring to this in looking at the criteria against which we sort of assess is the balance right or wrong, looking at it from the perspective of what's effective and efficient and adaptable over time. To inform that, we viewed that commercial life was relevant to copyright terms, so we  
35 went to the only evidence base that we thought was robust and relevant to Australia and that was the ABS analysis. We've asked people if they've got some concerns with the ABS statistics and methodology, which we thought were relatively robust, to give us that sort of feedback.

40  
**MS HADDOCK:** We have done that in our second submission, but I guess further to that, I sort of think one can't have it both ways. If it is the case that a copyright has a limited commercial applicability, then it doesn't matter if it's tied up in perpetuity as Mr Prior would have it because nobody's going to want to use it after the first five years. It's  
45 only because people want to use it and don't want to pay for it that they

want the term, either the exceptions to be broadened or the term to be shortened. So if all these works are suddenly released on to the market after 15 to 25 years, but they have no commercial applicability or interest, then what difference does that make.

5

**MS CHESTER:** Well under current copyright arrangements people wouldn't know if they could use it on issues like orphan works when you have life plus 70 years. There's a much larger window that people have to work with.

10

**MS HADDOCK:** I guess I don't understand the conflation of the orphan works issue, the term "issue". As I understand it, in my practice orphan works issues come up mostly with people who want to use photographs and they can't identify them. So it happens a lot with book publishers and I know it happens a lot in the museum and gallery area and sometimes with old letters as well. It's not really an issue for works that have been commercially available. I don't see that the longer term really makes any difference to that. In any event, what you're talking about is a work that people want to commercialise and then they can't find the owner. So if they want to commercialise at 70 years after the death of the author, then it does still have a commercial use. I guess I might be missing the point of the orphan works and term issue.

20

**MR COPPEL:** Can I take you up on copyright term, even though we don't have a recommendation in the draft report. All the forms of intellectual property are based on the idea that there's a need for a period of exclusivity to provide an incentive either for the innovator or for the creator, and in exchange for that period of exclusivity, after a period of time, it's a patent. The explanation of what is innovative is revealed and it can be then used in the public domain. It could support follow-on innovators. A similar thing with respect to copyright. Copyright has a much longer term than other forms of intellectual property. It sounds from what you are saying that either you're arguing that the current term for copyright is the appropriate term or something else. Can you elaborate?

30

35

**MS HADDOCK:** Yes, thank you. I think I've got two things to say in response to that. The first one is I don't see myself as an advocate for the current term. I think what happened, as we all know, is that copyright got traded for (indistinct) and we had a life, plus 50 term as part of the Free Trade Agreement. More powerful voices than ours were listened to to advocate for a longer term, but it is what it is, so I think that's a pretty academic area of discourse.

40

I do think that the answer to a longer term is not to increase the exceptions and to introduce a de facto shorter term. I think that would be an error, with respect. As I understand it, the justification for an argument that a shorter term is optimal is that the commercial life of a copyright work is relatively short. Therefore, the owner of that copyright only needs to be rewarded during that commercial life. I'm saying if the commercial life is short, it doesn't matter that the term is 70 years because if no one wants to use it after 25 years - I'm probably expressing myself badly but I think that's a bit of having your cake and eating it too. It is only being released into the public domain so that people can use it. If people want to use it, that means it has a commercial life. That's what I'm saying, but I'm not an advocate for the term. I don't think that's a large issue, the term.

**MR COPPEL:** I raise it because it seemed as though you were suggesting that the term should be something longer than life plus 70 years.

**MS HADDOCK:** I am certainly not suggesting that.

**MS PHILLIPS:** In fairness, Jonathan, I think what we said in both our first submission - in our initial submission we said term is a relatively academic issue because of the international treaties. Given everything else you have to cover in this inquiry, we recommend that you don't focus on it. We then spent quite a lot of the draft report focusing on it and then were surprised when people responded. For us, term is not the main issue. Our concern was that to the extent that your views on term had informed some of the other areas where you did make recommendations; for example, in relation to fair use.

**MS CHESTER:** I think our terms of reference obliged us to look at the arrangements holistically and to see whether there was a balance, and so it wouldn't have been appropriate if we hadn't looked at term as well. Just coming back to your point around geo-blocking and circumvention of geo-blocking, we've sort of had conflicting evidence as to whether or not there is uncertainty in Australian law as to whether or not Australian law would make circumventing a geo-block illegal which was the aspect that we were looking at and I'll elaborate why in a moment. We've got a lawyer here; what's your read of it?

**MS HADDOCK:** I'm not a circumventer of technology so I'm probably the wrong person to ask. The Council has an information sheet on VPNs and Fiona might be better placed to address the issue. My understanding is that if you hack into somebody's system, that might be illegal. It can be completely legal to use a VPN, except for the fact that there are

contractual terms of the service that you're reaching. So if I have my contract with iTunes says that I can only use the Australian site and if I use a VPN or an American gift card or whatever to get to buy music or movies from the American iTunes store, I am lying to Apple when I tell  
5 them that my address is Cupertino. I think that is not something that's socially acceptable to encourage.

10 **MS CHESTER:** The issue we were focusing on was was there any uncertainty in Australian law about circumventing geo-blocking.

**MS PHILLIPS:** Kate is completely correct. There's a copyright issue and then there's a contractual issue but the contractual issue leads itself into the copyright issue. The issue under copyright law is whether the geo-block is a technological protection measure under copyright and  
15 arguably if it's just simply a block to the IP address, that is not a technological protection measure because it's not attached to the copyright material per se. So that's not a copyright material. Then there's the contractual issue that Kate has explained. The terms of service say I'm in America and I'm in fact in Australia, so I'm breaching the contract in  
20 order to gain access to the content. Then you have to look at if the contract is actually giving me a licence to perform a copyright act in the US and I am in fact exercising one of the exclusive rights of the copyright owner in Australia, then I am using that copyright material without the permission of the copyright owner, and when I last looked that was  
25 infringement of copyrights. Do you understand how the contractual - - -

**MS CHESTER:** Absolutely. I was just pointing it to circumvention.

30 **MS HADDOCK:** My concern is actually a practical concern because outside Council I do act for people who license entities that sell content in Australia and a lot of those entities are American organisations, primarily American, but English as well that have set up entities here, that employ people here, and they do provide access to a greater range of Australian content than they do in their American services. If it is completely legal  
35 for Australian consumers to go to Netflix or Spotify, just to use the two most obvious ones, in America by VPN or whatever, then I can't see any incentive whatsoever for those firms to set up business here.

40 **MS CHESTER:** I guess one of the things we were trying to address is that we know that online piracy is highly problematic. We know that copyright's being breached left, right and centre. We're trying to unbundle what are the drivers of that infringement. When you look at the surveys that are done of consumers and Choice have done some surveys in the area. Kate's smiling, so there's going to be something on the surveys  
45 that you're not going to like I'm sure. It does suggest that the majority of

folk would be prepared to pay and not breach copyright if they had timely access.

5       **MS PHILLIPS:** With respect, look at the music industry for example  
where in Australia you have pretty much access to what you want, when  
you want it at a reasonable price or even for no price at all if you're going  
to be a member of a subscription service with a deal with the advertising.  
Still in the music industry, infringement is a significant issue. I think as  
10       we've said consistently in our submissions and as others have said too,  
availability and price are not the sole determinants of infringing  
behaviour. They're a big factor, but education and appropriate legislation  
has to go with that. As we've said in our submissions, I think this issue in  
relation to geo-blocking is in fact a distraction. Already in the time  
15       between the IT pricing inquiry and your inquiry, business models and the  
availability of services in Australia has changed markedly. I think as  
business models mature, these issues will just be seen as issues particular  
to a point in time and they're a distraction in a sense. I would agree with  
you that in a sense what we're dealing with now is perhaps the fallout for  
20       industry not being quicker to get on board 10, 15, 20 years ago and to  
come up with innovative business models. I don't think that the same  
accusation can be made now. I'm not saying that we're completely there  
but the industry definitely is - - -

25       **MS CHESTER:** No, I do appreciate that.

30       **MS HADDOCK:** Also, I mean there are lots and lots of studies that  
show that - I mean everyone talks about Game of Thrones, that even  
though Game of Thrones and Dr Who, which is more my area, are  
available in Australia at the exact time that they are available in their  
country of origin. People will still pirate that material. I don't know if it's  
for the joy of piracy or because there is a resistance to any price at all.

35       **MS CHESTER:** The surveys do show that there is a minority that will  
still continue to infringe.

40       **MS HADDOCK:** Yes, sure.

45       **MS CHESTER:** I'm conscious of timing. We don't want to spend the  
whole time on geo-blocking.

50       **MS HADDOCK:** Or Game of Thrones.

55       **MS CHESTER:** No. I'm with you, it's Dr Who genre. You also had  
some comments around our recommendations on fair use running into

problems with Berne. Is that because we strayed from the ALRC wording, which I'd understood - was "Berne" okay?

5 **MS PHILLIPS:** Yes. There's two things principally. There's two main things in raw formulation of fair use that I think are problematic. One is that you don't include a consideration of the nature of the work and I think that's problematic. The second thing is that you include a temporal restriction on the fairness of the use at the time of the infringement or the time of the use. That's where I say I think it's a little bit informed by your  
10 view of the term of copyright, because under "Berne" it's the interests of the right holder, the legitimate interests of the right holder, and that would not be limited to the particular time of the use. So where when you're looking at what things would not be remunerated, just pre-empting  
15 another one of your questions, if I am a novelist and my book's out there but it hasn't been made into a film. Your formulation risks any kind of adaptation, something that's not currently in the market, then perhaps having a leg up via fair use.

20 **MS CHESTER:** If we were revert to the ALRC wording, that addresses both your concern around the "Berne" and it also addresses that one example, Fiona, that you've given of something that was previously remunerated that would not be remunerated.

25 **MS PHILLIPS:** Yes, I think that's right. However, I would say and I have said at the Fordham conference in New York earlier this year that the fair use factors as they operate in the US set up the framework. But there are instances, for example, where I say that decisions of the US Courts actually are outside the three-step test. So it's not the fair use factors themselves but the particular application in a particular judicial decision.  
30 It has sometimes strayed. It's not a fool-safe way of saying that decisions made applying these factors are always going to be consistent with international law, but the factors themselves are less of a concern, whereas I immediately see difficulty with the factors that you've proposed in the draft report.

35 **MS CHESTER:** Thank you. That's helpful. Governance and collection agencies. I don't think this is an issue that you've touched on in your submissions. Is that something that you would have a view on and are you familiar with the EU determination?

40 **MS HADDOCK:** Broadly, but also extremely familiar with the code of conduct which in my experience has been an incredibly effective regulator of conduct, even though it's voluntary code, that change in the way that societies react to complaints in particular has been remarkable in the last  
45 10 years or so. I think that a lot of people, particularly a lot of licensees - I

know that what Mr Prior said about transparency. In my experience of the collecting societies that I work with, the concern about transparency comes less from members of the society and more from licensees, particularly licensees under statutory licence models.

5

I don't think that a code or a directive or whatever vehicle you use that says, for example, that you have to publish distribution information is going to be particularly helpful in circumstances where some licensees simply cannot report on a transactional basis. So what you have is with some lines of business, licensees are reporting on a line-by-line - you know, use Spotify and Apple and so on, can say this song was listened to this many times. That information is all available to members of collecting societies and it's the licensee that's giving the collecting society the information. So the last thing it wants is yet another 200 million line report coming back in its direction.

15

Where the educational institutions say they want to see where the distributions have gone, the distributions are necessarily informed by imperfect surveys, because the educational institutions are incapable, not through any unwillingness on their part but just because the technology does exist to report on a line-by-line basis of what they've been using. The less good the reporting, the less transparent the distribution is going to be able to be, or less accurate distribution is going to be.

20

**MS CHESTER:** We've put it to people that have had concerns, and we've heard from quite a few and not just from licensees, to have a look at the EU determination and say does that address your concerns. We'd want to be even handed so we'd appreciate if you were able to do the same.

25

**MS HADDOCK:** We could, yes, sure.

**MS CHESTER:** Let us know if there's any issues or parts of it that would not translate to the Australian situation, because I know part of it's also about what's happening within the EU as opposed to we'd just be doing it as a standalone jurisdiction.

30

**MS PHILLIPS:** I think Screenrights undertook to do that piece of work. Obviously the collecting societies are our member organisations so they were going to consult us in that process. There were a couple of questions you asked earlier this morning. Can I just quickly - you asked a question about - - -

35

**MS CHESTER:** Unless Jonathan's got any other questions.

40



**MR COPPEL:** No, I don't.

5 **MS CHESTER:** I'd covered everything I wanted to and we're now running sort of 15 minutes behind because we've had the pleasure of your company for longer than we should have. We will wrap it up there, if that's okay. Thank you both for appearing and for your active involvement in the inquiry. It's much appreciated.

10 **MS HADDOCK:** Thank you.

**MS CHESTER:** And for your frank feedback. I'd like to call our next participant, Fraser Old, to join us. Good morning, Fraser. Thank you for joining us.

15 **MR OLD:** Thank you. Good morning.

**MS CHESTER:** Thank you for your submission to our inquiry; that's much appreciated. Maybe if you could just firstly state your name and who you're representing for the purposes of the transcript and then if  
20 you'd like to make some brief opening remarks.

**MR OLD:** My name is Fraser Old, spelt F-r-a-s-e-r O-l-d. I've been a registered patent attorney for about four decades. I've spent 20 years at Spruson & Ferguson. I ended up there as Senior Partner. For what it's  
25 worth, I'm a former president of the Institute of Patent Attorneys. My particular concern is the question of patenting what might be termed computer-implemented inventions.

30 When I was at Spruson & Ferguson I acted for the CSIRO and wrote the Wi-Fi patent and that's earned Australia two or three hundred million dollars in royalties and it shows you what can be done. Also when I was there I acted for ResMed and that started what has now become a listed company and not just a single company but a whole industry dealing with sleep apnoea and that was all based on a single invention by a Sydney  
35 doctor.

I also acted for IBM in the IBM case and if you know about patent law, inventions and so on, there's a couple of cases, one of them was IBM. There's another case, CCOM, which is spelt C-C-O-M, and I acted  
40 there on a pro bono capacity for them and we won at least in the terms of the advance being patented. The problem is that if you look at the Patents Act, you'd see there's only one exception to the general principle of the amount of manufacture being patentable and that has to do with the creation of human beings.  
45

In point of fact, there's a vast raft of case laws built up over the years saying what is and isn't patentable. After the IBM and CCOM decisions and at the time I was the convenor of the Institute Committee dealing with this problem, we managed to convince the patent office that these  
5 advances were patentable and for 20 years or so there was never any problem. In the last few years there's been quite a marked change in the stance taken by the patent office, which has culminated in these two cases, RPL central and research affiliates. Both of those specifications were very badly drafted and in my view they should never have been taken off as test  
10 cases. They're terrible and the results are terrible because what's so important is that the Australian market is quite tiny. The big market is the American market. The Australian patents is the entrée for Australian companies into the American market.

15 I can give you as an example a patent specification, one of my clients which deals with an automated system for dealing with adverse reactions to drugs. The idea being that you can ring up and talk to the computer; the computer assesses the key words and what you've got to say, ask you questions, goes down through various paths and you get a benefit that  
20 someone in the middle of the night is able to get advice as to what to do and how to fix it. The published US specification number is 2014/0343958 and the client didn't bother patenting in Australia, simply because it wasn't patentable here. I give you a copy of that specification.

25 **MS CHESTER:** Thank you.

**MR COPPEL:** Yes.

**MR OLD:** In order to show you what's going on in the Australian Patent  
30 Office at the moment, I'll also give you a copy of an examiner's report. Ironically, it happens to be ResMed and the Australian and the Australian Patent Office has had various additions in its word processor for formulating these objections but they're spewing these things out and probably a third of all the electrical cases get one of these objections.  
35 Talk about a "how not to vote" card. I mean if you really want to impress people overseas and tell them to go away and don't patent anything here, this is the way to do it with the examiner's report. For the record, the number is 2009/296732.

40 Also in my submission I specify why I believe draft amendments should be made for the Australian Patents Act which would allow the patenting of presentational information. I've got with me a specification which I did some years ago which dealt with - if you consider a company like Avon, for example, where you've got a hierarchy of sellers. You can  
45 represent their sales in a hub and spoke arrangement and what I came up

with was the idea of making the width of the line connecting the hub to the subsidiary sellers proportional to the volume of sales, so that you could see at a glance on the screen that the fatter spokes represented better sellers than the thinner spokes.

5

Many people, myself included, are relatively sort of innumerate in the sense that if you have a list of numbers, it's very difficult to run your eye down and pick out which is the highest number, which is the second highest, which is the third highest. But when you look at that displayed graphically then it's easy and you can do it and it's advantageous. We  
10 launched a patent, a PCT application for it. There's a Regulation 39 in the PCT that says that the patent offices don't have to search if it's a presentational information, so the Australian Patent Office refused to search. I asked for a search fee back; they refused to refund it. I reckon  
15 that's official theft frankly.

**MS CHESTER:** We probably better not stray into individual cases, Fraser.

20 **MR OLD:** Okay. What I wanted to show you was an example of an invention that dealt with presentational information. This would undoubtedly have been patentable in the United States, assuming it was new. For the record, the published specification is WO02/05083. Also in my submission I included an extract from an interview given by Gustav  
25 Nossal to the IMSANZ organisation and in it he gives a very good exposition as to why it is that Australians should patent their inventions, in particular, in terms of getting the investment up to get the thing going. As he said, if you don't have a patent it might happen one day but if you do have a patent it's much more likely to happen. The reason is that  
30 investors want to see some sort of patent protection to provide a sort of safeguard.

I have often said to my clients that expenditure on patenting is like paying an insurance premium. You insure your R&D basically. One of  
35 the reasons you need to insure is because one of the groups of people who are likely to take you on are not only your existing competitors but also your employees. You can have a situation where someone comes into your firm, you spend a lot of money paying them a salary, but they are educating themselves as to what it is you are doing and how to go about  
40 doing whatever the business happens to be. There you can have a situation where someone says, "Right, well I'm going to set up in competition", and they take all that know-how with them and so on. One of the benefits of the patent system is that it stops that at least during the term of the patent.

45

Whilst mentioning the term of the patent, the average life of an Australian patent is only about seven years and that's because very often there's been a new development comes along and overtakes the old one and no one's interested in the old one any more. Like in the course of my  
5 working life, I've seen the rise and demise of the fax machine. Nobody bothers with faxes anymore because everybody sends emails with attachments. When people talk about patents and patent term, they tend to think about Viagra and all these drugs that actually run right to the very last day. Most inventions are overtaken by technology.

10 In the submission I point out that this enormous technical revolution that's occurred not only since the industrial revolution in England but since the Second World War, for example, has all taken place in the world of patents. Patents have existed. It's not possible to say that it wouldn't  
15 have happened without patents but it's certainly possible to say that patents didn't stop it happening.

**MS CHESTER:** Fraser, I'm just conscious of time. We might jump in there and ask you some questions, if that's okay.

20 **MR OLD:** Yes.

**MS CHESTER:** Particularly given your history as a patent attorney, this is a question I probably couldn't put to many folk but before computer  
25 software did become eligible for patent protection, computer software existed before then, how did people protect it?

**MR OLD:** You need to understand that if you go back to the 1950s, computer software was a list of instructions. It still is but it was a list of  
30 instructions that enabled the computer to operate. The patent offices took the view that you could have hardware on the one hand and you could have software on the other and the developments in hardware were patentable. Developments in software were subject to copyright and were not patentable. What happened was the technology changed and in  
35 particular with the PC and so on, you've now got the situation where by writing a program you can change what's happening within the hardware. Instead of just calculating a number or getting a result, you're actually getting a different machine out of it. The patent offices have never come to grips with that.

40 **MR COPPEL:** Can you give an example of that?

**MR OLD:** Well, for example, I've got one client who uses a Java virtual machine and Java language has gone through about seven different  
45 versions. There's an awful lot of programs out there written in old Java

language versions or editions which have pretty poor security. What they've been able to do is to use the Java virtual machine to run an early language version on the modern Java machine which then provides security against, for example, hacking and other interference. The outside world sees the modern program, but the actual work, for example for a bank, is being done by the program that's only second generation or something of that sort. So without having to have human intervention to rewrite the old program to get the new modern security, they have been able to, by programming, create a machine which is what the outside world sees that operates differently. That's going on all the time.

**MS CHESTER:** You mentioned before, from your own experience really, like the commercial term of life for computer software now is on average maybe around seven years or something. What role then do the other forms of IP protection in the forms of trade secret and first mover advantage, what role do they play in parallel or in substitute to patents?

**MR OLD:** The difficulty you've got is that with a lot of this stuff the advance is generally an idea where you say "Instead of doing this, let's do that". I gave some examples in my submission about lift technology because I thought they would be fairly easy to comprehend. Once someone has that idea and they put it into practice and it gets going, the word soon spreads around the industry as to what this thing is and does and how it works. So that people don't need to read the code to emulate it. They can go away. Once they've had that idea explained to them, they say, "I see what he's doing", and they can go off and they can write their own software which is an infringement that embodies copyright because it's an original work, but it does what this other fellow's come up with. If you want to stop that happening, you need a patent.

**MS CHESTER:** So trade secrets and first mover advantage don't play any role with short life.

**MR OLD:** Trade secrets, you go down to the pub and you buy a bloke a few beers and he starts explaining what he does at work and out the door goes the trade secret.

**MS CHESTER:** That leads me to my next question. You mentioned in your opening remarks some of the other commercial value that businesses that you deal with can get from patent protection, and you cited the example of the potential of an employee to take the IP when they leave and the patent protection provides additional protection beyond the employment contract, I imagine.

**MR OLD:** Yes.

**MS CHESTER:** Are there other sort of commercial values that your clients are getting from taking out patents in that sort of vein?

5     **MR OLD:** The patent's a little bit like a corner. On the one side you've got the ability to sue someone for infringement. On the other side that ability gives you the ability to licence their pitch and it's that that enables the patent to offer some protection to the licensee in return for the royalties. There's also sort of various other benefits in terms of having a published document that describes what's going on and there are plenty of examples. For example, in British code breaking in the Second World War where one of the things they did at Bletchley Park was go and get all the patent specifications dealing with commercial encoding machines to see what people were doing and how they were constructed and so on. In fact, the Enigma machine was a refinement of a much earlier machine which was patented. Gus Nossal makes exactly that point in his interview that the patent specification publishes what's going on and people can see it and you can trigger other ideas and create other inventions and so on. So in that sense there's a great openness about it because everything gets published in 18 months.

**MS CHESTER:** In your submission you made mention that there's a lot of innovations which are currently not patentable in Australia that are still patentable in the US.

25     **MR OLD:** Yes.

**MS CHESTER:** We've heard evidence from some other patent attorneys that the Ellis Corporation decision has had an impact on what's patentable in the US versus what's patentable here. Is that something that you're familiar with and have a view on?

**MR OLD:** There's a tendency for the Courts to move in the same general direction but in my view what's needed is not a sort of tweak of the case law but a rewriting of what's patentable. When the High Court brought down the NRDC decision in about 1960, I think it was, it was regarded as a breath of fresh air in the patent world and Australia led the world and the British Commonwealth followed suit. In those days particularly the precedent value of Commonwealth higher Courts was quite compelling. The situation in Europe, in particular, is just ridiculous and where's the European computer industry? Well it just doesn't exist.

45     The US has been in the forefront of allowing more and more liberal interpretations of things but recently the pendulum's swung back a bit with a case called Alice which ironically was an Australian invention.

What's needed is to permit the breath of fresh air that came with NRDC to be reinvigorated and to provide an amendment to the Act to allow all these things. There's no justification for preventing patenting for the display of information. Why? It's like saying you can allow a patent for inorganic chemistry but not for organic chemistry. Why prohibit something just because the person does it with using a computer, instead of using relays or instead of using an integrated circuit? There's no logic in any of that.

**MS CHESTER:** Fraser, I only have one more question and Jonathan might have some more. From your experience, have you also dealt with the flipside where you've had clients that find that a patent of another patent holder's in the way of them commercialising or innovating?

**MR OLD:** Yes, and I've done searches trying to invalidate someone's patent and been unable to find it and the client just had to wait until the patent expired and then that client and half a dozen others jumped in and started doing exactly what the patent was all about and the invention had to do with "for rest of life" clause. Sometimes you've just got to put up with it and let the term expire. This was a valuable patent and they were in it right up until the last - in those days it was 16 years and as soon as that 16 years was over everybody was into it.

**MS CHESTER:** But they weren't commercialising it during that period due to the patent protection?

**MR OLD:** No, they didn't infringe because they knew about the patent.

**MS CHESTER:** No, no, no, but the holder of the patent hadn't commercialised?

**MR OLD:** Yes, they were commercialising.

**MR COPPEL:** Just one question for you, Fraser. One of the issues that we've been asked to look at is a sense by some that our research institutions and universities have intellectual property but it's being locked up in the sense that licensing agreements are not coming to bear. I was wondering if you had any views as to whether such a diagnostic in your experience is one that you think suggests that there is such a problem with our research institutions and universities sitting on intellectual property?

**MR OLD:** I don't have any specific examples, save this one. There was a bit of a debate in the sort of the CSIRO research institute world as to whether or not if they issued a licence it should be an exclusive licence or a non-exclusive licence. There was a lot of sort of theoretical pie in the sky stuff about "It's a public board. It should be available for everybody".

It's far better commercially to make an exclusive licence and to enable the licensee to get going and not have any competitors for that little while because that first mover situation is very important.

5 I have a client in the conveyor belt monitoring field who took up such a licence from the CSIRO and, as it turned out, he was the only licensee. But he would have much preferred to be an exclusive licensee rather than just a non-exclusive licensee. He started a business and it's still running. The original patent has long since gone and he's now producing his own.  
10 The monitoring of the mineral-carrying conveyor belts is an enormous problem. Rio Tinto recently had a couple of belt failures where the belt ripped longitudinally and all the stuff that was carried by the belt fell down and so they had to dig all this out by hand, repair the belt, put it all back together. They lost a week or two's production, hundreds of millions  
15 of dollars. He has a device now that can detect these rip failures and stop the belt. You can do things before you've got to go and shovel everything away.

**MS CHESTER:** That covers all the questions that we were hoping to chat through with you today, Fraser. Thank you very much for - - -  
20

**MR OLD:** Can I just raise two things. One is that you were discussing earlier on the question of inventive (indistinct). It doesn't matter what the test is, it's always going to be very patchy to apply. I've had one client  
25 who had the Australian Patent Office and the Federal Court say his invention was obvious and the corresponding patent application in the European Patent Office was issued without an examiner's report issuing. Well it was granted without an examiner's report issuing which is just unheard of. It's the only case I've ever had in 40 years where that's the  
30 case. So who cares what the tests are but you get this application and that's human nature.

The other thing is that there are lots and lots of cease and desist letters written and the cases that get to Court are the cases where the advisers on  
35 both sides agree as to what the predictable outcome is going to be. So although litigation is to some extent uncertain and a bit of toss up and so on, basically the body of the side of case law is there and it keeps being applied over and over again and people make commercial decisions based on that and keep out of Courts.

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**MS CHESTER:** Thank you very much, Fraser, for your interest in our inquiry and for coming along this afternoon to have a chat.

**MR OLD:** Thank you.  
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**MS CHESTER:** Thank you. I'll call our next participant and apologies if I get the name incorrect, Chenoa Fawn.

**MS FAWN:** Perfect. Hello.

5

**MS CHESTER:** Hi, just come up and make yourself comfortable.

**MS FAWN:** Thank you.

10 **MS CHESTER:** Feel free to stamp your feet to keep yourself warm because it's freezing in here. Thanks for providing us with some comments post our draft report and for appearing at our public hearings. If you could just state your name and who you represent for the purposes of the transcript, albeit individual author, and if you wanted to make some  
15 opening remarks. Then we've got a few questions we'd like to run through with you.

**MS FAWN:** Thank you and I'll try and be brief because I know we're abutting lunchtime. My name is Chenoa Fawn. I am interested in the  
20 outcome of this from two points of view, as an academic and also as a writer of creative fiction. So just to give you some background about myself, I was in the corporate world and I was busily enjoying my gilded cage when I received a letter one day at home. The letter was asking to republish some of the work that I had published for free in a student  
25 journal during my university days. It came as a total surprise and also at one of those, what you realise later as a turning point in your creative life, because the letter represented someone valuing my creative writing and putting a commercial value on my writing.

30 The institution behind it wanted to use it for educational purposes and being someone who has benefited greatly from education, I didn't want to charge them for it. I wanted to just give it to them to donate my piece so that they could use it for their students. So I wrote back on their form, "Zero dollars. You don't need to pay me anything", and sent it off  
35 thinking that's the end of it, and feeling a little chuffed that my work which was created rather hastily back in those student days was something that someone later came to see value in.

40 That got me thinking about my old love for writing and for one day, as so many people do, harbouring a desire to be published to have a novel written. It was something that when it occurred to me when I was younger I put it aside. I put it into the category of something that I would do once I was already financially established in the world because I could already see how difficult it was for authors to make a living. So it was  
45 one of those dream items I would do once I had been settled in life. But

when this letter arrived asking to republish this work and offering to pay me for this work, it really made me think about, “Well why aren’t I exploring a creative life now. If people value this work, maybe they will value other work of mine”.

5

I went back to school. I did my Masters at night while working long hours in the corporate world and I reacquainted myself with the canon of English literature and I started writing. Eventually I got to a point where I said to my partner, “I really want to pursue this. This is a serious desire for me to create a path which is more creative”. So that has led me down quite a path and it was based on the fact that someone saw value in my work. The rest of that story is that while I was trying to give that work to them for free because they were using it in an educational setting and I don’t mean to imply by that that authors should not profit by that. It’s really important that they are paid. But in my circumstance, at that point in my life, I was earning a good income doing something else. I had the ability to be generous with my work because it wasn’t what I was relying on to pay my power bills; I had another stream of income. Perhaps I would have looked at it differently if there was no other source of income for me.

20

The final part of that is that when I started investigating the world of writing and how does one make a living in this world, one of the things that came up in I think one of the courses that I took was that you should register with the copyright agency, and that they should know you as an author and that all the works that you put out there should be registered with them so that if people want to reproduce what you have created, that there will be some recompense for you. So I did that and I did that just as a sort of hygiene factor as setting myself up for the future.

30

What I didn’t realise was that that piece of work that they had asked for to be used in the education system had been reproduced tens of thousands of times and that many, many students had read that as part of their formal exams and then they had to comment on my work, which I found quite entertaining. But there was a commercial benefit to me as a writer, because every time, even though I tried to give it to them for free, every time they reproduced it, that is registered with the copyright agency and that means that the author should then receive something in return for the fact that their work is of continued value.

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While in the scheme of things I’m in the beginning of this potential career for myself, I’ve already experienced the power in terms of the real return in monetary terms, even though it’s only small if you’re only talking about a few thousand copies here and there. But more of what I wanted to say to you is that there’s a motivational factor. In a creative

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person's mind, often their work and the fact that they even undertake something creative has been undervalued or they undervalue it. So if you then remove some of the small ways in which they can make money from their work, you're devaluing it as an option for future creative people to come through. In this world we seem to value things according to what do we get financially in return and we need to work within the system as it is. There's no patron in the system any more. So it's not a case of a new painter or a new writer aligning themselves with someone who can then provide them some kind of existence going forward in return for their creative work, like we don't have that option any more.

The option that we do have is apart from book sales or selling a painting or selling a song, we have that recurring revenue stream of the copyright. In my brief submission, the only thing that I really wanted to target because it was of most concern to me personally, was the term of the copyright period which seems to be coming up for debate. From my point of view, I have a business mind and I'm trying to become someone who is making their life based on their IP. So whether I publish my PhD thesis eventually as a book, whether I go on to write other academic work and or whether I have novels published or other pieces, I still need to eat. I still need to provide for my family and there needs to be some kind of economic benefit for me giving up my time to do these creative works, which have been shown in that little example to be of benefit to other people. I just wanted to only speak for myself, of course, because I'm not in a position to speak for more than that, but to give an example of someone who is starting out and who is assessing, "Can I make a living of this? Is this worth my time and will my work be valued?"

**MS CHESTER:** Chenoa, thank you for those opening remarks and it is a unique insight that you're sharing with us. We haven't had any other authors that are sort of starting out come in and talk to us during our public hearings. Perhaps if I could just make one important point of clarification which I think you might find helpful and then one or two little questions, if I may.

You may not have been here earlier. There's been a lot of media reporting around our draft report and our draft report doesn't recommend any change to copyright term and nor would we because our terms of reference told us that we had to give regard to our international treaty and agreement obligations. It's not practicable or feasible to make that recommendation, so we haven't. I think there was a finding that we had around the commercial terms of creative works which is the 15 to 25 years.

**MS FAWN:** Yes.

5                   **MS CHESTER:** If you were doing an optimal term of copyright from that perspective, that's what it would be and I think people have confused the two. I hope that helps in that regard.

**MS FAWN:** Yes, that does.

**MS CHESTER:** At the moment you're an academic?

10                  **MS FAWN:** I am finishing my PhD and I have lectured at university, yes.

**MS CHESTER:** Have you published? What sort of genre of writing would you ideally like to be involved in if you become a full-time writer?

15                  **MS FAWN:** Well there will be my academic work and my fiction work.

**MS CHESTER:** Do you have anything published at present or is finishing off the PhD number one priority?

20                  **MS FAWN:** That's absolutely the number one priority because it takes all my mental energy but I have had some poetry and some short prose fiction.

25                  **MS CHESTER:** Is the PhD an English Lit?

**MS FAWN:** It is, yes.

**MS CHESTER:** Here in Sydney?

30                  **MS FAWN:** Yes.

**MS CHESTER:** Great. You also mentioned what sort of instigated that turning point moment. I think we all remember what - I've had career path changes as well and there always is a bit of a turning point moment. It was where you got that letter asking for your authorisation or licensing of that previous work you'd done when you were at uni.

35                  **MS FAWN:** Yes.

40                  **MS CHESTER:** You then mentioned when you, as a hygiene factor, went and registered with the copyright agency to say, "I'm here and I want to be an author", to find that many others had used and copied that previous work.

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**MS FAWN:** Through that institution.

**MS CHESTER:** Yes, through CAL. I'm assuming it's CAL, The Copyright Agency?

5 **MS FAWN:** Yes.

**MS CHESTER:** Had they been collecting royalties on the copying of what you had written at university?

10 **MS FAWN:** Yes.

**MS CHESTER:** Who had those royalties been going to?

15 **MS FAWN:** I'm not sure where they store them, allocate them, or how that works. You'd have to ask the CAL people, but it was as if it was waiting to be claimed.

**MS CHESTER:** Okay. So then they gave you retrospectively everything that you would have been entitled to from all those copies?

20 **MS FAWN:** Yes.

**MS CHESTER:** Was that a material amount of money?

25 **MS FAWN:** Thousands of dollars, yes.

**MS CHESTER:** Do you know over what sort of time horizon they'd been sort of warehousing that money until somebody put up their hand and said, "Hey, it's mine".

30 **MS FAWN:** I'm not sure.

**MS CHESTER:** It's kind of the interesting that the - so who was the original party that asked for your authorisation? Was it an educational institution?

35 **MS FAWN:** Yes, the Board of Education.

**MS CHESTER:** So they tracked you down but CAL didn't, in terms of establishing the author?

40 **MS FAWN:** I think the onus is on the author to register with CAL.

45 **MS CHESTER:** Okay.

**MR COPPEL:** How does that process work?

5 **MS FAWN:** It's very easy. I just went online and gave them my details for my identity, "This is me. This is my work".

**MR COPPEL:** You have to have published work. You wouldn't register when you're just starting out and you haven't got material that's published?

10 **MS FAWN:** I don't think so but perhaps some people do.

**MS CHESTER:** I've got a daughter at university who's been writing and she's doing English Lit and I think she needs to register too.

15 **MS FAWN:** Yes.

**MS CHESTER:** I didn't have any other questions, Jonathan, did you?

20 **MR COPPEL:** No. Thank you very much.

**MS FAWN:** Thank you.

**MS CHESTER:** Chenoa, thanks for coming in.

25 **MS FAWN:** Thank you.

**MS CHESTER:** Okay folks, miraculously we're not too far over time. It's 12.35. We're going to take a break for about just under an hour, so if we could resume at 1.30, that would be much appreciated.

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**ADJOURNED** [12.36 pm]

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**RESUMED** [1.28 pm]

**MR COPPEL:** Welcome back, everybody. We will say at the outset we've got nine further participants for this afternoon so I'm going to ask each participant to be very brief in their opening remarks so that we can use the time available to us to engage in a Q and A. Our first participant this afternoon is from the National Copyright Unit COAG Education Council. Welcome, and thank you also for your contributions both pre and post draft report, including submissions but also participation in the

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copyright fair use round table. Could I ask you for the purpose of the transcript for both of you to say who you represent, who you are and who you represent, and then a brief opening statement, thank you?

5 **MS BROWNE:** Sure. Delia Browne, National Copyright Director, National Copyright Unit, the COAG Education Council.

**MS FLAHVIN:** Anne Flahvin, Policy Australia, and I'm here with Delia today.

10

**MS BROWNE:** So very quickly, thanks for giving us the opportunity to provide further comments to the Commission on your draft report. And as you know, the Copyright Advisory Group to COAG Education Council welcomes the recommendation, the draft recommendation, to enact a fair use exception as we believe it's going to bring Australia into line with leading digital economies such as the US, Israel, South Korea and Singapore, each of which have thriving education publishing markets. So we also welcome the draft report's recommendation, draft recommendation, to expand the copyright safe harbours to include education institutions. We think this is a long overdue reform and also it would help Australia comply with its obligations under the Australian Fair Trade Agreement to include all service providers in safe harbours.

20

So what I'm going to do is just very quickly talk about three - addressing three points that has come up that I've noticed with past public hearings and issues have been brought up in other submissions. The first thing is I want to reiterate on behalf of the school and TAFE sector that the Australian education sector will continue to rely on educational and statutory licences and voluntary collective licences of fair use is enacted, we do need - I will explain a little bit why we need fair use and why educational publishers and authors would not be harmed by this reform and just basically setting the record straight basically on some comments that have been made about the idea that reform will also decimate education publishing markets.

35

So again, first off, we have never, ever, ever, ever, suggested that fair use would apply to all or even most of the ways that schools use educational statutory licences. And this is something that we have been saying time and time again in writing in submissions to the Australian Law Reform Commission, to the issues paper and discussion paper, and also to the issues paper for the Productivity Commission and again our submissions to the draft report by the Commission. So we don't think fair use is going to cover all the things that schools are currently doing and we think we're still going to - we have to rely on collective licence arrangements.

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And I just want to - this is repeated assurances we've given time and time again so I just want to say that again for the umpteenth time. And also be aware that this is something that has been endorsed by the state and  
5 territory Commonwealth Education Ministers as well as the National Catholic Education Commission and the Independent Schools Council of Australia. So it's disappointing that people are still saying that we are, you know, we think that fair use is going to be replacing the statutory licences. That is simply not the case.

10 We also just want to reiterate it's important to remember that on our conservative estimate Australian schools spend at least \$700 million a year purchasing new educational content for students. And that is in addition to the money that we pay under statutory licences. And that's in  
15 addition to the money that we - you know, that is also paid by Parents and Citizens Associations also purchasing educational content to schools. So a fair use exception would not have an impact on this spending.

Why do we need fair use? MOOCs is one area that's come up in a  
20 few submissions. None of the existing copyright exceptions or licences enable Australian schools to take advantage of the modern education methods such as MOOCs. And so we disagree with the claims made by collecting societies that the statutory licence applies to MOOCs, we don't think that would apply to MOOCs if that content is shared with people  
25 outside the education institution. This is to some extent small extracts are permitted on MOOCs in the US and other fair use jurisdictions, we understand when using small amount of content in MOOCs they can rely on equivalent fair use style exceptions.

30 The other thing to note is also the increasing requirement by governments that schools should be collaborating with business industry just to develop STEM, the STEM skills of Australian students, but again our copyright laws are a bit of an obstacle to do that. So it's hard for us to - we can't rely on the statutory licences or the existing fair deal  
35 exceptions to use small amounts of material when engaging with the broader collaborative engagement we have with community, business and industry. And so they are exceptions that only apply to very, very traditional classroom use. And that's kind of one example of the social useful collaboration that could be permitted under a fair use regime and  
40 that wouldn't unnecessarily prejudice the rights holders.

With fair use remember it's about what's fair that's allowed, you know, if it harms the rights holder markets it simply shouldn't be allowed. So we think the flexibility of fair use or a fair use style exception is much  
45 better suited to an environment where increasingly schools are expected to



engage with industry and the wider community and it will bring us in line with countries like Israel, South Korea, Singapore, the United States, that have laws that facilitate collaboration engagement rather than laws that actually stop it.

5

Another little point to make is millions of dollars is being spent on freely available Internet material and orphan works. When I tell people overseas about Australian schools paying millions of dollars a year to use freely available Internet content no one ever expected to be paid for sometimes they look at me as if I'm describing something that's a scam. It's not actually a scam. And there's no justification for the Australian schools to be spending taxpayers' money, public funds, on activities that don't affect copyright owners' markets.

15 Such as printing out online TV guides, printing out health fact sheets, or the About page on a corporate website, printing out free tourism maps of Australia, asking a student to print out a map from Google Maps for a homework exercise, a teacher taking a screen of a section of a webpage that teaches students how to use computer software, reproducing thumb  
20 nail images of the book covers on the school intranet so you can show students what's available in the school library, or using orphan works. We think probably in this category about nine million of total amounts of our licence fees is for these particular types of uses and materials.

25 And I've heard in a previous hearing last week The Copyright Agency thinks this can be fixed by the tribunal by applying a zero rate. We do not agree that the tribunal has the - can do this, or the statutory licence allows the tribunal to apply a zero rate. And we also note that in 2013 in the  
30 Copyright Tribunal proceedings involving the copying of survey plans by the New South Wales Government counsel for the Copyright Agency, David Catterns QC was asked, "You say it's not possible for one to say where a statutory advised equitable remuneration that could ever be zero?" And Mr Catterns' answers, "Yes but it is our submission it says it must pay". So the tribunal looked at this question sort of back in 2013 and  
35 CAL's lawyers actually said that it wasn't possible for the tribunal to apply a zero rate. So I can stop there because I've probably passed five minutes and you might want to ask me some questions.

40 **MR COPPEL:** Seven minutes, actually.

**MS BROWNE:** Seven minutes, my God.

**MR COPPEL:** But thank you, Delia.

45 **MS BROWNE:** Okay.

**MR COPPEL:** Maybe I can start with fair use. You've given a number relating to the payments that you make under the statutory licence for materials that are freely available, could you elaborate and explain what you think would be areas that schools could use under the fair use provision should it be adopted that wouldn't be available under the current fair dealing? I'm trying to get at the rate of leakage, so to speak, so what materials that are currently remunerable under fair dealing would not be remunerable under the fair use, other than these free on line examples that you've given?

**MS BROWNE:** Just to clarify, the fair dealing exceptions in Australia do not cover educational use by schools and other education institutions. They only cover activities done by students in their own capacity with, you know, doing research and studies. So everything under the Part VA and Part VB licence, there was no - the only thing that can be excluded from remuneration - actually everything is in Part VA of the Screenrights Broadcast Licence, there would be nothing that would go out of that, there's no - you would pay for a copy of all television programs. In the current licence or the Copyright Agency Licence, the Part VB licence they administer, fair dealing doesn't have any - there's nothing a teacher can do that can be relied on on fair dealing except for very - when they're doing stuff for the purpose of education instruction or educational purposes of the school or the other education institute.

So there's no leakage there, there's just like anything that you do for the education instructional purpose of the school is in the, what I call the red circle, that's the easiest way of doing it. The only time that something might be outside that is all again to do with some negotiation by the school sector in relation to free Internet material is if it's very, very clear on the terms of use of a website or very, very clear on terms of use, say, if it's a publication, but mainly websites, that is either a Creative Commons licence, therefore it will be out of the equitable remuneration pot, or there's words that clearly say it's intended for educational use. Otherwise it will be in the red pot rather than the green dot, if that makes any sense.

**MS FLAHVIN:** And can I just add, I mean what you've highlighted there with that question is the difference between fair dealing and fair use. So our fair dealing exceptions are all purpose based and the courts have said that the relevant purpose is the purpose of the person doing the copying. So even though a student might be permitted under fair dealing to do a lot of the uses that we're talking about here, because fair dealing is a purpose based exception it just doesn't apply to anything the school does. Fair use just looks at the question, is the use fair? It's not concerned with, you know, who is doing the copying, it really just looks

at, you know, is this purpose a fair use? So that's just the difference between fair use and fair dealing that is really highlighted by the question.

5       **MS BROWNE:** And like in the electronic use survey there's even, you know, where the teachers record the electronic copying and communication activity for a period of time. One of the activities they have to record is if they tell students to print or save or download. So even if you give, say, look, here's some places you might want to go and have a look at as part of your ongoing research and study, even that  
10       activity is actually recorded in the survey. So that's another sort of, you know, it really is quite a broad statutory licence, it doesn't actually give very much room for zero rating, it doesn't give very much room for excluding material based on a fairness, at this stage.

15       **MR COPPEL:** If you took the fair use recommendation as proposed by the ALRC not that in the draft report, do you have any idea as to what material would no longer be remunerable under such a provision?

20       **MS BROWNE:** Under a proposal.

**MR COPPEL:** Under the ALRC proposal for fair use.

**MS BROWNE:** The best - - -

25       **MS CHESTER:** Assuming the negotiation with the collection agency reflected the negation informed by the new fair use.

**MS BROWNE:** In our submissions both with the Law Reform Commission and the Productivity Commission the two areas that we think  
30       would not attract and continue to attract equitable remuneration under a statutory licence would be freely available Internet material and probably orphan works. There might, you know, those are the two main areas where you see the main impact being which is why we've kind of come up with a guesstimate. We don't - you know, looking at what data we  
35       have from the statutory licensing schemes to sort of come up with a, you know, the best approximate we can.

**MS CHESTER:** So Delia, where does the \$9 million go to that's collected that doesn't need to be repatriated to any copyright holder?  
40

**MS BROWNE:** Well, if it's a - well, the Copyright Agency does its best to try and locate copyright owners. I'm not suggesting that they're not doing their job, but - - -

**MS CHESTER:** But you said the nine million was for freely available - - -

5 **MS BROWNE:** The nine million really is for Internet freely available to you so like 80 per cent, I think, or 85, of the electronic use survey is for Internet material that's not behind a partially protected wall and it's spread to everyone around the world to access and use but in Australia because of our statutory licence we are required to pay for it under the statutory licence. So the nine million - - -

10 **MS FLAHVIN:** Well, so some of that money I suppose CAL will be able to identify the rights holders but - the Copyright Agency, but they might be quite surprised to get, you know, a payment. And money that the Copyright Agency can't distribute because if they can't locate the rights  
15 holders, identify them or locate them if the works are orphan works, that money goes back into a pool and if it's not distributed after four years it goes to rights holders who had no connection with the work. You know, the view that we've always taken is that's a bit of a windfall for rights holders who have no connection but that work was copied by schools, the  
20 money eventually does get distributed to rights holders, just not the relevant rights holders.

**MS CHESTER:** And what does that sort of amount of money on an annual basis of the whole - sorry, of the whole amount that sort of CAL  
25 collects that's distributed just evenly across the pool, I'm assuming.

**MS BROWNE:** We're not privy to - - -

30 **MS FLAHVIN:** We don't know if that data - I think in past years to the best of what we are able to piece together at some points in time there were, you know, \$20 million of undistributed funds. I think the best that we can say is that there does appear to be quite a lot of money that either is not able to be distributed or is distributed in circumstances where, you know, there doesn't seem to be any reasonable basis for - nobody  
35 expected to be paid for this work, they put it up, they make it freely available, Australian schools are about the only people in the world paying - - -

40 **MS BROWNE:** We are the only people in the world. Yes, so universities. So again, it's the Internet has kind of changed everything when you look at the collective licensing. And one of the great benefits of collective licensing has been over the last 30 or 40 years it was very hard always getting direct licences and the models were very difficult so it was actually a very good public policy about having collective licence  
45 arrangements but it has changed things. And having a broad stroke across

it, it probably needs to be relooked at and whether it's fair, continuing to be fair, but no one is suggesting from our sector that collective licenses still have not got a place to play, we think they still will have.

5 **MR COPPEL:** Many participants to this inquiry that do not favour fair use argue that it will create uncertainty, what - - -

10 **MS BROWNE:** We don't agree with that analysis. We, the National Copyright Unit, has the Smartcopying website, [smartcopying.edu.au](http://smartcopying.edu.au), and we also conduct a lot of education workshop seminars, including online, to the TAFE and school sector. We think that we can provide guidelines in education to the school sector about what and what is not permitted. It's exactly what we do now to the schools and TAFEs, you know, they've got a pretty good idea of what is not and what's permitted and so we think  
15 there's been guidelines that have worked in other countries quite well.

And our sector is a sector that actually tries very hard to be compliant with copyright laws and we just think we can put pretty clear guidelines about whether it is or isn't. And if there is grey areas the schools are  
20 always encouraged to contact us and we provide, you know, Monday to Friday advice to schools and TAFEs and departments of education a variety of copyright issues on a daily basis by telephone and by email. And that is something that is kind of our unit is actually supported by all the states and territory governments' funding in the non-government  
25 school sector. So that will continue. So it will be business as usual with an education kind of campaign. We don't think that will be a problem.

**MR COPPEL:** You mentioned one of the benefits from fair use that it would allow the development of initiatives like MOOCs, can you give  
30 other examples of where you would see benefits from fair use?

**MS BROWNE:** Collaboration is the big area, particularly with industry and organisation that are not traditional education organisations. I mean, there is a huge push that's typical with the STEM subjects, and also  
35 collaboration across schools and across states and territories.

**MR COPPEL:** So what is it about fair use that allows better collaboration?

40 **MS BROWNE:** It doesn't limit it to the four walls of a school or the four walls of a classroom, you know, our exceptions and our statutory licence are of a time where there wasn't such a thing as communications technology and the Internet and the ability to actually do things outside a physical classroom. And even seeing how classrooms and our - the  
45 classroom of today, it may not be around in five years' time. I mean, even

think about the fact that the opportunities now for personalised learning are fantastic so more and more you're seeing personalised kind of educational learning kind of apps and resources being available for students and parents to purchase, like Mathletics and Spellodrome. It's a really different environment.

So the way our exceptions and statutory licences are set up really was to deal with the photocopying issue which was a good public policy issue, there was a real concern and a genuine concern that, you know, photocopying was going to mean that teachers were going to start photocopying books and not buying educational resources and the way that we dealt with that public policy issue was really introducing the statutory licence. Things have really changed with the Internet so we need a little bit more flexibility but the fairness thing is very important to still have.

Fair use is not there to allow whole scale copying of other people's materials it should only be there for, you know, short extracts that aren't going to be applied against the fairness factors. It's not meant to be there for a free ride for everybody, it's meant to have an element of fairness. We don't have those fairness components in our current exceptions or our current statutory licence and I think it's time for that transition to start happening. But again it's not meant to be and it's not intended to be a free for all.

**MS CHESTER:** The business model that wraps around the text book worlds seems to be changing in terms of traditional hard copy texts required for all students to online content and open access sort of poses the question are people conflating concerns about fair use with what's really technological change with the way traditional text books had previously been?

**MS BROWNE:** Look, that's probably a fair assessment. I think also the fact that we've got new players in the educational resource market that aren't just traditional publishers but also you're seeing some new offerings also being made. You've got the digital course materials thing that CAL is doing now. Learning Fields is another, a new kind of offer into the educational institutes which allows them to do their own kind of digital course for the payment for licence fees to - I can't remember how many publishers are involved in the Learning Fields initiative that's been around with the Copyright Agency for a couple of years.

You're also seeing, probably we're seeing a bit of a transition of the sort of things that are being offered now for educational institutes but, you know, there are new players in the market too such as education apps and

Google Classroom and you can sort of think - but other sort of business that are doing very well under the statutory licensing that will continue to do well under the statutory licensing, such as ClickView which is a great - is a company that offers a 24/7 kind of copying platform for schools and other education institutions and these things will continue to kind of happen.

So I think it is a change of time. Look, how long have we had iPad for? Maybe five or six years. I mean, that's changed everything in the classroom. Mobile phones are being used kind of more predominantly by students and staff, so it's just that technology has changed everything. The publishing industry is probably a little bit stressed by those sort of changes. But again, there are some opportunities we see already happening with the different types of offerings that are more suited for the digital learning environment now being offered by publishers too. So I don't think it's generally all bad news, it's just that times are changing.

**MR COPPEL:** Can I come to the collecting societies? You mentioned that technological innovations are disrupting the traditional model and there's a lot of adaptation taking place, and in that context it's often being submitted that the level of transparency and accountability is wanting. It's been suggested that the code of conduct, being a voluntary one, could be improved upon. In that context the EU directive offers a model for better transparency and accountability. Do you have any views on the EU model or the current voluntary code of practice?

**MS BROWNE:** I will make a couple of points here. I mean, we've participated a couple of times in the code review, the voluntary code of conduct review, and actually the first time we did it was I think back in 2006 and then we decided we weren't going to do it for a while but we've just done it recently I think last year. Look, there's a few problems with the voluntary code of conduct. It does appear to me that if the parties can't come to an agreement unanimously around the table that the code reviewer doesn't feel like he has the power or she has the power to actually make any reasonable orders directing the collecting societies to do something.

What we were trying to do in the last round of the code review was trying to get some additional clauses into the code of conduct which were in relation to releasing information, high level information, to the licensees. The classes of licensees, i.e., that, you know, the universities, the schools, the TAFEs, government schools, rather than to individual licensees, which was a concern from them. We were unable to come to any agreement on that and the code reviewer declined to make an order and seemed to think that the best way of dealing with this was actually

going to the Copyright Tribunal. I don't think the Copyright Tribunal has that power to make such directions either. We do have a declared some guidelines - the Attorney-General has some guidelines that are very, very old on declared collecting society guidelines, but now that is now - now  
5 that the statutory licence is now under the Minister for Communications it's probably timely to review that.

We probably think a better way of looking - that we do think there needs to be a bit more regulation and transparency and ability to direct  
10 collecting societies to do things. The Act doesn't give the minister any power to direct collecting societies to act in any particular way in relation to licensing or distribution of royalties, or in fact the general obligations to members or licensees. So we probably think a good thing to look at as a way forward might be the UK as a model, they recently enacted  
15 regulations. I think it's called the UK Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014, and that requires collecting societies to enact a code of practice that includes the following obligations:  
"Ensure that its dealings with licensees or potential licensees are transparent; consult and negotiate fairly, reasonably and proportionally  
20 related to terms of conditions of a new or significantly amended licensing scheme; and provide to licensees and to any potential licensees who have requested it information about its licensing schemes, their terms and conditions and how it collects royalties." So we think that's probably a model to look at.

25  
**MS CHESTER:** Delia, that sounds - I've only had a quick look through the EU directive but it sounds like it's drawn from that, which would - - -

30  
**MS BROWNE:** Yes, I think it's in compliance with - - -

**MS FLAHVIN:** It needs to comply with the EU directives.

**MS CHESTER:** So what would be helpful, though, is we'll obviously look at that as well, but if there's anything else that's in the EU directive  
35 that you think would also be sort of best practice in the Australian context, that would be helpful to know.

**MS BROWNE:** Okay, well I'll have a look. I will look at a bit more detail in the EU but the UK regulations are in compliance with the EU  
40 directives, so - - -

**MS CHESTER:** And that would address the issues that you have?



**MS BROWNE:** Yes, I think that, yes. It's simple, clean, and it's - you know, the UK is a common law jurisdiction like Australia so I kind of naturally look there.

5 **MS FLAHVIN:** One point to the commentary that we saw on those guidelines was that they're based around the ideal that collecting societies really are quasi-public bodies and ought to operate in that way, the rules ought to be set up in that way so that they have obligations to the licensees as well as licensors.

10 **MS BROWNE:** Yes, particularly if, you know, the collecting society is administering a statutory licence scheme, and particularly if that statutory licence scheme - significant moneys are being paid by public money and taxpayer money under that licence scheme, so that would be for the  
15 government copying licence scheme and the educational copying licence scheme.

**MR COPPEL:** In that context do you see any roles for the ACCC to monitor the activities and outcomes of collecting societies, statutory  
20 collecting societies?

**MS BROWNE:** Look, I think that that's a question that's been raised from time to time and it's not something that, you know, we've discussed but I can't see why not.

25 **MS CHESTER:** Does this interface at all with the section 51(3) exemption of the CCA?

**MS BROWNE:** No.

30 **MS CHESTER:** It doesn't at all, which is about how licensing - it does go to licensing of copyright material.

**MS FLAHVIN:** I think that's more the point as to whether or not  
35 collecting societies ought to have an exemption from, you know, just general competition principles. This is, I suppose, the point that we're looking at is more a - I suppose the competition concept comes into it in some respects. It's more about transparency and - - -

40 **MS CHESTER:** Yes, no, I'm seeing it as - is it at all tangentially linked given that we still want to deal with the governance issues around the agencies themselves. And you mentioned before whether or not the tribunal had the powers to make certain decisions, the example I think that  
45 you mentioned was whether or not anything could be sort of zero rated.

**MS FLAHVIN:** Zero rated.

**MS CHESTER:** And from your experience nothing is zero rated?

5 **MS FLAHVIN:** No.

**MS CHESTER:** So is there an issue then around the powers of the Australian Copyright Tribunal or is it how decisions are being made, I'm just trying to get an understanding of what are the impediments and  
10 obstacles for using the tribunal in that way to help with - - -

**MS FLAHVIN:** We think it's a power issue. Our analysis of the relevant provision in the Copyright Act, and we've looked at it quite closely, is that the tribunal would have no jurisdiction to determine a zero rate. As Delia  
15 said, that's the view that was expressed by David Catterns, the senior counsel for the Copyright Agency in some recent tribunal proceedings. The Copyright Agency has, you know, historically applied, if you like, a zero rate to the disability statutory licence, and provisions there are the same, but the view that we reached was that the tribunal would have no  
20 power to do that, it's something that the Copyright Agency decided to do.

But it possibly has no power to do that, if any rights holder complained about that possibly, you know, the position would be that they had no power to do it. Then I suppose the practical overlay in all of that is  
25 that the statutory - the disability statutory licence will soon be replaced with an exception in the - you know, the legislation, the draft legislation that was released for discussion and the government has said that it will put forward in the next sitting of parliament, the disability statutory licence will be replaced with a free exception. That just makes a whole lot  
30 more sense with things, you know, with copying that all parties agree ought not to be remunerable, there doesn't seem to be much for obtaining a statutory licence overlaying with administrative obligations, et cetera. It makes more sense to treat that kind of copying as being subject to an  
35 exception.

**MS BROWNE:** Even the other thing is it's like where we can we should be focusing the data collection on stuff that is actually going to be remunerable rather than non-remunerable because there is a burden on the people filling out the survey then having to record stuff that actually isn't  
40 going to go anywhere towards remuneration.

**MS CHESTER:** Well, that was my next question, so the government does require an assessment of what's the regulatory impost of policy changes so it would be good to get your feedback on, given the current  
45 regulatory cost burden to schools and other educational providers under

the fair dealing provisions in terms of how it interacts with the statutory licensing, how might that change that regulatory burden if we move to an arrangement of fair use?

5     **MS BROWNE:** Yes, well, I just have a minor correction. Fair dealing is an area that really has little impact on the educational copying by schools and other education institutes. Look, and I just have to also give a bit of a positive talk about CAL. We actually try very hard with CAL and  
10     Screenrights to try and minimise the burden in data collection and we actually do kind of work quite close together to make it as accurate and reasonable as possible on the burden. So I just want to make that very clear on the public record. But with a fair use regime we will be able to probably furnish that a lot better and also stop actually recording stuff that  
15     clearly would be falling into that kind of green dot rather than the big red circle.

So I think that there is a huge ability to sort of try and improve the data collection methods. I'm just saying we are trying to do that all the time, both sides, all sides, Screenrights as well the Copyright Agency, you  
20     know, so that is something we are always trying to do but I think that there's a much better scope for us to actually be very innovative. Again making sure we're getting data that's going to help with the distribution and also the ongoing setting of fair use either by negotiation or by the tribunal if we fail. But hopefully, fingers crossed, so far we've been pretty  
25     good at negotiating with each other.

**MS FLAHVIN:** I was going to say, it's not just the burden on schools, on teachers having to collect the data, it's the burden on the Copyright Agency having to process the data when everybody accepts that these  
30     copying instances ought to be zero rated, just it seems a little inefficient to us to do that through the process of a statutory licence.

**MR COPPEL:** Okay, I'm going to stop here as we have another eight participants. So I thank you both, Delia and Anne, for participating today  
35     and again for the contributions throughout the inquiry process.

**MS BROWNE:** Thanks for the opportunity.

40     **MS FLAHVIN:** Thank you.

**MR COPPEL:** Our next participant is David Barnett from Pearson Australia. So David, when you're comfortable for the record if you could give your name and who you represent, and a brief opening statement?  
45     Thank you.

**MR BARNETT:** Commissioners, thank you for your time today. My name is David Barnett, I'm the managing director of Pearson Australia. Let me say that we welcome the discussion on ways to simplify the way that industry stakeholders work together to deliver better value to consumers. Pearson is the world's leading learning company. In Australia we're the market leader in learning resources, Access, and education services. Pearson has invested in Australia many, many millions of dollars over the years in developing Australian products and services and very much would like that to continue.

We do that because as a commercial organisation we believe we can achieve a good return but Pearson also has a bigger mission which is to help people make progress in their lives through learning. Every single day we work with schools and universities, teachers, lecturers, to help support them with their teaching and learning resources. Having said that, we appreciate that there won't be too many tears shed for a multinational corporation losing out through the changes that are proposed through the Productivity Commission's draft report.

But what we can't accept is the impact that we foresee on the Australian learner. Let's be really clear, the Australian learner will suffer because if the fair use recommendations are accepted then our ability to develop content, products and services in the future will be seriously compromised. I understand the Commission has rejected parallels to the Canadian experience but I believe that's probably semantics. Essentially what we think has happened in Canada is through the overhaul of the copyright regime the education authorities, having said they would continue to pay for licences, then back flipped, with quite serious consequences.

Let's also be clear what's proposed in the draft report in terms of the adoption of fair use would fundamentally undermine our business model and compromise our ongoing operations. This is because there is a serious misunderstanding included in the report. On page 19 of the draft report it states, "Most new works consumed in Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia's fair use exceptions." This is wrong. In schools publishing the vast majority of content is created from the ground up to align with the Australian curriculum and local environment. Australian education publishing is highly competitive which sees the creation of high quality print and digital learning resources. Australian educators are in fact spoilt for choice. And for the vast majority of instructors and institutions access to high quality learning resources is critical to supporting teaching and learning, including implementation of new curricula. This was I think

very clearly supported by the AEU in their submission to the ALRC review.

5 We think the existing copyright regime has struck the right balance between access for consumers and a fair return for creators. It means that a teacher who wants to copy a chapter of one of our books understands what he or she can do. The evidence of the number of pages copied would support this. I think we're looking at around one and a half billion pages per sampling period, or 300 pages per student per year. All at a very  
10 reasonable rate of \$17 per student per year, which is a tiny percentage of the total education spent.

This fair regime has helped create an environment conducive to ongoing investment and innovation. And Delia talked about  
15 collaboration, we see lots of examples of good collaboration and it's actually taken place within the existing regime. So, for example, Learning Fields, which Delia also mentioned, has come out of the existing copyright regime, it's a collaboration, it's an industry collaboration which has taken to schools and students a very different offering of access to  
20 content at chapter level through a learning portal on a subscription basis, it's a world first. Learning Fields was created because the market, the teachers were telling us you need to be more innovative publishers, which we accepted, and the evidence also that we looked at about the level of copying which was taking place. All investments of course are inherently  
25 risky but companies need stability and certainty to support investment decisions.

So let me just be clear on the specific recommendations and just some final comments. Firstly about PIRs, which I haven't mentioned yet, our  
30 view on them is clear in our submission, we don't believe that that would be a positive development for higher education learners who are the consumers of imported products in general in education. Were the recommendations in the report around fair use to be accepted, and I'm talking specifically about the example of a teacher copying a chapter of a  
35 book for their entire class over and over again. We think this would significantly undermine Pearson's confidence in the market. As a global commercial organisation Pearson's is constantly looking for - are looking to make decisions about where it will allocate its capital and ongoing investments. And those decisions are constantly reviewed.

40 As the AEU submission, as I referred to earlier, to the ALRC suggests, this would have serious impacts on the development of appropriate learning materials for learners. So ultimately if there's no product to copy any more then there's no product to copy any more,  
45 there's no product for students to learn from if there's no ongoing

confidence and platform to support investment. Ultimately learners are the casualties in this exercise.

5 **MR COPPEL:** Thank you. Maybe I can begin by asking a similar question that I asked Delia and - the previous participant, with respect to the introduction of fair use and how it interplays with the education statutory licence. Do you have a view as to what would be the leakage, that's the term, leakage, from such a change in the Australian copyright law and on what basis do you form that view?

10 **MR BARNETT:** Are you talking about the remunerable and the non-remunerable leakage?

15 **MR COPPEL:** Yes.

**MR BARNETT:** Can I actually get a glass of water? I'm just about to expire. Look, I don't think it's clear actually what the - I appreciate Delia's comments about the specific number she mentioned that are around the orphan works and freely available Internet material. The first think I would say is I think we understand the concern around that material being caught up in the Copyright Agency sampling activity, we understand that, but we think the mechanism exists through the Copyright Tribunal to deal with that and have a discussion about what could be zero rated and what should be included for copying.

25 What I want to make really clear about our position on this is we're talking - Pearson is talking about the materials it spends significant moneys investing and developing to help learning. That is the thing that we're most focused on, both because that's our core business but also because that platform and having security of that platform then allows us to develop new innovative learning products. So it creates an environment to support innovation. I mentioned Learning Fields, that's a good example in the past.

35 From Pearson's experience specifically we have created a product called Lightbook, which is a, for want of a better phrase, a digital learning environment. It's not a physical book, it's a place where students learn. It contains interactive material. It contains assessment objects that help students learn in quite a personalised way. Like most new products that you build you don't get a payoff immediately, you get a payoff maybe in years two or three, or whatever it might be. For Pearson to have the confidence to invest ahead of a good return in a product that's brand new that's quite risky, the business here needs to have an ongoing platform to provide it with that financial security.

45

5 I think that, back to the fair use proposal in the PC's draft report, the idea that a teacher can make a copy of a chapter and distribute that to 30 students and for that not to be remunerated provides - that's our core business, teachers using our content in the classroom either in the classroom setting or to give the students to take home to use in their own time, that's the business that we are in every single day. That's what is potentially threatened by the extension of fair use.

10 **MR COPPEL:** So is the crux of the issue uncertainty as to the impact of the change of shifting to fair use rather than accepting the idea that if fair use were adopted there would still be remuneration for educational materials under the education statutory licence the leakage would be low?

15 **MR BARNETT:** Well, at the moment if I - I'm just referring to your fact sheet here and there's a number of example scenarios, short scenarios at the bottom of that page, those are scenarios that refer to what goes on every single day in the classroom that's core to our business. If that was no longer remunerated because it was considered fair use and therefore exempted from remuneration that would create a scenario, we would have to say, is clear. What is the environment that we are publishing into, if a teacher can take our print product and run off 30 copies and then next week 30 more copies, and then in three weeks' time 30 more copies, then how much of the book remains that hasn't been copied?

25 But it doesn't have to be multiple times, a single instance, which at the moment is remunerated under the statutory licence, that creates a significant issue for us and it would therefore create both an immediate business risk of our existing operations but an environment in the future where we would have to say, well, is it really worth investing these millions of dollars here or should we take this money and invest it in another market in another part of the world.

30 **MR COPPEL:** But Pearson is represented in over 70 countries, are there other countries with fair use where you can draw on that experience, the US, Philippines, Korea, Israel, which have a fair use exception, is the scenario that you're painting here from the adoption on fair use on that has materialised in these jurisdictions?

40 **MR BARNETT:** I think those markets face challenges all the time. Canada is an example of a market that has faced real recent challenges. I can't speak for those markets, I can speak for my market, and that reality is a very real one for us in the future.

45 **MR COPPEL:** I think Canada is one of those examples that's often being put forward. It's not a fair use country, it's a fair dealing exception.

But as I understand, there were a number of changes that took place there that were unrelated to what we're proposing in our draft report. But you do still operate - you operate in Canada?

5     **MR BARNETT:** We do operate in Canada.

**MR COPPEL:** So maybe you can - - -

10     **MR BARNETT:** But the environment is far less attractive and the investment is being considered far more closely than it perhaps was in the past.

15     **MS CHESTER:** But you are unable to copy - a comment on any other jurisdiction that Pearson operates, in just Canada and Australia?

**MR BARNETT:** Not specifically around the issue of fair use.

20     **MR COPPEL:** What about parallel imports, you've noted that you don't agree with the proposed recommendation that the submission says that it could lead to low cost, low quality import editions, Australia has an Australian curriculum so that the books that are used in schools are specifically designed to cater for that Australian curriculum, doesn't that provide some form of natural territorial boundary that would limit their scope for parallel imports in the school sector?

25     **MR BARNETT:** It does, and I'm not talking about the school sector, there's no issue with the PIRs for schools because, as I said earlier, all the content we create here is built from the ground up, 95 per cent of it is created from the ground up. My comments refer to the higher education market where probably about half or a bit less than half of the industry's revenue comes from US originated or UK originated product that's imported and sold essentially in the same form. Students can currently obtain copies for their own personal use from offshore providers such as Amazon and Book Depository without any issue.

35     They have fast service, they get them here, so there is already a way to deal with the price concerns that have been around this issue in the past. Our concern is this would open the opportunity for resellers to then import from all over the world any edition that they want to and resell it here, including pirated editions. So there's a very active pirate industry that creates very high quality facsimiles of products and distributes them around the world. That would be, I guarantee you, that would become quite a flourishing market here with zero return to authors and publishers.



5 The other point that's worth making about the higher education sector  
is that there's a hidden economy that takes place in higher ed around the  
support of lecturers, is that publishers create high quality materials which  
they provide to lecturers to support them in their teaching which are not  
10 charged for, supported by the sale of the book. So that would be disrupted  
by the import of low quality or pirated editions from other parts of the  
world. So I think it's really an unnecessary - for the terms of the - I can  
only speak for the education market, I don't think there's really any  
benefit to be gained by changing the PIRs for educational - the principle  
15 concern around price, and everyone understands that argument, is really  
dealt with by students having all sorts of options for accessing from other  
parts of the world.

15 **MR COPPEL:** But on piracy or low quality imports of education text  
books, why is PIR the sort of instrument of choice to deal with such an  
issue, we have laws that would enable you to pirated copies?

20 **MR BARNETT:** Well, it's very hard to see it. It's very hard for us to  
see it. So if a large university bookstore chain imports a thousand copies  
of a pirated edition from some other part of the world and resells through  
their channel we don't really - we don't see that. We might see a book  
sitting in a bookstore but we don't have visibility of that activity and it's  
very - as I said, it's very hard to actually find out and determine whether  
25 something is a genuine product that's been imported from a genuine  
provider in Europe or from a pirate sitting somewhere else in the world.

**MS CHESTER:** David, what's the current sort of price differential on  
tertiary text books between Australia and - - -

30 **MR BARNETT:** It really varies. It varies obviously depending on the  
currency, so the currency at the moment is low so the - - -

**MS CHESTER:** So setting currency issues aside, do you have data that  
you would be able to share with the Commission?

35 **MR BARNETT:** I haven't got it with me but last time I checked we were  
reasonably competitive with prices particularly in North America.

40 **MS CHESTER:** So then if we set aside the issue of unauthorised copies  
that you referred to, what then is the risk of a flood of offshore texts if you  
guys are price competitive today and you also have the additional  
advantage of no transportation costs internationally?

45 **MR BARNETT:** I think, as I said before, it's the issue around creating  
uncertainty in the market, that's our concern. The other thing I should say

- about higher education is that we invest locally in developing higher education products. So some product can be imported and resold without any changes but we actually do invest in building, for subjects that need localisation we invest in building those products out and driving innovation. We do rely on the certainty from that investment from the products that we import, that we are licensed, because they're Pearson products, to import and resell. We rely on that to create an overall financial position that supports that investment.
- 10 **MS CHESTER:** So your submission did mention that your profits on imported content subsidised local content, can you just explain how that business model works?
- 15 **MR BARNETT:** It's a scale, we're in the scale business, so as I said we need to create a business that has enough scale for us to support ongoing investment. If you are going to create, if you can take the risk in building a big new biology text book or a big new physics text book, you can't do that from a zero base, or it's much harder to do it from a zero base.
- 20 **MS CHESTER:** So I just kind of wanted to understand the cross subsidy issue and how that works, what is the level of cross subsidy between profits on your imported content versus - - -
- 25 **MR BARNETT:** I haven't got that number, Karen, I haven't got that number in my head.
- MS CHESTER:** Are you able to give us that number, because it's just - - -
- 30 **MR BARNETT:** I'm not sure we actually calculate the - let me take that away as a question on notice.
- 35 **MS CHESTER:** Yes, because it's just difficult, you know, statements are made in submissions that become part of our evidence base and we need to test the efficacy of them. I'm just trying to understand if this is a great advantage to local content through this cross subsidy what's the extent of that cross subsidy, so if you're able to back that up with some evidence that would be helpful.
- 40 **MR BARNETT:** Well, let me take that away as a question on notice.
- MS CHESTER:** You mentioned before I think the split was about 90/10 on your revenue for local versus imported content for school and then what was it for tertiary?
- 45

**MR BARNETT:** It's 50/50, roughly.

**MS CHESTER:** How does that then flow through to the royalties for local versus offshore across those two different sectors?

5

**MR BARNETT:** Really, royalties will vary by contract, by author contract, so there's no hard and fast or uniform percentages to apply, it really depends on the individual author contracts.

10 **MS CHESTER:** Okay. So when Pearson is looking at a business case to go with the local content and then making that assessment based on some sort of required rate of return to Pearson, are there different rates of return that are required for local content in Australia versus the imported  
15 offshore content given that cross subsidy that you discussed in your submission?

**MR BARNETT:** Sorry, can you just repeat the question?

20 **MS CHESTER:** So I'm just trying to work out if there's a cross subsidy happening that would suggest that there might be a different required rate of return on publication sales from local content versus publication sales here in Australia from offshore content?

25 **MR BARNETT:** Obviously anything that we're building ourselves here generally speaking will sell mostly in Australia. We have to carry the business case based on the performance of that product within the Australian geography.

30 **MS CHESTER:** So does that mean that you have the same required rate of return in a business sense on imported content being published and sold in Australia and local - - -

35 **MR BARNETT:** That business case would be carried by the originating geography for a wholly, you know, US or UK developed product.

**MR COPPEL:** I'm going to be brutal on timing. We've just passed the allocated time so thank you, very much, David.

40 **MR BARNETT:** Thank you.

**MS CHESTER:** And if you could come back as soon as possible with those numbers that would be really helpful, thank you.

45 **MR BARNETT:** Thank you.

**MR COPPEL:** Our next participant is Kane Waterworth from Kawat Enterprises. So welcome, when you're comfortable if you give for the purpose of the transcript your name and who you represent and then a brief opening statement.

5

**MR WATERWORTH:** I'm Kane Waterworth, I'm from Kawat Enterprises, I'm working mostly with trying to - digital technology trying to solve Australia's labour productivity problem. I've actually got to be a bit careful because I mostly wanted to talk about digital disruption but I understand that's outside the scope of what we're here to do today.

10

**MR COPPEL:** Yes.

**MR WATERWORTH:** So what I want to talk about is that the problem is trying - for a lot of businesses, trying to get information from the government and I was wanting to see if maybe the intellectual property arrangements can be done to include some provisions similar to what the GIPA Act is in New South Wales. The GIPA Act allows a business to get information from the government and the onus is on the government to prove that it is overwhelmingly in the public interest towards non-disclosure because the problem is if it's just not an overwhelming requirement then the government is unlikely to be in favour of the person seeking information or business seeking information.

15

20

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Now the problem is that - so with the GIPA Act you've got a number of ways in which if the decision is towards non-disclosure that decision can be challenged. So I think there's about three different ways, there's to the Commission, it's to the - there's to the Privacy Commission, sorry, and there's a - you can appeal, actually directly to a lot of government departments, so, yes, there's a few ways to do that. Now the problem is also now once that information if it's successful then another problem is that the government itself is keeping the information accessible and in a compatible format to hand the information over. Because a lot of times they may turn around and say well that's going to be 58 hours or a hundred hours to retrieve that information from multiple data bases which is effectively the same as, you know, you're not going to get the information anyway. So that's a big problem as well.

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35

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There may be a self-interest there where governments don't want information released. They wish to make their department's image look good by not allowing information that could potentially make them look bad. That's the main part of what I wanted to talk about, so basically provisions to ensure that information is released and the government really has to prove that they can't release it for it not to be released. There's one more thing, and that is a government application of copyright.

45

Government, I know in the state government at that level a lot of public sector leaders or whatever apply copyright willy-nilly, and even when the government doesn't wish - has no intention of developing a product or service, and that effectively stops innovation from occurring because now  
5 no one can't use that because the copyright has been applied.

**MR COPPEL:** Yes.

**MR WATERWORTH:** So they are the two - that's the two main things  
10 I wanted to talk about.

**MR COPPEL:** Great, thank you, Kane.

**MR WATERWORTH:** Thank you.  
15

**MR COPPEL:** I think many of the points that you have made relate to the access to information.

**MR WATERWORTH:** Yes.  
20

**MR COPPEL:** That's provided by the government, which may be for reasons other than copyright.

**MR WATERWORTH:** Yes.  
25

**MR COPPEL:** I think you were referring to things like freedom of information provisions?

**MR WATERWORTH:** Yes.  
30

**MR COPPEL:** I will point, however, that in the draft report we do have a recommendation that relates to Australian state and territory government making available in an open access way the material that comes from publicly funded research. So we think that as a default that information  
35 should be freely accessible and there should be limited exceptions. So I think that is in a specific context but it is from what I can understand consistent - - -

**MR WATERWORTH:** But if you included that like as a federal - under federal law, wouldn't you be able to then say be able to sort of systemise that release of information across the state government, or - - -  
40

**MR COPPEL:** We're recommending that Australian state - the Australian Government, the Commonwealth Government, state and  
45 territory governments, implement this recommendation.

**MR WATERWORTH:** So are they going to be all under a similar standard, or - - -

5 **MR COPPEL:** How the actual, if the recommendation is adopted, how they actually implement the recommendation isn't specified, they don't get into that detail.

10 **MR WATERWORTH:** Because it's got to be standardised, yes, it's got to be standardised for it to really work because otherwise everyone has got their own system. Yes, so that provision where the government really have to prove that its nondisclosure is in the public interest, that's really important, like, an overwhelming provision because that's it, you are always going to have - it's making work for someone so someone is going to say no, basically. So, yes, so that's about it, that's all, really. Most of  
15 the stuff I wanted to talk about was about, yes, the digital disruption and the scope for productivity policies. I guess that's outside the scope of what we're talking about today.

20 **MR COPPEL:** Yes.

**MR WATERWORTH:** And the measure of productivity in new technologies which was cited by the report as being problematic. That's about it. Thanks.  
25

**MR COPPEL:** Okay, thank you very much, Kane.

**MS CHESTER:** Thanks, Kane.

30 **MR COPPEL:** So we're going to take a brief pause for afternoon tea and stretch our legs and we'll reconvene in 10 minutes' time, so 2.40. Thank you.

35 **ADJOURNED** [2.31 pm]

**RESUMED** [2.41 pm]

40 **MR COPPEL:** Welcome back. We'll reconvene with our next participant who is Rebecca Harris from Universities Australia.

45 **MS FLAHVIN:** Also Anne Flahvin from Baker and McKenzie, if that's all right?

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

5

**MS HARRIS:** Sure. Okay. So my name's Rebecca Harris. I'm the Director of Copyright for Universities Australia.

10 **MS FLAHVIN:** I'm Anne Flahvin from Baker and McKenzie, wearing my other hat, here with Rebecca today.

15 **MS HARRIS:** Yes. So thank you for the opportunity to provide comment on the Commission's draft report. Universities Australia strongly welcomes the draft recommendation to enact a fair use exception. This reform would put Australian universities on a level playing field with universities in the USA, Israel, South Korea and Singapore. In a highly competitive international education market this is significant. We're a little surprised there's been so much of a scare campaign around fair use. There's been a great deal of misinformation about the likely impact of fair use on educational publishers and authors, from our point of view. It would be good if I could set the record straight today.

25 Firstly, claims by the copyright agency and others that fair use would result in universities refusing to enter into collective licences, are without foundation. It certainly is the case that universities have an increasing number of alternatives to the part 5B statutory licence but that sort of stuff is already happening and it really has nothing to do with fair use or the introduction of the fair use exception. It's due to the increasing range of high quality, open education resources and the increasing spent on direct licences with publishers. For example, the EU announced last month that it is aiming to ensure that all publicly funded scientific papers will be freely available by 2020. This is part of a global trend towards open access for academic publications that will continue to make the statutory licence increasingly less relevant to universities. But this, in itself, has nothing to do with fair use.

40 The amount that universities spend on library resources has been increased. The most recent figure, from 2014, was \$300 million per year that universities spend on education resources through publishers and the like. These licence fees flow directly from universities to the rights holders and will continue to do so regardless of whether or not fair use is enacted. It's also the case that transactional licensing is becoming more efficient and therefore more attractive to universities for many uses.

We do not resile from the fact that some of what is currently paid for under the statutory licences would most likely come within a fair use exception if enacted. To put this in context though, universities currently pay, under the statutory licence, for freely available internet content including content uploaded onto blogs and freely available wikis that no one ever expected to be paid for, and also orphan works. The money paid by universities for this content is eventually paid to copyright agency Viscopy members who have no connection to the works that were copied, that's because copyright agency Viscopy has nobody else to distribute that money to.

Secondly, the copyright agency is wrong when it says that we don't need fair use because the statutory licence covers all uses that universities want to engage in. It doesn't. Some examples of this are, for example, massive online open courses or MOOCs. Neither of the statutory licences permit universities to use small amounts of content in MOOCs, that's because the statutory licences cannot be relied on for content that is made publicly accessible regardless of whether it has been done for educational purposes. None of the existing fair dealing exceptions apply either. Our universities are therefore not on a level playing field in a highly competitive higher education market.

Another example is material that's contained in theses. The statutory licence doesn't apply when a university makes student theses publicly accessible in a digital repository. Often students will include small amounts of third party content in reliance on their own fair dealing rights. But the university is required to remove this content before uploading it to a digital repository or risk being, maybe, sued for infringement unless the student has been able to obtain a permission from the rights holder. We do have a couple of examples of that as well.

Another example is data and text mining. New technologies such as text mining and data mining are transforming scientific research and particularly also in the digital humanities by enabling automated searches of vast quantities of text and data to look for patterns, trends, and other useful information. But since they involved reproduction of entire works, the statutory licence does not apply. This is limiting the ways in which Australian Universities and research institutions can make full use of these cutting edge technologies.

These limitations on academic research and engagement are acceptable in a knowledge economy. They place Australian Universities at a very real disadvantage to their counterparts in jurisdictions such as the USA, Israel and Singapore who have the benefit of a broad, flexible, fair use exception.



Finally, there's been some talk about Canada as an example, and some opponents of fair use have held up Canada as an example of what might happen to the educational publishing market if fair use is enacted.  
5 One of the things we could point to is that why haven't these groups pointed to the US, the home of fair use, where the educational publishing market is thriving? The same goes for Singapore and Israel, fair use jurisdictions with thriving educational publishing markets.

10 As we set out in our submission, there are a whole range of factors that have impacted on the Canadian educational publishing market, not the least of which is greater availability of high quality open education resources. It's also interesting to note that the Canadian reforms do not appear to have prompted access copyright, the Canadian equivalent of  
15 copyright agency, to finally agree to offer transactional licensing to universities after many years of refusing to do so.

**MS FLAHVIN:** They do appear to have prompted.

20 **MS HARRIS:** They do appear to have prompted. Sorry, my – I'll read that again – do appear to have prompted the use of transactional licensing to universities after many years of refusing to do so. So they are now enacting transactional licensing to universities. Thank you. So happy to answer any questions that you have.

25 **MR COPPEL:** Okay. Thank you, Rebecca. You've given a number or examples of, sort of, inflexibility with the copyright laws in the education, higher education sector and you mentioned MOOCs as being one example of that. It's an example that's been brought up in other hearings so far.  
30 Can you tell us then what needs to be done to get a MOOC up and running under the current copyright legislation?

**MS HARRIS:** I'll probably ask Anne to help because she interfaces a lot with the people who are directly doing this.

35 **MS FLAHVIN:** Sure, sure. It's not so much that without fair use you can't operate a MOOC. The point is that in fair use jurisdictions, people putting MOOC courses together have that flexibility to use little bits of content, excerpts from this or that, or tables and charts in a MOOC. In  
40 Australia, the statutory licence doesn't apply to that so you can't because the material is made publicly accessible and the fair dealing for research and study exception doesn't apply.

45 I think in some of the university - individual university submissions to the Commission's first Issues Paper, some universities gave examples and

perhaps it was in the CAUL submission, Council of University Librarians, it gave some examples of the enormous licence fees that universities had been quoted when they sought permission to use, you know, a table, a chart.

5

In many cases, that was content that had been created by the academic running the MOOC course. But because, you know, their material had appeared in an academic journal, had to go to the journal publisher to seek permission to use the content and in some cases they were quoted, I think, in one case it was something like \$40,000 to use this one. So they had to take that content out of the course. So that's the point. It's not so much that we can't run MOOCs, but in a highly competitive, you know, international education market, Australia is placed in, you know, a disadvantageous position not being able to use kinds of content that other, you know, MOOC operators and other jurisdictions can use.

15

**MR COPPEL:** Is it the cost of getting the material from a licence or is it the cost of actually going through a process of ensuring that every aspect - -

20

**MS FLAHVIN:** I suppose it's both of those things. So in some cases the permission is just refused in circumstances where in a fair use jurisdiction it might be – and we're talking about very small amounts of content. So, for example, in the States, guidance given to people who are creating MOOC courses is generally along the lines of when you're looking – when you're doing your fair use analysis putting a MOOC course together you need to be much more conservative than you would need to be if you were putting together a course that is just going to be available to, you know, enrolled students and won't be publicly available. Because of the public accessibility of MOOC content, you take a much more conservative approach to determining, you know, is it fair to use. So it's small bits of content, you know, a graph, an illustration here and there.

25

30

So the problems that we face in Australia are, you know, permission might not be granted, or it might be granted and you're told, you know, \$40,000 and you think, well no thanks. As you say, the administrative burden of having to go and lock down all of those permissions, is a burden in itself.

35

**MR COPPEL:** The other example you gave of the lack of flexibility standing in the way of universities collaborating with industry, can you give an example of where the copyright law has prevented such collaboration with industry?

40

**MS HARRIS:** In terms of research collaborations with industry?

45

**MR COPPEL:** For example.

5 **MS HARRIS:** I'd probably have to go back to a specific example at a university. I haven't got one to call to mind, but I can take that on notice and give you several examples.

**MR COPPEL:** Okay.

10 **MS FLAHVIN:** We know, for example, because the statutory licence doesn't apply if universities are engaging with, you know, members of the public, industry, you know, research bodies, et cetera, you just couldn't do it. So, you know, that is one way in which fair use becomes very  
15 important for the higher education sector at a time when the, you know, government policy is driving them to engage more and more broadly with industry and, you know, the wider world. The statutory licence doesn't apply to that. The fair dealing and, you know, the existing purpose based fair dealing exceptions certainly don't apply to that.

20 **MS CHESTER:** Just so we understand it, so stat licensing, because it's publicly available, are out?

**MS FLAHVIN:** Yes.

25 **MS CHESTER:** Fair dealing with the MOOCs because it's not within the four sandstone walls, it goes outside?

**MS FLAHVIN:** It's not so much that, it's just that fair dealing – what  
30 our Courts have said about fair dealing in Australia is that it can only be relied on by the individual person doing the research. So, for example, copyright agency expressed the view that if two or three academics are engaging in, you know, collaborative research that they couldn't rely on the fair dealing for research and study exception to share bits and pieces of content among themselves, like (indistinct) you do your research you can  
35 rely on exception.

40 That's the point that we've made with theses that, you know, when you put the thesis together you can rely on the exception. In the old pre-digital world, you'd write your thesis, you know, it'd be up there for anybody to have a look at and that would be just fine. In a digital environment, when the university puts it on a digital repository, they're copying that again and they can't rely on the fair dealing exception that the student had. So they're actually cutting content out of theses.

- 5 **MS CHESTER:** So when people have suggested to us this morning that we've got it wrong, that there's nothing in fair – that fair dealing is technologically neutral, that's the language of fair dealing. It's how it's then used with technology and uses changes that makes it non-adaptive?
- 10 **MS FLAHVIN:** It's kind of two points. I mean, it's technology neutral in the sense that, you know, you can – I can use fair dealing if I'm using digital technology. I think the real limitation with fair dealing versus fair use is fair dealing is purpose based and the Courts say you have to look at the purpose of the person doing – and the reason that's such a problem for schools and universities is that our Courts have said they don't have the relevant purpose. They're doing the copying for their educational purposes, not for the student's purpose of research or study. So that's the main difference there.
- 15 **MR COPPEL:** So given these examples relating to MOOCs, collaboration with industry, do you have any idea of whether they are acting overall to prevent that sort of activity or that sort of innovation in the university sector, or are they rare examples?
- 20 **MS HARRIS:** They probably would be going towards that because every university has got a system by which they have copyright offices, and copyright people who are advising people on their regular day to day work, what they use, what they don't use in terms of copyright material. If it's flagged that something isn't allowed under the statutory licence, it's quite likely that there will be a, kind of, no answer, you can't do that. So we probably have not a great knowledge of exactly what is being prevented, as it were, because if people are coming up against those barriers and saying, "Well, we better look at a different way of doing it", or "We'd better not do it that way", then that will intrinsically stymie the, sort of, innovative uses or the research collaborations that they'd be entering into.
- 25 **MS CHESTER:** Rebecca, you mentioned before, similar to our previous participant, that under the statutory licensing the universities are paying for content that's either freely available or subject to orphan works. Do you have a quantum figure on that?
- 30 **MS HARRIS:** We don't have access to that data either. So I can only rely on estimates that have previously been given. So we don't actually have access to the data on what that might be so, yes.
- 35 **MS FLAHVIN:** UA hasn't engaged in that same analysis that CAG engaged in when they went through the data and tried to put that number together. Universities haven't engaged in that. But look, I mean, a big
- 40
- 45

part of the problem is that we – schools and universities, we just don't have full access to that data that would show us, you know, what – who – which rights holders they haven't been able to identify, you know, what – we don't have that data.

5

**MS CHESTER:** When you did get previous data on that, was it, sort of, a comprehensive figure and can you share the order of magnitude in terms of - - -

10

**MS HARRIS:** Well, we don't have any data on it, so - - -

**MS CHESTER:** You were never given it even though - - -

**MS HARRIS:** No.

15

**MS CHESTER:** Okay, all right.

**MS HARRIS:** So, for instance, the estimate that Delia might've given would be the only type of access to information we'd have. So we don't have that fine grain detail because we don't have the data to analyse.

20

**MS FLAHVIN:** It's probably the case that schools are copying freely available internet material more than universities would be.

25

**MS HARRIS:** Yes.

**MS FLAHVIN:** Yes. There's little doubt on that.

**MS HARRIS:** Certainly we have more accurate figures on things like the amount of money that the sector is paying through digital subscriptions and so on to access things like journal articles and so on and so forth. The Council of University – Australian University Librarians keeps those figures and the most recent estimate from 2014 is around – just a shade under 300 million per year.

35

**MS FLAHVIN:** 300 million, yes, yes. Fair use won't change any of that.

**MS HARRIS:** No, that will still be paid for. The university sector will always need to rely on subscriptions for their research material that's used, you know, both under-graduate, post-graduate and research uses. So that figure will – fair use won't affect that figure whatsoever.

40

**MR COPPEL:** There is, though, the onus on the lecturer or the academic to make a judgment as to whether something is fair use or not fair use and

they may not be legally trained so there's a role for tools to support that decision making process.

**MS HARRIS:** Yes.

5

**MR COPPEL:** A number of jurisdictions that have fair use have these tools. Do you have any view as to whether they are effective in reducing that uncertainty?

10 **MS HARRIS:** Yes.

**MS FLAHVIN:** Can I jump in there?

**MS HARRIS:** Yes, go.

15

**MS FLAHVIN:** I mean, one of the real differences, I think, between Australia and some other jurisdictions, and perhaps, you know, Canada might be a jurisdiction to compare us with, in Australian universities that process of making content available to students is generally very  
20 centralised. We have those learning management systems that people think of academics putting course content up and students accessing them. Actually, what's generally happening is the student is accessing a link to content that sits on an E reserve and that - you know, the decision to put that content up and to do the copyright clearance, that's done at a very  
25 centralised level in most - I think, in all universities.

**MS HARRIS:** Yes.

**MS FLAHVIN:** So this concern about academics not knowing how to  
30 construe fair use and being concerned about what they can and can't do, there's two points to make about that, one is that, you know, to a very large extent that won't be an issue because they'll just do as they're doing now, they put - they send their content in; the copyright officer, or whoever is tasked with that, makes a decision, does this fall within the  
35 statutory licence, you know, it would be, does this fall within fair use. The other thing to say is that the university sector would provide its people with, you know, carefully crafted guidelines that would give detailed assistance.

40 **MS HARRIS:** In fact, we have a history of having done that for a long period of time. We operate with all of our 39 university members making sure guidelines are updated, queries are answered, that becomes general knowledge. So that, kind of, iterative process of compiling guidelines that are then widely distributed through the sector has always been our

practice. So we would expect that to continue to give people quite clear guidelines of fair use and those decisions. Yes.

5 **MR COPPEL:** Are there ever practices that would serve to limit, at least during a period of transition, the degree of uncertainty or lack of predictability, in your view?

10 **MS HARRIS:** I think it'd probably be fair to say that if a fair use exception was enacted, we are already starting the mechanisms of how to actually advise the sector of how to go about using information, making decisions on information, and so on. So a period of uncertainty would be quite limited because we're already operating at that level in terms of being across any guidelines or obligations or compliance that universities would have to measure up to. So we wouldn't think that - given that  
15 we've already got the infrastructure in place, that it would be a pretty painless transition in terms of understanding exactly what to tell universities on how they should be behaving.

20 **MS FLAHVIN:** We've dealt with copyright reform in the past.

**MS HARRIS:** Yes.

25 **MS FLAHVIN:** And dealt with new exceptions. We've dealt with changes to the statutory licence in the past.

**MR COPPEL:** A number of submitters on the draft report have argued in favour of fair use, but say that the approach proposed by the Australian Law Reform Commission was preferable to the one in the PC draft report. I don't recall seeing any point on that in your post-draft submission, but do  
30 you have a view on that issue?

**MS HARRIS:** I think it'd be safe to say that we have yet to explore that. Do you want to answer that question? Yes.

35 **MS FLAHVIN:** Yes. I think that's absolutely – I think that the position that the sector has taken is, you know, "We want fair use. We think it's a bit of a no brainer. Let's sit down then and talk about well, what should the fair use factors be?" We certainly, at the time of the ALRC Review, expressed strong support for the ALRC's fair use factors. But we haven't  
40 really consulted with the sector as to, you know, "If you had a choice between the Commission's factors and the ALRC's factors, which would you prefer?" That's not a discussion that we've had.

45 **MS CHESTER:** Yes. If it is possible to have that discussion within the frame of our inquiry, that would be helpful.

**MS HARRIS:** Okay.

5       **MS CHESTER:** Lest we have a further consultation post our report  
being considered by government. I think the main issue that's been raised  
with us, and it's probably a reasonable point, is that because we started to  
import some outcomes based terminology in our fair use factors, that  
would then make it more difficult to be able to draw on a leverage from  
10       offshore jurisprudence and offshore guidelines and the like. When we,  
sort of, talked through what were really our objectives there, it wasn't that  
disparate to what the ALRC was trying to achieve through their principles,  
so.

15       **MS HARRIS:** Yes, we can come back to you on that, yes.

**MS CHESTER:** That would be really helpful. Thank you.

**MS HARRIS:** Yes. We can come back on that.

20       **MS CHESTER:** I don't have anything else.

**MR COPPEL:** Anything else?

25       **MS CHESTER:** No.

**MR COPPEL:** Great. Thank you very much.

**MS HARRIS:** Thank you.

30       **MS FLAHVIN:** Thank you.

**MR COPPEL:** Also thank you again for your initial submission and the  
submission on the post-draft – on the draft report.

35       **MS FLAHVIN:** Pleasure, and thanks for the opportunity.

40       **MR COPPEL:** So our next participants are from Free TV and also  
Channel 9 and Channel 7, Sarah Waladan, Justine McCarthy, and Irene.  
Yes. So please make yourself comfortable and when you're ready if you  
could give your name and who you represent individually, for the  
transcript, and then a brief opening statement. Thank you.

45       **MS WALADAN:** Sir, my name's Sarah Waladan. I'm the manager of  
Media Policy and Regulatory Affairs at Free TV Australia.



**MS McMONNIES:** Irene McMonnies, Nine network Australia, I'm corporate counsel.

5 **MS McCARTHY:** Justine McCarthy, legal counsel for Regulatory and Business Affairs at Seven Network.

10 **MS WALADAN:** So thank you for inviting Free TV to address the Productivity Commission Inquiry and to answer any questions that you may have. Free TV is the peak industry body representing Australia's commercial free to air broadcasters including Network 7, 9, 10, Southern Cross and Prime. Our members provide 15 channels of content across a broad range of genres free to the public, as well as a range of online and mobile offerings. Over 30 million Australians tune into free to air television on any given day and the most watched shows on television are  
15 Australian. In 2015, for example, every one of the top 50 programs on free TV was Australian. Commercial free to air broadcasters invest over \$1.5 billion on Australian content and are the major underwriters of the Australian production sector employing over 15,000 people both directly and indirectly.

20 Australian copyright law provides the fundamental framework that incentivises the production of this highly valued local content and enables broadcasters and other content industry businesses to invest in the industry. It is well established that, for optimal benefit to the economy  
25 and community welfare, this framework should strike the right balance between incentivising and rewarding creators, innovators and investors on the one hand, and facilitating individuals and businesses to access and share information, ideas and products on the other. Copyright is also a critical mechanism for supporting the creation of cultural works that  
30 capture uniquely Australian stories.

Free TV's overarching concern with the draft report is that it dismisses concerns about the impact of its recommendations on creative industries on the basis that Australia is a net importer of IP. This analysis,  
35 however, does not appreciate the cultural importance and welfare enhancement of Australian content creation. The availability of cheaper or more readily available content from other markets is not a substitute for an entire local content industry or the cultural value that that content holds. Local Australian creative industries enrich our society, reflect and  
40 contribute to our sense of identity as a nation, and also play an important role in attracting tourism, migration and business to Australia.

Free TV's view, therefore, is that a number of the draft report's recommendations which relate to copyright would have a detrimental  
45 impact on the ability of broadcasters, and other content producers, to

continue making and investing in Australian content. Due to time restrictions, I'll just briefly provide two examples which are the key concerns for free TV.

5           So firstly, Free TV strongly opposes the proposed replacement of the  
current fair dealing exceptions with a broad fair use exception. The  
existing fair dealing exceptions for criticism and review, parody and satire  
and reporting the news, are used on a daily basis by broadcasters in  
10       compiling programming and they provide a level of clarity and certainty for  
broadcasters around the uses of copyright material that can be made for  
free. Principles of economics suggest that legal rules must be well defined  
and known in order to achieve efficient outcomes. If rights are not well  
defined, users will be less likely to seek licences to use copyright works  
15       and this will, in turn, undermine the market for those works. Decisions to  
invest in content creation will be adversely affected as a consequence.

            Fair use in the US has been described by academics as a moving  
target. It's introduction here would massively increase uncertainty and  
risk negatively impacting both use and creation of copyright works.  
20       While it's important that copyright laws adapt and change in response to  
changing technologies, the question of how this is best achieved in the  
context of the Australian legal system needs to be considered. Free TV  
believes that no case has been made out for such a fundamental change.

25           In considering the introduction of fair use in the UK, the Hargreaves  
Review effectively found that the economic benefits of a more adaptive  
copyright regime are more likely to be achieved by an approach of  
legislating additional prescriptive exceptions rather than adopting fair use.  
This was because of, basically, the serious doubts about the viability of  
30       the US case law based legal mechanism.

            Then just very briefly, the second example I'll just briefly mention is  
the Safe Harbour Scheme. So Free TV opposes an expanded Safe  
Harbour Scheme to cover a broader set of online service providers, in the  
35       absence of any amendments to ensure that the authorisation infringement  
provisions are also operating as intended in the online environment. So  
our view is that the law should first ensure that where a service provider is  
aware of an infringement on its network, and if it is within the power of  
the service provider to take reasonable steps to prevent that infringement,  
40       that it should be required to take those steps. Without effective  
authorisation provisions, the expansion of a Safe Harbour Scheme, in our  
view, is illogical. So Free TV's detailed position on these, and other  
issues, is providing in our written submission. Thank you for having us  
45       here and we welcome any questions.

- 5 **MR COPPEL:** Great, thank you, Rebecca(sic). Maybe if we begin with the proposed recommendation on fair use and you've made the point that fair use would undermine the investments in local content. In the hearing so far, we've made the point that fair use doesn't equal free use and the fairness factors would allow for remuneration of copyrighted works. So my question is what, in your view, would be the materials that are produced currently that would no longer be remuneration under a fair use provision?
- 10 **MS WALADAN:** Well our view is that exactly because of the uncertainty and the lack of clarity that would surround a fair use provision, it's very difficult to point to specific exceptions that would no longer be remunerable. However, the point really is that the introduction of fair use will lead to a re-examination by both rights holders and
- 15 copyright users around what falls within the scope of the free exceptions and what doesn't, what falls outside of that. So the question of what will still be covered, you know, will be a moving feast and will be redefined, and there's a lot of uncertainty involved in that process.
- 20 **MR COPPEL:** The recommendation also comes with measures that are also aimed at limiting that uncertainty during the period of transition and thereafter. There are other jurisdictions that have adopted fair use. Is that a basis for getting a better grip on that issue of loss of potential revenue from materials that are no longer remunerable?
- 25 **MS WALADAN:** So, for example, if there were – what sort of?
- 30 **MR COPPEL:** I'm just trying to get a better understanding of the depth of that concern, because we do have jurisdictions that have fair use including the US, even though it's not exactly the same in terms of the fairness factors.
- MS WALADAN:** Yes.
- 35 **MR COPPEL:** Are you able to draw in on that experience how a greater degree of certainty as to whether those prospective impacts that you've outlined really will materialise or not?
- 40 **MS WALADAN:** I think, in a sense, it's impossible to say how it – one, it would depend on how the provision is drafted in Australia, and then two, it would depend on how the provision is interpreted by the Courts, whether they would draw on US jurisprudence, you know, it's very hard to say, it'd probably depend on the circumstances and, thirdly, I mean, until a case goes before the Courts and the outcome of that case is known,

there'll be uncertainty during that period and, you know, that's potentially a very long time.

5 **MS CHESTER:** So Israel actually parachuted into this system holus.

**MS WALADAN:** Yes.

10 **MS CHESTER:** Including its jurisprudence, such that there were a few cases to have to deal with it. So, I guess, one other way of putting the question, because we keep hearing the sky's going to fall in, but nobody can give us examples of how that's really going to impact revenue streams. So say if Channel 7 and Channel 9 were going to be operating in the US today under their fair use system, what is it there that you would no longer be remunerated for under fair use in the US that you are  
15 remunerated for under fair dealing?

**MS McCARTHY:** There are two areas of concern for us from a business perspective and the first is at the moment, with the existing exceptions copyright, what you can and can't do, and what you will and won't be  
20 remunerated for is very well understood by the business to the extent that we actually, as a legal department, get very few questions from program producers or other content makers in relation to copyright. Those things are able to be handled internally by the relevant production areas who have that expertise and have that understanding and don't need  
25 instructions.

Any change, and this is a, sort of, radical departure from that, will necessarily involve for us a large additional expense of increasing the legal resources available to assist all of those people to understand what  
30 the new regime means. I can't see Australian Courts just holus bolus importing foreign jurisprudence. They will want to make their own determinations based on whatever the actual wording of the provision was and, you know, the unique Australian principles of interpretation.

35 So I can't imagine that the outcome would just be – will just follow whatever happens in the US. There may be a period of time during which businesses would need to refer to the US as guidance as to what is likely an Australian Court would hold. But you couldn't know for sure, therefore that creates uncertainty. In an environment where revenue – all  
40 of our revenue streams are very uncertain and people are very sensitive to risk, you would have to assume that will result in reduced investment in Australia content. We can't say, you know, X program is not going to be made any more if this happens. It's just that it creates an environment in which funding decisions, in relation to content, will attract an increased  
45 level of uncertainty.

5 I would imagine that would be the case for quite a protracted period of time because it will, essentially, be up to rights holders to enforce their rights under this new system and it may actually be quite some period of time before you would have a period of case law on which to draw upon.

10 **MR COPPEL:** On that last point, you suggest that there's a shift in the onus towards the rights holder to uphold their rights. Can you explain why that – how that shift occurs between fair dealing where it's – to our understanding is already the rights holder who have that responsibility?

15 **MS WALADAN:** Well it's about the clarity though. So fair use, if there are – you know, we don't know what's covered. Fair dealing, currently, is operating very well in my members' newsrooms. So on that basis it is functioning. That's not to say that they are, you know, in every aspect the clearest provisions ever, but they are working well. We've been working with them for a long time and so – whereas fair use would be a clean slate and has often been referred to as, really, a right to litigate. Until that first case comes out we really don't know. A couple of other points that I just  
20 wanted to make - - -

**MS CHESTER:** So is there a reason that Australian industry wouldn't respond the way industries have responded in the US, Israel, South Korea, and Singapore, by developing guidelines to use within industry, whether it  
25 be a film production room or an educational institution in terms of how the - - -

**MS McCARTHY:** I'm sure they would develop internal guidelines that most probably would be based on a combination of existing international  
30 jurisprudence until we had Australian case law to draw upon. But certainly my understanding is, at least as far as Singapore is concerned, that the introduction of fair use did at the same time introduce concerns about risk and reduction in investment, certainly in the initial stages. Is that your understanding as well, Sarah?

35 **MS WALADAN:** Yes, yes.

**MS McCARTHY:** Yes.

40 **MS WALADAN:** The other point I would just make as well is 200AB is an example, perhaps, of a provision that was introduced that is a fair - you know, fair use style like provision where an industry standard was introduced and, I mean, I think there's still – that was introduced in 2006 and there's still a lot of lack of clarity around that, as I understand it,  
45 although the particular sectors would be better to ask about that too. But,

yes, I think that just, sort of, demonstrates the great uncertainty that surrounds these types of, you know, changes and the amount of time that it can take.

5     **MS CHESTER:** Yes. So we've had participants, film producers and documentary film makers, that have suggested that the fair dealing makes their lives very difficult. It constrains what they can do and it actually increases their costs and uncertainty. That's, sort of, bread and butter for Channel 9 and Channel 7, I would imagine, for production. So wouldn't  
10     you stand to benefit then from moves from fair dealing to fair use if the evidence that we heard from those folk is appropriate?

15     **MS McCARTHY:** Look, I think that's why we, in a way, feel quite well placed to comment on this issue because we are both people that are holders of copyright and also significant users of the existing exceptions. There would be some circumstances, no doubt, where we would potentially benefit from broader exceptions. But, on balance, we believe that we would prefer to stay with the existing provisions even though they may add some degree of complexity where you are acquiring rights to use  
20     material that's owned by third parties because, I guess, in our mind, there's clarity as to when you do need to go and seek a licence from a third party and when we don't. We prefer that certainty.

25     **MS WALADAN:** That's not to say that they're perfect and – but we would prefer an approach of, you know, looking at additional prescriptive exceptions that are required and adding those in a clear form in the legislation compared to an approach of having to fight it out in the Courts, effectively.

30     **MS CHESTER:** So what are the additional changes that you'd be suggesting to fair dealing?

35     **MS WALADAN:** None today. But if we did want additional, you know – you can envisage that might, you know, be our position at some point. If it is then that would be the approach that we would prefer.

40     **McMONNIES:** I would just add to that, to your statement about it being our bread and butter, I mean, coming from the perspective of 9, our bread and butter really is news production. You have to remember that it is happening in real time every day, a number of bulletins every day. So we're using those fair dealing provisions on a daily basis. Not a single news bulletin would go out without us referring to those fair dealing provisions. Because the operation of them is working very well we, obviously, take a risk averse approach. If there's a holus bolus change to

legislation that involves fair use, that is a totally different ballgame for our (indistinct) writers.

5 **MR COPPEL:** It's been submitted that very few cases have been brought before the Courts that deal with fair dealing. So regardless of whether you're talking about fair dealing or fair use, there's always an element of uncertainty. That's something that we have to live with. I'd be interested in your perspective as to where are the elements – are there elements of uncertainty that relate to the current arrangements with respect to fair dealing, the fair dealing exception that you confront?

15 **MS WALADAN:** There are obviously elements of uncertainty around the existing provisions but, as my colleagues have said already, the way they are currently operating, you know, is working very well on a day to day basis in newsrooms at any given time.

20 **MS McCARTHY:** Yes. We would very much take the fact that there have been so few cases as actually indicating that the existing system is operating really well. People are clear what the parameters are and they don't go beyond what's permissible.

25 **MR COPPEL:** I mean, in your post-draft submission, this theme of changes creating uncertainty runs across several of the recommendations in the draft report, and one of the other ones relates to the repeal of section 51(3) competition creating additional uncertainty for rights holders.

**MS WALADAN:** Yes.

30 **MR COPPEL:** Could you expand? You didn't mention that in your opening remarks.

**MS WALADAN:** No.

35 **MR COPPEL:** But you could expand on how that works, or is it simply the change is bad?

40 **MS WALADAN:** Our concern really there was just in responding to – and our response was quite short in our submission, our point really is that even in the draft report it notes that many of the arguments put in favour of dispensing of the exception rely on identifying instances where anti-competitive conduct might occur rather than instances where it does occur, or has occurred. So, I mean, on that basis we just think until there is evidence to, you know, explain the need for its removal, then we would be in favour of its retention at this point in time. I mean, I think there's already a level of uncertainty in relation to the operation of that provision,

and that was made clear in the draft report and we would – I mean, I think we'd also welcome any guidelines in relation to that, which was also suggested in the report.

5 **MR COPPEL:** Yes.

**MR COPPEL:** Are there licensing arrangements that Channel 9 and Channel 7 are involved in that actually are relying on that exception today?

10

**MS McCARTHY:** I think from our perspective that is a task that we haven't yet undertaken to actually review those existing arrangements and determine if this change is something that would affect our existing contracts. So that was part of the concern as to well, this has been  
15 proposed. We're not actually sure the basis on which the change is seen as necessary and, obviously, it will cause an administrative issue for us temporarily.

**MS CHESTER:** So we detailed some concerns, especially around  
20 complex licensing arrangements over content and also practices across the pharmaceutical sector, and certainly the Harper Competition Policy Review set out a very clear case for it as well. So in the absence of evidence that we're going to inadvertently capture things that shouldn't be captured, it's difficult to see what case there is not to repeal it and not to  
25 have the same competition policy laws apply to licensing and the affording of IP rights.

**MS McCARTHY:** Perhaps that's something that we could look into further and provide you some further thoughts?

30

**MS CHESTER:** That would be really helpful, thank you.

**MS McCARTHY:** Yes.

**MS CHESTER:** Just one other quick thing, you mentioned before the  
35 Hargreaves Report. Jonathan and I were lucky enough to meet with Professor Hargreaves and the overriding factor for his not recommending any change to the fair dealing provision was that they were unable to, because of the EU, and perhaps that's changed after Friday. But that was  
40 the main reason.

**MR COPPEL:** Do you have local content provision laws that also operate on decisions that you make in terms of your programming?

45 **MS WALADAN:** Yes, absolutely.



**MR COPPEL:** Yes.

5 **McMONNIES:** I think the regional licensees, in particular, are operating under local content provisions. So there are, I think, regulations in relation to regional licensees and (indistinct) and also our regional licensee, NBN, and there's a quota system in place which means that there are minimum numbers of material local significance and local news that needs to be produced in these local areas.

10 **MS McCARTHY:** That's right. Obviously, we also have the overriding Australian content obligations as well. But at the moment all broadcasters are exceeding the level of Australian content that is technically a requirement of those (inaudible).

15 **MS CHESTER:** Okay.

**MR COPPEL:** Nothing else?

20 **MS CHESTER:** No, thanks.

**MR COPPEL:** Right. Thank you very much for participating today.

25 **MS WALADAN:** Thank you.

**MR COPPEL:** And also thank you for your initial draft – initial submission and your submission on the draft report.

30 **McMONNIES:** No worries at all. Thank you.

**MR COPPEL:** So I'd like to call on Kingston Anderson, Australian Directors Guild. So make yourself comfortable.

35 **MR ANDERSON:** Thank you.

**MR COPPEL:** Then, for the purpose of the transcript, if you could give your name and who you represent and a brief opening statement.

40 **MR ANDERSON:** Sure. Great. No worries. I'm Kingston Anderson. I'm the CEO of the Australian Directors Guild, and the Australian Screen Directors Authorship Collection Society – long name. The ADG is an industry body. It represents over 1000 directors across Australia and ASDACS is a sister collection body which also collects money for directors in both Australia and New Zealand, so it covers directors in both  
45 those countries.

- For screen directors in Australia, the framing of the Commission's draft paper represented an attack on the livelihoods of Australian creators without an understanding of the process of creation or the creative industries. In particular, and with all due respect, assumes that all Australians are simply passive consumers of content rather than appreciating that Australia has a vibrant creative sector that creates, produces and indeed successively exports Australian stories and culture.
- It characterises rights holders as monoliths and users as somehow – that they're somehow disenfranchised. Directors are original creators. They create the majority of content across all screens. It's clear that they have – there is an imbalance for directors when it comes to that content creation and their rights. Users of creative content are not simply Australian consumers; they are large foreign corporations, like Google and You Tube who have created business models that leverage others creativity for commercial gain.
- Copyright is the linchpin of the creative economy which is a significant financial contribution to the Australian economy. Australian screen directors make vital contributions to culture, diversity and economic growth. Directors are creative and talented individuals which form the basis of all film, television and dramatic productions. Their work brings people together in the form of entertainment, in addition to educating and building empathy in the community. Furthermore, it instils an appreciation of history, Australian culture and our community's perspective on other cultures.
- Australian stories, through film and television, are exported to the world. To give you some example of the long term of those, the entire Mad Max series which has become a long term series of movies starting back in the early 1990s and obviously finishing with the most recent, and the most successful of all the Mad Max movies. Many titles such as Peter Weir's Picnic at Hanging Rock; the Rocky Horror Picture Show which is an Australian production, it originated in Britain in the 1970s which is now playing on a screen somewhere in the world every day of the week. So it's been going, and recouping money for those creators, since 1974, I think it is, as well.
- Of course, the television. Television is probably the most popular or pervasive. We can't forget Home and Away obviously; Neighbours; and now more recent ones Mrs Fisher's Murder Mysteries and the recent Clever Man; as well as a massive number of children's television productions like Nowhere Boys. It is that reason that the ADG and ASDACS has been lobbying for the expansion of copyright for Australian

5 directors. In contrast, in many other jurisdictions, including the UK, the Australian Copyright Act does not currently recognise directors as makers of films, or as copyright owners in film, rather this is usually the producer except in relation to a limited retransmission right which was granted to film directors in 2006.

10 You may be surprised to learn that Peter Weir, one of our greatest directors, does not own any copyright in Picnic at Hanging Rock or Gallipoli. Both those productions are probably two of the most iconic Australian films, again which are playing somewhere every year and, in fact, I've just been in negotiation with the – believe it or not there is a World at War Film Festival that happens in the Champagne District in France. Being the 100th year of the First World War, Peter's film Gallipoli is in great demand around the world, particularly in France.

15 Again, he has no control over that and if that was out of copyright there would be no remuneration. Again, another piece of content that continues to generate income for the people that created it. In the case of that one, the producers of that film.

20 For the reasons set out in our submission, copyright is a critical incentive for directors to provide fair remuneration for their hard work and success of that work. We reiterate our request to the Commission, probably not in your powers but I'll ask it anyway, for the expansion of director's copyright in its final report, not the reduction in any way. I

25 might just talk a little bit about copyright and a little bit about fair use, if that's okay, and then finish off on that. The Commission has suggested a reduction in the term of copyright to 15 to 25 years from the creation. Sadly, this demonstrates a bit of ignorance in terms of the commercial reality of film and television production, as I've probably just given you

30 some examples.

It is incorrect to suggest that the average commercial life of film is between 3.3 and six years. Even in the writing and production phases alone, televisions programs and films can take up to five years to come to

35 fruition. Probably an interesting example is a film that was made several years – called Diana and Me. As you probably guessed it's about the Princess – well was the Princess of Wales. That film was completed, about to be released and unfortunately the Princess of Wales died. The film was then not released for six years after that because circumstances

40 meant it couldn't.

But if the copyright reduction had taken place, you can see the problem. The exploitation of that work would have been reduced significantly and if it had to wait longer that – and that's something that

happens a lot with films, they may not be released straight away. They take a while after they're created. So that's also part of that.

5 In many cases films take an enormously long time to develop and make. I mean, probably the classic recent example is Mad Max, the final Mad Max film. They started making that in 2003 or 4 and it wasn't completed until last year. So again you see a huge – we see a huge problem with any reduction in the copyright because it reduces the exploitation of that work. We also welcome the government's statement  
10 that they probably wouldn't change the copyright, and we also obviously have the provisions of the Free Trade Agreement with the US, means that we – that it's not possible either. So we're hoping that that is the case. I'll just make a brief comment on fair use, if I've got some time as well.

15 **MR COPPEL:** Yes.

**MR ANDERSON:** We feel that bringing in a US style of fair use really provides no clear benefits to Australian creators or consumers. The Commission's discussion on fair use presupposes that all copyright  
20 owners are large corporations and all users of content are Australian consumers, whereas the reality is that many copyright owners are individuals, like my members; and users of copyright content are large multi-national corporations that use other creators content for their own commercial purposes, like Google and You Tube.

25 I don't know if this has been mentioned – if it has please tell me. A colleague of mine, Angelo Loukakis, who is an Australian author, one of his books was published by Google Books without his permission. He's been, I think, fighting in the Courts for about three years in the US to try  
30 and regain control of that book which he owns and he owns the copyright. For me, that's a terrifying thought for an individual author and, in the case for us, not just directors but writers, producers, et cetera. They're not able to sustain that in many ways.

35 That's one of the major problems that we have, is that the fair use regime really, significantly, make it hard for individual creators to defend their work if they so choose. If they choose not to show it, if they choose that they want to control it, if it's taken away from them, they will not take the legal action. Like my colleagues before me, at Channel 9 and Channel  
40 7 who have the ability to take legal action, my members, in some cases make \$25,000 a year, are unable to do that. If we have a system where the only way that they have recourse to reclaim their work or control their work is through the legal system, it will be a disaster and it will stop the creation of content by those individuals, which is the strongest and richest  
45 vein of content that is produced by my members and also members of the

film industry. We represent an enormous number of documentary makes and those guys tend to be one person bands who make those documentaries as you go.

5           So we feel that the two things that were in the report which we feel shouldn't go ahead – and I know you haven't proposed that they do – is the reduction in the copyright term, we think it should be maintained; and the introduction of a fair – a US style of fair use. We'd also love directors to have copyright in audio visual work and we'll continue to push that  
10           with the government and wherever a forum gives us that opportunity.

**MR COPPEL:** Okay. Thank you, Kingston. So you're correct, we do not call in the draft report for a reduction in the term of copyright for the same reasons that you've indicated, amongst others. Can I come to the  
15           point about expansion of copyright for directors?

**MR ANDERSON:** Yes.

**MR COPPEL:** What do you have in mind there?  
20

**MR ANDERSON:** Well, it's pretty simple. Australia stands out in the world as one of the few countries that don't have it. In fact, when our Copyright Act – and I'm not a lawyer, so please correct me about the history – but when our Copyright Act was framed in the late 60s, it was  
25           very much heavily framed based on the English Copyright Act. In that Copyright Act at the time producers were the owners of copyright. So when that was first framed, theirs was the same as ours.

          But, some 20 years later, that was reframed because once England  
30           was – although they're leaving the European Union now, when they started to do more with Europe, who has a very clear division of copyright ownership between a writer, a producer and a director, they changed it. Audio visual work in the UK is owned 50 per cent by producer and 50 per cent by directors. They recognised that directors are major creators of  
35           audio visual work.

          So we look around the rest of the world and we see that we're one of the few countries, literally few countries of say 30 to 40 countries who have copyright for directors, and we're one of the few. It makes no sense  
40           to us in terms of providing long term sustainable careers for directors. I mentioned Peter Weir. I mentioned those directors, the great directors. They're not just the great Australian directors, they're great directors, don't have access to that. A lot of our creative people will leave the country because they do lack access to that sort of remuneration, post the  
45           creation of that work.

**MR COPPEL:** So is it more the way in which the copyright receipts are divvied up rather than the quantum itself?

5     **MR ANDERSON:** Yes, at the end of the day. I mean, we have a small right, section 98 of the Copyright Act, which was introduced in 2006 because I felt the government was concerned that directors had moral rights in a work but they had no economic works, unlike producers, writers, composers. But that's been ineffective for us in the last 10 years  
10     and it really – in fact, that's interesting because that shows you what can happen when you have an ineffective change to the Copyright Act where the only way we could – we've been urged to go to the Supreme Court to push our case. Well, there's no money from our organisation or our individuals to do that. So to assert our rights legally that's a very difficult thing to do,  
15     and for individuals almost impossible, and they're not willing to do it because that will mean the end of their careers, effectively.

**MR COPPEL:** By saying “asserting their rights individually” are you referring to the ability for a director to reach a commercial agreement - - -

20     **MR ANDERSON:** Yes, under section 98 of the Copyright Act, yes.

**MR COPPEL:** Yes.

25     **MR ANDERSON:** It is about individuals. I mean, obviously, we're a union, but we're negotiating as much as we can. But under our system if a director, for example, were to pursue it – and this has been said to a number of our directors, “We're not doing it. We're not doing it. Bugger off. You don't get the job”. They have no power to fight that against a  
30     large production company or a large network. So it becomes an ineffective. So their next recourse is to then take legal action on the basis that they believe section 98 applies to them. They're not going to do that. They're not going to take the next step. They'll never take the next step because they won't win it, because they don't have the resources, and it  
35     will be the death of their career because that production company will basically black ball them.

40     So individual creators have a huge problem with a system where legal action is the only recourse for them. It really puts them at a massive disadvantage so – and that's the majority of my members. I mean, we don't – yes, we have some large members with Baz Luhrmann and Peter Jackson and they can tend to look up because they've got resources. But I've also got numerous documentary makers who make the documentaries that we see across all our networks. Jennifer Peedom, whose magnificent

documentary Sherpa, she would never go down that path because she's a single operator. She has a small company. They'd never survive.

5 **MS CHESTER:** So, Kingston, of your members, the 700 - - -

**MR ANDERSON:** 1000, actually.

**MS CHESTER:** Sorry, I was looking - - -

10 **MR ANDERSON:** No, that's an old one, yes.

**MS CHESTER:** Okay, thanks.

15 **MR ANDERSON:** But since then it's gone - - -

**MS CHESTER:** It's 1000. So of your 1000 members, how many of them are also film producers?

20 **MR ANDERSON:** Very few actually.

**MS CHESTER:** Is it just like the top end commercially successful ones?

25 **MR ANDERSON:** Yes. I'll very quickly break it down. So the documentary directors, yes, they are director producers, absolutely. They take – because of the size of the particular project. So they'll take those roles as writer, producer, and director. There's a whole group of TV directors who are all just directors of TV. So they're directing. Peter Andrikidis, who directs all Ivan Milat, the whole – there's a whole suite of those who work for production companies and/or networks. Then feature  
30 film directors who tend to work in collaboration with producers but they're not necessarily producers. Fred Schepisi would also possibly be a producer, but he'd mainly be the director. So it's sort of broken down that way.

35 **MS CHESTER:** So those that don't have a film production credential or right attached to them are effectively employees of the producer and then it's a commercial contract to - - -

40 **MR ANDERSON:** Yes, exactly. Yes, they're contractors, I suppose, is the effective - - -

**MS CHESTER:** You mentioned there were 30 jurisdictions still left in the world that - - -

**MR ANDERSON:** Well 37, I think. I'd have to look it up again. Who were all – most of them in Europe and obviously South America, around the world, where copyright exists, obviously, I'm talking about.

5 **MS CHESTER:** Yes.

**MR ANDERSON:** In some places, like China, obviously there isn't any regime for that. So in the jurisdictions where audio visual work is supported by governments, there have very clear copyright support for  
10 directors, writers and producers. It's those three groups because what we – we'd consider those above line. They're the people who create the content in form as a group. But those directors in Australia, for some reason, have been left out of this and, you know, it's to the disadvantage – and we lose directors because of it.

15 **MS CHESTER:** North America, what's the status there?

**MR ANDERSON:** The status there is they don't have copyright because the – in the 1950s they were able to negotiate incredibly powerful deals.  
20 My colleagues, I look at them with envy, at the Directors Guild of America, are a massive organisation who have got strong, contractual relationships with the studios that dictate those. There's still a whole section of that industry that work outside the law as well, who work outside that structure in the independent. But the studios are the dominant  
25 players.

If I had union power like that, it'd be fantastic for us. I mean, all the unions in the United States have massive power to prosecute their case. If anyone gets out of line, I mean, the Directors Guild of America have –  
30 they employ like 30 lawyers just looking at those issues. So you see what I mean, they're well equipped to deal with any infringement that goes on. Of course, they're still dealing with the problem with piracy, which is a massive, massive issue. My members deal with it. It's constant.

35 I mean, we're about to take a film called "Healing" to the US and we wanted to get a copy to someone who was going to do the Q & A in Los Angeles. They said, "Don't worry. It's on You Tube". The director, who was also had – did have part of the producer said, "What do you mean it's on You Tube?" It had been put up two days before. They'd taken it off  
40 five times. This continually happens in - you know, it's another issue. But it is connected because it's about whether people think they can get away with it. He would never take anyone to Court over that because he doesn't have the resources to do that. If that regime was here, it would be disastrous for those who didn't want their work shown too.

45



5 The other part of this is something that's not – it's a cultural issue, not necessarily a commercial issue, are films that are made by individuals who have – may have them taken away from them and shown when they didn't want them shown. I think that's a reasonable thing for many reasons as well, so. This is something that our members have expressed to me quite clearly.

10 **MS CHESTER:** You mentioned your views around fair use. It's quite interesting because we did actually take evidence from a documentary filmmaker in our public hearings in Melbourne last week.

**MR ANDERSON:** Who was it? Probably a member.

15 **MS CHESTER:** Probably. His name will escape me, but it'll be in the transcript somewhere. Hotel Coolgardie was one of his documentary films that was - - -

**MR ANDERSON:** Which is just at the Sydney Film Festival. Yes.

20 **MS CHESTER:** Yes. So he's very much supportive of moving to fair use because, apparently, a fair dealing gets in the way of his ability to, sort of, make documentary films.

25 **MR ANDERSON:** Well, it's not true and, obviously, I've got a lot of documentary members. There are some issues in terms of people wanting to get content, particularly archival content, and finding that archival content. But the other issue here, and a lot of the documentary makers have said to me, "Well, if I want my content used by other directors, I would like to licence it to them".

30 **MS CHESTER:** Yes, I think he's a bit - - -

35 **MR ANDERSON:** "I wouldn't like them to be able to use it in a free way without consideration of why it was made". I'm a documentary filmmaker myself and so I've gone through that process of making documentaries looking for historical material and using other people's material. I totally understand, and it's been expressed to me by all of my many hundreds of documentary members. They totally understand that that's a better way to do it than a free for all which is what they see  
40 happening because their work will be exploited and pillaged – I hate to use the – some very emotional words – but pillaged by others to make other people's work that they may not want. Some of that's incredibly sensitive material as well.

**MS CHESTER:** So the main concern that he had was around incidental music in the background which made his life incredibly difficult.

5 **MR ANDERSON:** Right. Yes, I mean, again I understand that but –  
well, as a documentary filmmaker you can deal with that. It's very easy to  
deal with, (a) it's not a problem because unless it's part of the soundtrack  
that's required to move the action forward, if it's incidental music you  
take it out, put other incidental music that you've got licence for. You can  
get free music. It's very easy to get the music to fit incidental. So it may  
10 be in his situation you've got a jukebox going in the corner, there's a  
scene going on, it's playing an INXS song which clearly requires  
licensing. Well, the smart way you take is think about that before you  
shoot. Good documentary filmmakers do that. It's not a problem. It's a  
hurdle. But it is like making any film, you require creative thinking and a  
15 way around it.

It certainly hasn't stopped some of the best documentary films that are  
being made in Australia at the moment. I mention Sherpa again because  
it's got the highest box office of a documentary. I mean, they're going  
20 through the roof. Coolgardie as well, I mean, it's very successful at the  
Sydney Film Festival. So, yes, I mean, I can have a chat to him about  
that. I can help him out if he wants. But, yes, documentary filmmakers  
realise there are issues to do that, but they also don't want to exploit other  
people's work because it's their work that gets exploited as well.

25 **MR COPPEL:** In the draft report, what lay behind the finding  
concerning copyright term was information from the Australian Bureau of  
Statistics on the, sort of, average commercial life of creative works.  
You've pointed to a number of examples or that have become cult films  
30 that certainly defy that average. Do you have data across your members  
then that can, sort of, paint a richer picture of the returns?

**MR ANDERSON:** I don't. But I certainly think the Screen Australia,  
who collect massive – in fact, they're a very, very good source of data  
35 across the board here because they collect data on – they've been  
collecting data on films for the last 30 years. So that data – and they can  
actually give you an idea. I'd suggest you – Screen Australia it's a great  
resource.

40 Having great respect to the ABS, but I don't think they – I mean, I  
have to go back to the Rocky Horror Picture Show because that was a  
theatre piece that was made in the 70s in the UK in a tiny theatre that went  
on to be a film. Now copyright started when they created the original  
musical which, of course, also goes around the world. That director was  
45 smart enough, when they did that deal, and also being in the UK had more

power to do that, to get it (indistinct) the copyright. It's his superannuation for the rest of his life. That one production has given him the ability to direct a massive amount of work in opera and theatre that he would not have been able to do without the support of that film.

5

So it's a classic example of how a creative talent can be rewarded across the years and spurn more creative work. I mean, the stuff that Jim does in the theatre and in opera doesn't – it, sort of, half pays the bills. If anyone works in theatre, and I've worked in theatre, it's a hard life to keep going. Certainly, none of us had superannuation. We always talk about this as – with directors and writers that their content, the stuff they make – and my wife's a writer – is their superannuation and without control of that content and the ability to get remuneration from it, they wouldn't have that because we didn't have a superannuation system when we all started.

15

**MS CHESTER:** Just one quick question from me and it's just – and you may know the history here, Kingston. So given the fact that directors are not afforded the same, sort of, copyright treatment as they are in other jurisdictions, and there's been other reviews of Australian copyright laws historically, is there a reason that it hasn't been addressed, or why haven't the arguments gotten up before?

20

**MR ANDERSON:** Well, it was addressed. Pete Spielman 2006, we put submissions in. Our colleagues around the world – there's a group called Writers and Directors Worldwide who are aiming to get copyright for writers and directors in all jurisdictions including China, and that's through SESAC because obviously as a collection agency we're a member of SESAC International Organisation. Why hasn't it been successful? Well, if I had the answer to that I'd probably be able to turn it around.

30

I think it's a combination of things. I think it's been a commercialisation of our industry in Australia that's shifted. We've shifted from a smaller industry where the creative talent of individuals was the most valued to a more commercial, and that's also to do with the change in the world. I think it's a range of things. I mean, we haven't been strong enough, I think, to effect that change and, of course, we're operating on our own. It doesn't benefit anyone but us, and my members, for that to change.

35

We are looking for a view from government that directors are content creators. They are the authors, in our opinion, of audio visual work and they should be recognised as such. They are recognised as such under moral rights legislation, but they're not in an economic sense. I suppose, if they were in an economic sense we wouldn't be having this push from

40

us. So really, we're just asking for something we think they're due in every jurisdiction.

5 Obviously, our collection society doesn't collect much money from Australia. Where we collect most of our money is from overseas and it exists because of that. We have relationships with 22 countries and that's because our directors, again, work worldwide and their work is seen in 22 of those countries. So we collect money for those directors under their clear copyright legislation which provides money back to those people and that covers everybody from Peter Jackson down to the humble  
10 documentary maker who may have made one documentary but is being seen on French television.

**MR COPPEL:** In your submission on the draft report relating to an information request we had on the voluntary code of conduct for collection agencies, you said that the government should consider those issues separately. When you refer to those issues, are you referring to the issues that we've raised in the draft report, are you – or are you referring to other issues and if so what are they?  
15

**MR ANDERSON:** No, no, just referring you to those issues in the draft report.  
20

**MR COPPEL:** In draft.  
25

**MR ANDERSON:** We're happy to have reviews of systems that are in place. We obviously believe in transparency and that's important for us as well. We don't collect much money, but it's important to be incredibly transparent because we don't collect much money. So we're happy if there's a view that that would be useful. Ultimately, it's all – for us there's a – we feel there's a code reviewer that works effectively to review the code. So we've never had an issue, I suppose, from our point of view. So, I suppose, you could say we're a little bit agnostic but happy - if there was a wish to do that, we're happy to support that.  
30

**MR COPPEL:** Okay, thank you. That's all from us.  
35

**MR ANDERSON:** Thank you very much for allowing - - -

**MR COPPEL:** Thank you, Kingston.  
40

**MR ANDERSON:** No worries.

**MS CHESTER:** Thank you.  
45

- MR COPPEL:** Our next participants are Delia Falconer and Shannon Stein. So welcome. Please make yourself comfortable and when you're ready if you could each give your name and who you represent, for the purpose of the transcript, and a brief opening statement.
- 5 **MS STEIN:** My name is Shannon Stein. I'm here as an author of fiction. I'm also the administrative officer for the Romance Writers of Australia, and I'm here to basically address some of the proposals in the draft report.
- 10 **MS FALCONER:** I'm Delia Falconer and representing myself as a writer, the author of two works of fiction, one of non-fiction, two edited collections, and I'm also a senior lecturer in creative practice at the University of Technology, Sydney.
- 15 **MR COPPEL:** Good. So would you like to make some opening - - -
- MS STEIN:** Sure.
- MR COPPEL:** An opening statement.
- 20 **MS STEIN:** Okay. So I write romance fiction under the name Shannon Curtis and I am published here in Australia as well as over in the States and hopefully soon to be in the UK. I'm also the administrator for a writer's organisation. Some of the elements in the proposed draft report
- 25 are of concern to me personally and to the organisation and our members. We're about 1000 members at the moment. One of the things I wanted to address was the – I'm not quite sure what the proposal for the term of copyright, is that actually something that you actually want to change at the moment?
- 30 **MR COPPEL:** No.
- MS STEIN:** Okay. Because one of the points that was raised was that literary works provide returns for between 1.4 and five years on average,
- 35 three-quarters of original titles are retired after a year, and by two years 90 per cent of originals are out of print. Firstly, I have to disagree with that. I think a large number of our members would disagree with that. I don't know if the digital formats have been taken into consideration when this statement was formed, or if it was factored into forming this statement.
- 40
- At the moment, when you sell a book you – or when it's contracted we can contract for a number of rights that includes the print version, the digital version, the audio, any – you know, going into, you know, TV, if we're lucky and film. At the moment, we get to say what rights we sign
- 45 over to the publisher and we control the longevity of our - I guess, as

Kingston (indistinct) our superannuation. This is how we look at our works when we're writing a book, the amount of time that it takes and the amount of effort that we put into it, the proposed changes of having it, first of all, not of our own, I guess, right – that we lose the right after 15 to  
5 25 years, for us, when you have a book that can be available in a digital format going forward for quite some time.

I can tell you that my first novel was published in 2011. What we've found is, and something that we teach our members, is the power of the  
10 backlist. So when you have a number of titles that you publish, each subsequent title will find you new readers and those new readers will go back and look for those titles, and they will purchase those titles.

I was thinking of Tomorrow When the War Began by John Marsden, now that book was actually - I think it was published first in 1993 by Pan  
15 Macmillan. Now the TV film - sorry, the film for that was actually done in 2010, which is when I found the book. So I went and bought the book because of the movie and now it's on TV on ABC (indistinct). So you will have new readers going back to find that source material 16 years, 17  
20 years later, finding that original publication. With the proposal here is that John Marsden wouldn't receive the benefit for his work there. So I think we do have serious issues with that going forward and I think that the digital capacity to be able to still retrieve those titles and purchase those titles hasn't been factored into this proposal.

25 **MR COPPEL:** Thank you. Delia, are you going to make an opening statement or shall we - - -

**MS FALCONER:** Yes, well thank you for your time. In Fishing in the  
30 Styx, the Australian author Ruth Park, who is one of our most loved authors, tells the story about her husband D'Arcy Niland who in 1955 published the Australian classic The Shiralee but through a series of catastrophic errors Niland's publisher in England botched the copyright and the British company Ealing films adapted the book within a year. But  
35 the Niland/Park family didn't see a cent. So when Niland met one of the Ealing scouts in a Sydney pub he threw the man across the bar and triggered one of the heart attacks that would kill him at the age of 49.

Now although these details don't correspond exactly to the current  
40 situation I have to say that I very much wrote my submission in the shadow of this story because it returns us, I think, very vividly to a time when there was virtually no local publishing industry in Australia when authors were often dependent on their books and films going through the colonial centres of the Northern Hemisphere and before the sophisticated  
45 copyright system that we have today. Now as well as being an

academic - sorry, a writer, as I said in my submission, I'm an academic, from a research perspective I find it hard to have confidence in a document that suffers from a lack of peer review and industry consultation.

5

Recalling that a very significant majority of the stakeholders across all sectors of the publishing industry have opposed many of the changes that are suggested, often based on their own research, it contains concerning errors in terms of grasping the financial basics of a writer's career. And failure to understand Australian copyright, that the importance of the - which Shannon has just spoken about, of the long term investment that authors have in copyright. But I'm not going to speak about that today because I think it's been covered by a lot of other authors.

15

The major problem I have with the study is that it lacks recent statistics. As the Australian Society of Authors' submission points out, the cost of books in Australia has dropped 25 per cent since 2008, unit prices are now comparable to overseas, even books bought with GST, without GST, and with free postage. And I buy a lot of books online so I speak as a consumer of books as well as a writer of books. In addition the report ignores the deregulation of New Zealand's book industry, which is probably the most relevant model for comparison. As Tom Keneally discusses in the Australian Financial Review, the New Zealand book industry has contracted since the 1998 repeal of PIR legislation. And since 2008 the range of books has contracted by a third and the price of books has risen while the price of Australian books, with PIR restrictions in place, has gone down.

So it's the cost of the potential devastation to the industry that I feel it fails to factor in. I would also note that in advocating for reduced industry the report is going very much against the grain of recent international conversation about soft power in which governments, including those of Japan and China and the UK, have been actively promoting the role of culture as an essential part of achieving economic or cultural influence and I feel that this benefit hasn't been - would be well included in this study. We were sixth in 2015 on the UK based Institute for Government Soft Power Survey.

Now studies of Soft Power recognised that cultural influence comes not just from official sources but from the spread of stories and imageries that strengthen a country's profile. And also from the basic fact that a company is seen to be able to support a cultural sector. The Australian publishing industry has already been doing this work without government subsidy and while employing more than 4000 people. I would also note that having just been in Argentina and speaking at the Cátedra John

Coetzee about our literature, that it's the diversity of our industry and the successes, and particularly often of our indigenous authors overseas that's most often remarked upon positively. And that's a diversity that depends on a local industry dedicated to the idea of Australian literature.

5

I would also like to speak very briefly about the report's recommendation of moving to a model of fair use. Like most authors I consider remuneration for use of my copyright materials by educational institutions via CAL as an essential part of my income, somewhat like having a diverse investment portfolio. Those CAL payments are around sometimes 900 a year, sometimes a few thousand, along with the LR and PLR payments, which are often around 3000 in my experience. It may seem paltry to the Commission but as part of writers' - as writers' incomes are on average around \$12,000 and as an author of a book I earn about only 10 per cent per copy, and I'm taxed on that, that these are actually very significant parts of our earnings, lifesavers sometimes when that money comes in.

20 So I think this change is likely to stop many writers writing. But also I think the thought of our intellectual investments, and, you know, I speak as a mother of two children as well, that the thought of those investments being appropriated does make some of us feel a bit like D'Arcy Niland clutching our hearts. But it's harder to imagine how such a change might encourage productivity around fair use in my industry, in the publishing industry. Perhaps I think one of the most - one of the ideas is - has at its heart is the idea that Australian works could be used by schools and universities.

30 However, while the CAL system costs \$17 per student in Australia and is funnelled back to writers, I believe it would be very naive to believe in an environment in which universities depend increasingly on digital resources that the alternative would be free or cheaper, especially if Australian authors stop providing content, which I really think is - or that content is limited, which I really think is very likely to be one of the results of these changes. Or they start publishing through overseas publishers. Because universities, and I speak as someone in the university sector, now spend significantly and increasingly large parts of their library budgets on commercial licences to expensive electronic resources, almost all Northern Hemisphere based, such as JSTOR, ProQuest, LCDF, et cetera.

45 And I would really encourage the commissioners to investigate these figures in the final draft if that's possible. Compared to the relative cheap productive non onerous CAL system and as someone who has to fill in CAL surveys sometimes at work, I can assure they're very infrequent and



5 very non onerous from my point of view as an academic, one very plausible scenario is that our schools and universities would be spending more on content and accessing less Australian content, which I think would be obviously a very poor outcome. Not to mention that the fair use model does risk becoming a lawyers' picnic in terms of being less clear.

10 So I believe this draft report is missing so much fine detail in terms of the Australian publishing industry that implementing it would be a very risky and radical experiment that I think will cost far more than in the long term that it will save. Thank you.

15 **MR COPPEL:** Thank you, Delia. Maybe I could just begin by clarifying I think what relates to one of the points you made about the report using out of date information, and I think you were referring to information that was in the Productivity Commission's 2009 report into parallel import restrictions. This draft report was asked to look at transitional arrangements following the government's response to the Harper Review to implement the removal of parallel import restrictions but before doing that to look at transitional issues.

20 The point that you have made about the 2009 report is one that has been made by many other people participating in the hearings. We will be updating some of that work for the final report and we have asked that we also receive the information that lies behind the point that you also made that, well, prices since then have fallen by 25 per cent. So we'll also be looking at that information when we get it.

30 Shannon, you also made the point about the sort of the average commercial life of a book, and that information is actually coming from the Australian Bureau of Statistics, it's an average across books, films, music. I don't know if that includes digital distribution rights but that will be something that we will look at with the ABS. But in that regard I would be interested in hearing from you based on your work how the royalties that you receive how they relate to those sorts of numbers.

35 **MS STEIN:** Certainly.

40 **MR COPPEL:** I mean, you're suggesting an experience that's quite different.

**MS STEIN:** Yes.

**MR COPPEL:** If you could talk us through that?

**MS STEIN:** So from my experience, my first book came out in 2011 and it came out as a digital only book over in Canada and sold through the North American market. And each time I've released a title since then I've actually seen more books being sold, it might just be a little bit, little increments. By about the third book that seemed to step up a little bit, by the seventh book - the first book I'm still getting royalties from that first book that are coming through because I'm getting I guess a broader readership. And we have, again anecdotally within the organisation where a lot of writers are sharing their experiences, well, we talk about the magical seventh book where there seems that it used to be the fifth book but it seems now to be the seventh book, where you actually seem to see some traction in developing a career for writing.

So you see some growth in readership, some growth in royalties. And obviously when that happens your earning potential with future books increases because your advances increase. And when that happens you've got publishers who are a little bit more interested in doing a little bit more promotional and publicity, which again fuels that backlist and keeps that building. So from my experience, and I can say from a lot of our members' experiences, the longevity of a career is based on you being productive, you getting a new release out and then another new release out, and then another new release, that will fuel sales for all of your work.

For me, personally, I look at this as I would love to be able to make this my full time role. At the moment I'm doing the admin work part time. I first got published going to an international publisher because at the time there was no publisher in Australia who was publishing the style of books that I was writing. Since then we have noticed at our writers' conferences, for example, we have I think - in 2007 we were struggling to get the attention of a publisher to attend our conference, in 2008 we had six publishers wanting to come to our conference.

I think in 2014 we had 20 professional representatives from agents and publishers wanting to come to our conference. And we noticed that it's so much easier now to find Australian content on a bookshelf in the store. From I would say probably about 2010 it was very hard for me to find a book that I would like to read in romance genre, romantic suspense, or paranormal romance, written by an Australian author and set in Australia. That's now changed. And we're so fortunate in that regard that we have a volume of titles available, we have an increasing number of authors in Australia who are getting published. And our theory is that, especially with the parallel importation restrictions, if they're changed, that it will reduce our, I guess our capacity or our potential to actually get picked up by a publisher.

From what we're seeing with New Zealand it will contract the Australian industry. We can see that with getting the international cheaper versions in that there will be a downward push on prices, perhaps, although from the draft report I'm not sure if that's backed up with some statistical data there. But I don't think in the long term that it would serve the Australian publishing industry, or it would serve the consumers. As Delia mentioned, the cultural aspect of this, I can now find a book set in Australia in the genre that I love. I couldn't do that before. And on the odd occasion that I could find a book it was such a thrill to find something that I could relate to that I can engage with on a home base perspective.

But also, for example, if there was a city or a town that was described there I'd go look for it. I might even go visit it because of the information that you've read about it in a book. And if that gets translated to screen it's, you know, joy, joy, happy days for everybody there. But I think the term of the copyright possibly doesn't also address that potential, where you have - we have a number of our members at the moment who are in talks with Hollywood Studios about their work, and works have been optioned. But that's a very long process to get from the point of talks and options to a box office sort of thing, so - and I don't know if that's been factored in as well. And even though it may be the exception to the rule for that to happen we all have the hope that one day that will happen. And this kind of takes away that hope for a creator to be able to build a legacy.

**MR COPPEL:** When you talk about the impact of a new work on the backlist, is there a difference in terms of the impact that it has on sort of digital sales, is it the non-digital print sales, is there something about digital that - - -

**MS STEIN:** There is. I think digital is much more accessible and it's more affordable in this regard. And it's, I guess, you can have an e-reader where you can have thousands of titles on it. If you actually had thousands of paperback titles at home the husband is going to have a problem with storage. So it's a lot of people will go for the digital. I personally prefer a paperback copy, but that's just me. There are so many people out there that use - and digital sales was on the increase, I think it's only just beginning to plateau. But even so, the volume of those digital sales worldwide is still quite significant.

It's I think probably when you're looking at it from - you have authors who are only published in digital formats as opposed to the print versions because it's costly for a publisher to put every single title into a print format but they can put every single title into a digital format and put it out in the marketplace. And that's an earning potential. And when an author proves themselves in sales then they can actually straddle both

5 markets in print and digital, or they can even do something like self-publish their own work. There's a lot of our members have done as well, we call them hybrid authors, where they've published with a traditional publisher but then also because of technology they're able to create their own work, publish it, release it to the market and receive sales from that directly to them.

10 **MS CHESTER:** Delia, you mentioned earlier concerns around moving from fair dealing to fair use, and that's another area of our report where we were able to look at some work that had been commissioned by stakeholder groups about what might be the potential impact of moving from fair dealing to fair use, and we did a critique of some of those methodologies in our draft report. We were also very mindful that the department - well, previously the Department of the Attorney General but  
15 now the Department of Communications, which has copyright policy responsibility, had actually commissioned so that - and sort of an independent government agency has commissioned a cost benefit analysis to be done and we're hoping that that will - well, we're expecting that that will be available for us for our final report.

20 So that will better than address the issues around the relative merits of fair dealing versus fair use in terms of what might be transitional and ongoing impacts. And obviously trying to capture both benefits and costs, which is not a straightforward nor easy exercise. What in particular do  
25 you have concerns about in terms of what you would see as being copyright works that you would be remunerated for today that you would see as not being remunerated under the fair use, the proposed fair use for factors and exceptions, mindful as well that we're not making any recommendations to change statutory licensing for education?

30 **MS FALCONER:** Well my work, you know, I have a 20 year body of work now, and a lot of my work is taught at a lot of different universities. It's not as if the CAL method is flawless, I know that often, you know, sometimes if the universities are audited in the year that my work is in that  
35 survey I - you know, I miss out. But I can live with that because authors, you know, we do subsidise the culture a lot and we're aware of that and that's I suppose part of feeling like you're part of a literary community. However, I find that my work is, both through CAL but also through the - I haven't had much of a CAL payment this year but sometimes it's  
40 quite big, and that payment could be for work that is being taught, excerpts that are being taught from my first novel or my second novel. Or it could be quite recent work. And I find there's actually - I find that it is like an investment portfolio that in fact it's often some of my earlier work that has been canonised in some courses, that tends to be taught, it will  
45 appear more often on my statements than recent stuff.

**MS CHESTER:** Okay, so it's short excerpts from previous publications?

**MS FALCONER:** Yes.

5

**MS CHESTER:** That you are currently getting remunerated for.

**MS FALCONER:** Yes. Yes.

10 **MS CHESTER:** What sort of percentage of the royalties that you're getting from CAL would represent those short excerpts?

15 **MS FALCONER:** Now that's a hard question because sometimes shorter pieces and articles that I've published have been included as well. But I'd say it's mostly excerpts, mostly excerpts from my novels. And actually from my Sydney as well which is being taught across a lot of institutions at the moment.

20 **MS CHESTER:** When you say excerpts, sort of what percentage of the original work would those excerpts represent?

**MS FALCONER:** Well at the moment universities aren't able to copy more than 10 per cent of any book. So, and I know that when I set work for my courses the library checks.

25

**MS CHESTER:** Yes, you do the same.

30 **MS FALCONER:** It's a very straightforward process, it doesn't take very long at all. The difference is that when I as a - in my academic role, say to the library, look, I'd like to publish a copy of the first chapter of Mandy Sayer's Dreamtime Alice, they go, yes, that's less than 10 per cent. The difference is that that's not being - they're not going- or if a short story that has appeared, if I'm publishing that say as a copy as a pdf for my students to then access that's very different to content that exists  
35 that say I've ordered from a university academic publication. Now I can't tell you the numbers there but there are some very good studies that I have looked at that are looking at the increasing costs for academic libraries, both at a senior school level and at a university level. One of those studies says that that system is already skewed towards global - of getting content  
40 from overseas, and is skewed against the Australian content. But also that is quite expensive as well.

45 So not only is there an issue for me in terms of that being quite a - sometimes quite a healthy part of my income for the year, I find personally the healthier part of my income is coming from ELR and PLR

payments but not, you know, I have a concern as a teacher teaching Australian literature very often and Australian writing and being part of that culture of teaching students as often as I can our own literature, I worry that that those things are also at risk without those payments  
5 because, really, it is at the point where the Australian writing community is so pressed because individual writers have lost 75 - the funding to individual writers has dropped by 75 per cent with all the changes to the Australian Council at the moment. So a lot of us really feel increasingly stretched. So that loss of that sector of one's income just it can often be a  
10 quarter, a third sometimes of the average writing income, is a very big deal.

**MR COPPEL:** Delia, you made a comment that the draft report failed to take adequate account of industry experts, are there any industry experts  
15 that you can see from our submissions either on the initial report or subsequent to the draft report where there are obvious people that we should have spoken to?

**MS FALCONER:** No, I think there are obvious areas of literature that I  
20 would like you to speak to. Some of that literature around, and I'd be happy to provide references because I don't have it off the top of my head, but I think certainly around some of the numbers that are being crunched around Soft Power I think are very relevant. Some of the issues around the cost to education through digital services, I mean, I thought - I did  
25 think that the research that was done by CAL and by the ASA was very good but I feel the broader - I thought that the emphasis in the report was on the potential gains in the industry but I felt there was a lack of some grey literature, which is just literature outside of - that encompasses broader cultural areas.

30  
**MR COPPEL:** If you could take that on notice and get back to us that would be helpful.

**MS FALCONER:** Yes. I would be happy to. I actually took a lot of the  
35 references out of what I was going to say today because I thought we wouldn't have time today but I would be more than happy to do that.

**MR COPPEL:** Thank you. Okay, that's the questions that we have.

40 **MS CHESTER:** Thank you.

**MR COPPEL:** Thank you, again, for participating in the hearing and we've given you a bit of homework and we look forward to receiving that.  
45 Thank you.

**MS FALCONER:** Thank you.

**MS CHESTER:** It's nice to give the lecturer homework.

5 **MS FALCONER:** Well hopefully there will be homework back for you.

**MR COPPEL:** A slight change in scheduling due to the absence at the moment of Bernd Winter. I understand Tamara Winikoff from the National Association for the Visual Arts - so welcome, Tamara.

10

**MS CHESTER:** Don't feel rushed. You being here early is being very helpful for us.

15 **MR COPPEL:** Please have a seat. Make yourself comfortable. And when you're ready if for the transcript you can give your name and who you represent and a brief opening statement?

20 **MS WINIKOFF:** Okay, thank you. So my name is Tamara Winikoff, I am the Executive Director of the National Association for the Visual Arts and NAVA is the peak body representing the visual and media arts craft and design sector. And it represents a constituency of about 25,000 creators and other people who work the visual arts. Our submission to both the Productivity Commission and the Australian Law Reform Commission in both those submissions we opposed the replacement of the  
25 fair deal in copyright regime with fair use because we anticipate that this loosening of copyright regulation will seriously disadvantage visual artists in being able to benefit from the use of their work and thus sustain their careers.

30 Visual and media artists, photographers, illustrators, cartoonists, craftspeople and designers, are already very substantially contributing and subsidising the public's access to cultural experience. And often they're more than generous when asked for use of their work for a great variety of purposes. But the great majority of artists are low income earners. And  
35 within the last national survey it showed that the mean total income that they earned was \$23,100 a year and craftspeople about \$29,800 a year. So their survival within the profession is extremely precarious. So when it comes to copyright even under the current regime artists face the overwhelming challenge of gaining access to justice in seeking to counter  
40 the widespread illicit exploitation of their intellectual property.

According to the art sector survey we did last month of the 643 artists who participated 43 per cent had had their copyright infringed. And while around 40 per cent have earned some income from their copyright  
45 payments only 9.24 per cent reported that they received fair payment for

the use of their work. I will just read you some examples of the comments that they made. I mean, we had probably about 500 comments so I've just selected three. So the first one says:

5           “Reproductions of my drawings being sold in a public institution were reproduced overseas without my knowledge and reproduced on jigsaw puzzles and then sold to Coles where they were sold nationwide. I had a solicitor follow it up with Coles, I received payment which I did not consider to be fair but which failing a better alternative I accepted.  
10       The work was not removed from sale as I requested but as I was very young at the time I accepted the payment and conditions as being better than nothing at all.”

Then the second quote is from someone who says:

15           “My photographs were used on saleable items without my permission. I contacted the people who used the photos, there have been a few, some people were apologetic and paid but others, mainly record companies, just told me to like it or lump it as they worked by their  
20       own rules. I couldn't afford to take them to court. I haven't worked for these companies since.”

The third person says:

25           “I design trophies for a national member organisation. I design works in order to profit from manufacturing the objects. After the first year the organisation commissioned the same design from a trophy maker in another state. They made these for many years and I lost the 25,000 profit a year for those years after. I rang the managing  
30       director of the organisation and told him that this was infringing my copyright and his response was simply, ‘sue us’.”

Implicit in that sentence was that a one man business has no chance of winning against them. And if this is what it's like under the current regime  
35       which imposes certain limited exceptions imagine how much harder it would be if a concept is open and wide to interpretation as fairness became the only test of recognition of copyright. And each time it will have to be prosecuted through the legal system, which for most artists as these demonstrate is unaffordable. And that of course is what the  
40       exploiters rely on. We see nothing in the Productivity Commission's recommendations that would be supportive of Australian artists. The thrust of the report aims to privilege users and overshadows completely any consideration of specific impacts on visual artists and other creators.



- My organisation, NAVA, is not opposed to changes to the system but we contend that it should focus on streamlining copyright and sharing of content on genuinely fair terms, including fair compensation to creators. The world is voracious for content. I would like to ask the Productivity
- 5 Commission why you have given so little consideration to the consequences of sacrificing the career viability of the creators of this content. NAVA asserts that fair use risks the creative geese that lay the golden eggs being killed off by greedy giant commercial enterprises.
- 10 **MR COPPEL:** Thank you, Tamara. Can I maybe begin by starting with where you finished, which is the point that a preferable course of action would be to improve the licensing or existing licensing arrangements. And you've given many examples where under the current arrangements it's very difficult to enforce infringement and the nature of any of these
- 15 works makes it also amenable to infringement. So I'm interested in hearing from you how you would see an improvement in the licensing arrangements limiting those cases of infringement, on deliberate wanton infringement?
- 20 **MS WINIKOFF:** Yes, that's the question that I think that all of us who work in this area have been trying to find the answer to in various ways, particularly in the digital environment. And I guess we're interested in the solutions that have been developed in the UK, the Copyright Hub, as one example of how using open source technology you can enable licensing
- 25 for a fair payment, or for free, it's up to the person to make their own decision, for high volume and low value transactions. So we see that as one way in which the access to the work can be facilitated without sacrificing the payment that should go to the creator.
- 30 I think as time goes on and the development of various technological mechanisms, the way that they develop over time that is going to become easier to actually track use and automate the process whereby - or to some degree automate the process whereby the users can simply dial in what they want to use it for. There will be solutions that have been pre agreed
- 35 by the creator, and it will all happen on line very straightforwardly. And I think that that is really, our recommendation would be to be cautious and await or allow for the development of those mechanisms rather than changing the law in such a way that the producers of the content or the intellectual property are disadvantaged on a very long term basis. And
- 40 that their capacity to negotiate fair payment for the use of their work is very much diminished if not eliminated altogether.

**MR COPPEL:** I mean the music industry is one area where these online options have been developed and have enabled access to content, which is

one of the drivers limiting piracy. What role do you see then for the visual arts industry to pursue the same strategy?

5       **MS WINIKOFF:** I think it's a very good thing to do. I think that that's something that we should certainly be aiming for. And I mean we're not a licensing body but there are visual arts licensing bodies like Viscopy and Copyright Agency and I think that that would be a very important course of action for them.

10       **MR COPPEL:** So are there any initiatives under way to move down this track?

15       **MS WINIKOFF:** You would probably be better asking Viscopy about that because that's their business. I know that it's a matter that's of great interest to everybody across the whole of the art sector and we're all looking into what we're all hoping that those who are responsible for doing the licensing will actually develop those mechanisms. I'm not completely au fait with it but I was told about something that YouTube has developed which allows a similar sort of process to be used. And  
20       YouTube is a visual medium as much as a sound medium and so I would imagine that that might, you know, some variation of that might be possible to apply in the visual arts. But it's not my area of expertise.

25       **MR COPPEL:** You've also made the point that shifting to fair use would in some instances equate to free use. Can you give some examples of the type of work that was remunerable under a fair dealing exception that would become non remunerable under a fair use provision?

30       **MS WINIKOFF:** Well I suppose the problem with the fair use provision is that it's open slather and until those limits of, you know, what the boundaries are between what's fair and what's not fair are tested in the courts it's not going to be possible for that to be negotiated just on a good will basis because it's challengeable legally. And what I understand is that what's happened in the United States is that there's a huge variation  
35       in the legal judgments that have been made which is just causing chaos and confusion everywhere.

40       With something as difficult to define as fair, fairness, you can imagine that the same thing would be likely to happen in the Australian courts. So you know, by the time the case law is developed which is going to be years and years and years because you have to wait for people who have had their copyright infringed having enough money to be able to bring a case in the first instance, you know, there will be a whole lot of creators whose careers have just gone down the drain.

45

**MR COPPEL:** I mean the purpose of the case law in a sense is to identify what those boundaries are.

**MS WINIKOFF:** Of course.

5

**MR COPPEL:** There may be an issue as to how wide those boundaries are over an initial sort of transition period. We've identified a need for guidance that can act as a mechanism to reduce the width of those boundaries but we think that litigation really will be in those areas where we're testing - we're very close to the boundary and it's contested as to which side of the boundary it is. There are many other uses where it would be pretty clear cut. So litigation is really only showing the tip of the iceberg. But I would be interested in getting a sense from you as to whether those boundaries would be ones that are initially sort of within a fairly limited range, or do you see an adoption of fair use initially as one where the boundaries could span potentially quite a wide range of remunerable material?

**MS WINIKOFF:** Yes, I think the real problem is that the users, and on the whole, you know, we can anticipate who the main users are going to be, you know, the Googles and the huge companies, intellectual property - I mean, the online companies. And I think the real problem is that the onus of responsibility then comes back to the creator rather than it being the exception having to be proved, you know, that instead of the presumption being that most copyright uses are not fair unless they're properly negotiated the presumption goes the other way. And so on the basis of that presumption you can imagine because this is a power game that the powerful entities that want to use the intellectual property of the creators are going to take it and wait and see whether somebody challenges them.

So I think that that substantially will expand the scope of what they feel that they can try to get away with. And, you know, because of that power imbalance artists are in a particularly vulnerable position because they're very low income people in the first instance to try to bring any matter of this kind to law, and in fact most of the examples that we have - that, you know, most of the examples that were quoted in the answers to our question in the survey were really done on the basis of negotiation, that it was illegal to use copyright unless you fell within one of those quite limited exceptions. With the presumption going the other way, you know, you can see that the scope for exploitation is magnified many times over.

**MR COPPEL:** I don't think the presumption does go the other way. It's still the responsibility of the user to be confident that they are using the material in a legitimate way.

45

**MS WINIKOFF:** But it only happens when they're tested. You know, they may argue the case that it's fair but unless somebody is there to argue it with them why wouldn't they try to get away with it?

5

**MR COPPEL:** But that gets back to the initial point about how wide those boundaries are under a shift from the current arrangements to fair use.

10 **MS CHESTER:** One issue that's come up in the context of asking people for their rights holders if they were operating in the US or Israel today what would not be remunerated that would be remunerated if they were operating in Australia, is that a question that you'd feel you'd be able to answer based on your knowledge of your membership and of any of  
15 them having worked in those jurisdictions?

**MS WINIKOFF:** No.

20 **MS CHESTER:** Of your membership as well, I'm assuming, and this may be wrong, that some of them might be what we have referred to as transformative artists where they take another piece of creative works and they transform it, and there is obviously a spectrum across which transformative art reside, where do you kind of draw the line in the sand for when it then becomes something so distinct or disparate from the  
25 original creative right that it does become a new and separate standalone piece of copyright?

**MS WINIKOFF:** Look, I think that there are a couple of ways in which that is already being dealt with through the - through both critique, you  
30 know, the exceptions for critique and parody and satire, there's already room for transformative reuse. But our simple equation is to say on the whole artists are very generous with their work and in most cases they will say yes to another artist reusing their work for artistic purposes. But where they draw the line and where it was interesting in our survey was  
35 that when we asked the question about whether they thought - actually I will just check the question because we were fairly careful about how we asked the question.

40 Would you be happy for another artist to use your work without your permission or payment and make a profit from it?" I think that there are two issues there; one is the question about "without permission", because you then come into the sort of moral rights territory where artists at the moment have the capacity to say "I feel that that would be derogatory to my reputation if you did that", and that's already protected in law.

45

5       The other is that the question around whether the reuse will then  
enable that re-user to make a profit. In our case, in the case of the people  
who answered our survey, about 95 - yes, just over 95 per cent of them  
said no, that they didn't think that that was fair that somebody else could  
reuse without their permission and make a profit without sharing the profit  
and without getting permission. I guess in consulting with artists and  
being guided by them, our bottom line is given that they are on the whole  
generous to other artists, that the least that should happen is that they  
should be asked.

10       **MR COPPEL:** Is that survey something that you could share with the  
Commission?

15       **MS WINIKOFF:** It's been sent to the Commission, both the survey and  
all the comments, except for those who said they didn't want their  
comments shared and there were only about three of those. You've got  
that material.

20       **MR COPPEL:** Okay, I'll follow that one up. I don't seem to have it in  
front of me but thank you.

**MS WINIKOFF:** I've got a copy I can give you.

25       **MR COPPEL:** That's okay.

**MS CHESTER:** If you've got a copy, I'm happy to take it today.

**MS WINIKOFF:** Yes, sure.

30       **MS CHESTER:** Thank you.

**MS WINIKOFF:** The original is in colour, so it's easier to read.

35       **MR COPPEL:** Thank you.

**MS CHESTER:** Thank you.

40       **MR COPPEL:** I think that covers the questions that we had for you, so  
thank you very much for participating in today's hearing, and also thank  
you for your contributions through the submissions.

**MS WINIKOFF:** You're welcome.

45       **MS CHESTER:** Thanks, Tamara.

**MR COPPEL:** Our next participant is Bernd Winter from DDI Australia. Welcome, Bernd, and make yourself comfortable and when you're ready, if you could give your name and who you represent for the purposes of the transcript and a brief opening statement.

5

**MR WINTER:** Thank you. Bernd Winter, I represent today my company, DDI Australia, but I also represent as the chair of the German International School, I suppose I represent the future of Australia to some degree; I represent those students. I also represent, still holding also a  
10 European passport, I represent some of the European community and having migrated to Australia as a designer, I suppose I represent the design community.

My particular concern and why I wanted to speak to you today was  
15 that I feel IP rights are the same as ID rights. I think it is a basic human right that people have a right to their IP. I think as the design industry and as the whole media industry evolves - a colleague of mine has just come back from the Cannes Festival and everything is moving into virtual reality. When you look at those new media and you look at the way they  
20 integrate, whether it's something is the written word, whether it's sung, whether it's projected, whether it's made into an object. If you design a 3D chair at the moment in a virtual reality game, it's got like one set of copyright. If you design the real chair you've only got five years and you've got to apply for it four years before. I think it's untenable.

25

Therefore, I suppose I am suggesting that Australia urgently needs to organise this in the same way as the music industry has obviously organised itself to have protection and that Australia should adopt the EU  
30 International Design Rights in terms of patent, copyright and trademarks and sign The Hague Agreement, which I think 60 countries have already signed. I think even the Vatican might have signed it now. There are lots of countries internationally that think this is the right standard to agree to and I think it would be important for Australia to do so.

35 Then most importantly, I think Australia must enforce that law. There should be a six months amnesty in which I suppose people should confiscate in counterfeit product because industrial design I think is the weakest link at the moment. I actually in my design department employ a lot of industrial designers. They actually cannot get a job. They would  
40 love to work as an industrial designer but they get ripped off before they even do anything. It's such an issue. You know, they can only either work overseas or just change their industry or work as a barista. It's very poor unfortunately.

Just to give you an example, in the music industry imagine if someone when they're writing a song, instead of putting it on YouTube and seeing how good or bad it is, in the same way designers when they design a new product, they might put it out to test the market. As soon as they do that,  
5 Kmart or whoever, Bunnings, all these people just rip it off and abuse it. So before the actual designer can actually lodge the prototype, sometimes the copies are made. These people are designing free for these ginormous companies with massive shareholdings. It's just so grossly unfair and they have not got a leg to stand on.

10 I think these laws need to be enforced and it needs to be policed. I think in that original document here about the Commission, there was a suggestion there's like economic benefit of reducing IP. I would suggest when you really think that through, it would be like saying there's  
15 economic benefit to the South American drug cartel, you know, because that also brings jobs into South America but that can't be real. When you really do the numbers on what it costs society for these young people to go through university and not get a job or to get an education that they then can't pursue in this country because there isn't a basis for it.

20 If you think of probably the best school that happened in that sort of arena is the Bauhaus in the 1910 and 20s as a movement. If you think the Bauhaus would be possible in Australia right now, well if you really think that through, and we had a discussion one night, and it could never work.  
25 Now I'm not saying right now in this climate it would work in Europe necessarily either but at least they would have a chance to kind of see how good they are. They could get a group together and actually work it because they have protection for their ideas and their rights and they can kind of manufacture things and make things.

30 At the end of the day I believe designers in lots of ways are the backbone of society. They're the people who design artificial limbs. They design better helmets, seat belts. I know who lost or settled out of Court with the New South Wales Government on a fire extinguishing pack  
35 because some of them work 12-hour shifts. They kind of have three days on, then four days off or whatever, that kind of system. In his own time he had his own design thing. He developed his own product. When he made it really well and put it to market, basically the government just counterfeited his product and had someone else knock it off cheaper.  
40 When he then said, "But I want to be paid on this", they ended up in a \$200,000 Court battle and it was just so embarrassing.

45 This kind of thing is going on where people actually invent things to further society, get their livelihood questioned and their IP stolen. If there is a design industry, there's never going to be a proper industry because

that's the ideas; that's where everything comes from. If people don't design the things - think of fashion, otherwise you're just going to make potato sacks. There needs to be someone who comes up with the ideas.

5 I firmly believe we've got some great talent in Australia and we need to foster that. We need to find ways of protecting that and encouraging that. I suppose in closing, I'd just like to say, like musicians, there's obviously a great system in place. I'm not sure how good The Hague Agreement is but it's certainly a very good starting point and it's a good  
10 standard. Industrial design covers so much more than just furniture. It's like all sorts of everyday products. There are companies in Australia who have done little kitchen products and they actually take them to the US. Some of them don't even produce their stuff in Australia any more. It might get here like two years later because they know if they start here,  
15 they'll never get it off the ground. It's that bad. So if we could find ways to help those people and ensure that the policing happens.

I suppose international fines - I just looked that up this morning and I suppose the pound's a little bit different now but you know it said £50,000  
20 in the UK and 10 years' jail. I think the same way as we have introduced good governance in other companies and started punishing white-collar crime, it is a white-collar crime to deprive these young, talented people of their livelihood and of their potential future. With design you can never say, "Is this something that's going to be awesome". Like who is to say  
25 that the egg chair ever became such a beautiful symbol of design or any of those products. It needs to be around for 50 years first before people can make that call. There's a German phrase called "im Keim erstickt" which is like you know you kind of squash it before it even germinates; that's what we're doing here. We just cannot have an industry like that, a design  
30 industry.

**MR COPPEL:** Thank you, Bernd. Maybe I can just ask you a point of clarification when you make the statement that designs here are being  
35 ripped off with replicas. Are you referring to replicas made after the period of protection from a registered and certified design or before then?

**MR WINTER:** I refer to firstly, like I said before, I think having to register a design and having like a three-month period or whatever. I think it's completely unworkable. I think that as a system for young  
40 designers - I know one of the young designers. He's got 15 designs at the moment. If he puts them up on Instagram tomorrow to see which ones he should develop, they'll be gone. That's just giving it away. It would be like as if someone published a new song and then put it on YouTube. The minute he does that, he's lost that. That is the problem with - whether you  
45 call that a replica. It really is counterfeit because people just take that idea



and steal it. There's no recognition. There's no mention of the originator. I think from when people actually create something, they should automatically have the copyright of that, the same as if you now sing and song and you write it and that's yours.

5

**MR COPPEL:** In Australia, the registered designs, they cover furniture, they cover bottles, they cover clothes, they cover food packaging. Are you referring to something which is specific to - - -

10

**MR WINTER:** I'm referring to that as well because I think the timing for that is probably also out of date. I think all of those copyright and design laws should be the same, which is why I'm referring to now in virtual reality, they're all going to melt. So to have different copyright laws apply to different parts, it's going to be an absolute nightmare. Do you see what I'm saying? Therefore, if you're going to have an egg chair in a video game, do you then pay the person who originally has the deal and pay the company in Denmark that actually still has the copyright on that. It's very, very difficult. I think there need to be some clear strokes to that and make it the same for everyone would be a big part of that.

20

**MS CHESTER:** Bernd, we've been fortunate enough to hear from quite a few designers post our draft report. We've received submissions and we've heard from a number of them during our public hearings, indeed, here in Sydney last week, down in Melbourne, and even in Canberra. The issue that you're touching on in terms of this period of risk where sort of the prototype's being developed or the idea's being sort of market tested, that's been raised with us. Is that the main area where you feel the designers are at greatest risk of unauthorised copying, given that there hasn't been a registration process yet?

30

**MR WINTER:** Yes, I think that's the biggest area and it probably links a little bit to also enforcing, and there's a company called Cool Hunter. They, at some stage, had I think over a million followers on Facebook before Facebook took the page down. The reason why Facebook took the page down is because they illegally just put everyone else's work up there making themselves look great, "Look, I found this cool thing" but without crediting anyone, and that is wrong. That's a bit of a hassle to find out who created this but if have a piece of architect or you have a piece of photography, just do the right thing and credit the people at least. So if you credit that person, credit that writer, credit that photographer, credit that architect, then anyone has got an easy way now to kind of go, "It's done. Bang. There it is". So anyone can just get back to the source.

35

40

45 In this information age it's a very, very simple thing to do and it's an absolute courtesy and I think that is that human right that I'm talking

about of everyone's IP. If people create something, they should have the ability to kind of say, "Well, if I put it out there, I put my name to it, so that when people reproduce this, just take my name with it, when I'm the photographer". When you open (indistinct) it credits the photographer there. It's not that uncommon but unfortunately people now sort of fast track and where they don't have to, there is none of that crediting. That is a very big problem and that time to market. So when Kmart rips off some of those young designers, of course they don't credit them. They go, "Oh whoops".

**MR COPPEL:** You have a creative agency that represents many designers. Are you in a position to give us a sense as to the commercial life of a design, the average commercial life?

**MR WINTER:** Well that's a very good question. I think the commercial life of a design, like at the moment you probably know "Keep Calm". You know that whole campaign; I think it relates back to the Second World War. Is that it's second or its third iteration. I don't know who wrote it but I think if someone did have some point, it would be nice if they still got some sort of credit for it. It's not just in a financial sense but just in terms of attributing things to people in the correct way. That's just a nice, rightful thing for society. I think it is manners. I think when we talk about art, we talk about a Picasso painting. We don't just talk about the back. I think we attribute things to people because they have made a contribution to society of doing something different first and opening up our eyes to other ways of looking at things. People that have written great things, with great writers we can quote things and people say, "Yes, that's Shakespeare, that's Proust, that's whoever". I think it's an important part of our culture to do so.

**MR COPPEL:** Many of the points you've made relate to deliberate infringement or piracy of others works and a common theme in many of the participants hearings over the last week have been the difficulty of enforcement and I'm interested in your views as to how other laws can complement the intellectual property laws, like passing off. We've heard particularly in relation to design rights, that often the copy comes together with a picture of the original creator against their will, which strikes me as an example of passing off. How do those laws address those sorts of concerns?

**MR WINTER:** Well the difficulty is that - like let's for example take the guy who designed the fire pack. If he launched a new hit single on The Voice, which I was watching last night, he would have so much backing. If something happened or if he needed to defend his right, easily there would be like a two or 10 million dollar lawyer, just a whole system that

would back him. With these individual designers and creators, unfortunately that's not the case. They quite often - individuals, they kind of do what they do. They're more workers and engineers and designers. They're not good at writing nasty letters and threatening people. So it's  
5 very difficult for them to kind of protect themselves. They are kind of hopeless. They don't lodge things on time even if they kind of try and register something. I think that's why we need to kind of have a very simple ruling where we help them and we protect them. I think the media is a very big perpetrator of that.

10  
On the radio, and don't kill me for that, but I listen to Fitzy and Wippa, and they do this thing where they at the moment develop a product themselves and they put it on to this TV show and promote it and say how cool they are and whatever. I'm not sure whether it's to promote the TV  
15 show or whichever but either way, when they talk about it, they're sort of, "This morning we're spinning the wheel and we're giving away a Louis Vuitton product or whatever" and they kind of say how cool it is. When they talk about themselves and their wife, they're talking about, "You wouldn't buy the real thing. Just buy a knock off, you know, no one will know". You don't get the real (indistinct) shoes, you kind of get \$100 knock-offs. You don't pay 500 bucks for that".

There's an inbred kind of weird attitude in Australia. I don't know where that comes from, but it's that a knock off is kind of an Aussie thing.  
25 I think that is the biggest thing we have to stamp out. I think we have to kind of change that to fair go and say you've got to give everyone a fair go and you cannot knock off stuff, because the minute you do that, you're killing your whole industry. I've actually got an example of a design student who was kind of writing on a blog at some stage and said, "This is great. This is a copper metal folded over thing. I could make that for 300  
30 bucks or whatever". Some other design student said, "You idiot. You're arguing against our whole industry here. It's not about that you can knock this off yourself. It is about that someone had the idea and brings it to market and develops it and makes this." I think it's quite a road of  
35 understanding and appreciation but I think there is a real long-term benefit to the Australian society.

**MR COPPEL:** My sense is that consumers that may not deliberately purchase a knock-off can identify the genuine product from the non-  
40 genuine product and receiving a knock-off wouldn't see that as the genuine article. I can give the example of my daughter who bought a pair of Nike shoes through a website and when they came, they weren't obviously Nike shoes. She's never worn them; she refuses to wear them. I wonder whether that's something that's more general than that anecdote  
45 but you seem to suggest it's part of the Australian psyche.

**MR WINTER:** I'm not saying everyone but good on your daughter. That's great. It's very considerate of her, but I think there is a part of society that I'm saying that kind of endorses this, "Buy a knock off. Why would you get the real thing? Who wants to pay that sort of money?"

5 I've got Eames chairs in the office that are like 19 years old. You should see them; they're awesome. They're scratched and everything but they're just fantastic. Like all this other furniture would be like those normal office chairs. You just throw them out every five years. It's just landfill.

10 I don't want to get too focused on furniture because I really believe the big opportunity here for Australia is - at the moment we're just scratching the surface with a few people who have kind of made a little bit of furniture, like Adam Goodrum. But actually the design industry when you look at it in a place like Germany, like the stuff that people design, every

15 wheelchair. Everything needs to be designed.

We could be making so many things. Like, you know, the Australian boat building industry, it's like an awesome capacity to kind of build stuff and register it and own as their design, not just from winged keel but from

20 an interior perspective of generating great income for this country. I know we can't compete on mass production but we could very much compete on one-off, on exclusive, on individual, on unique production. We've got some great craftsmen and we have some great designers. I think if we bring those people to the task and let them build, we could achieve some

25 great things.

**MS CHESTER:** I only had one other question, Bernd. I guess it's trying to distinguish parts of the market and I won't use furniture as an example. We heard from the woman who owns and runs top3 by design and she

30 gave several examples or anecdotes of where some of her customers were mortified when they found out that what they were looking for was an unauthorised copy. It wasn't actually the original design of a piece of work. So just setting aside the confusion factor where it's difficult to distinguish between an unauthorised copy and the original design

35 produced piece, where there is such a price difference between a replica and an original design piece, because of the quality and the workmanship and what's been used, are they kind of like separate markets though anyway? The consumer who's going to buy the cheap replica would never look at purchasing the original design piece of work, it's just not in

40 their budget. The reason I'm asking it from this perspective is do you view that differently if it's someone purchasing a cheap replica if it's outside the design protection period, versus someone buying a cheap replica or an unauthorised copy within the design protection period, given I'm suggesting that to some extent they might be separate component

45 parts of the market. Am I articulating that well enough or not?

**MR WINTER:** Yes, I think you are articulating that well enough. I'm not sure about the second part of your question. I think to the first part I do think unfortunately a lot of people don't actually know the difference and if they had the opportunity to really think about it, they would rather save up their money, the same as your daughter for the right shoes, and not be passed off with some secondary product, because otherwise they just buy some other cool runners. You know, it's not about that.

10 I think there are these few examples of design products where the original is much more expensive than the sort of cheap knock offs. I think there's a real cost to society of those cheap knock offs. There are design chairs. You know, there are some great - like the Panton chairs, an exclusion bolt chair that you can buy for a few hundred dollars. The fact that it might be a bit more expensive in Australia is also because those that bring in that furniture fight so hard and they've got such small market share because everyone just wants a knock off so it makes it very difficult. If it became more acceptable and there would be competition, it would actually be cheaper I would argue. If you order those products from Europe, they're actually cheaper there.

**MS CHESTER:** Would that suggest a bit more of a holistic solution to these concerns in terms of someone would offer an educative campaign so Australian consumers can better - if they do want to do the right thing and save up and buy a piece of furniture that's going to last them 20 years and not three years.

**MR WINTER:** Exactly, yes.

30 **MS CHESTER:** Who do you see playing that sort of educative role?

**MR WINTER:** My agency. I do think it would be a concerted effort between all bodies. I think it would probably start from the UTS with some of the professors, or from universities. I think it would be a general education process the same way as you educate society that it's unhealthy to smoke. I think it's an important process and I think it is something that we could maybe offer reward programs in terms of getting start-up companies with more like design collectives to help them get off the ground. The most important thing would be that we really protect their work, because under the current circumstances, I can guarantee, I've helped, I've tried everything with some of these people to try and get them - it just doesn't work. They just get defrauded of it left, right and centre. It's not possible. We need to set an environment where they can actually prosper and I think signing that European Hague Treaty as a common ground would be the first and most important step to do so and enforce it.

**MR COPPEL:** Thank you, Bernd, for participating in today's hearing.

**MR WINTER:** Thank you.

5

**MR COPPEL:** Ladies and gentlemen, that concludes today's scheduled proceedings. For the record, is there anyone else who wants to appear before the Commission today?

10 **MS RUNCIE:** Yes.

**MR COPPEL:** If you could give your name for the record and very brief remarks, please.

15 **MS RUNCIE:** Yes, very brief because I think we're down to 1 minute, 30 seconds. My name is Sarah Runcie and I come from the Australian Publishers Association. You've heard from one of my colleagues, Michael Gordon-Smith in your Canberra hearing. I don't actually have  
20 any opening remarks but we felt we couldn't leave you without giving you something to take away. So we have a list of questions for you that we'd like to give you and to collate on the behalf of rights holders, further questions that we feel are important to be answered for us to fully understand the implications of your report. We would be grateful if you would consider those questions and get back to us because you know  
25 where we are. Thank you.

**MR COPPEL:** Thank you for that homework. Thank you, Sarah.

30 **MS PHILLIPS:** Just three things that came up recently and I can be brief, perhaps 90 seconds.

**MR COPPEL:** The clock's ticking. You still have to say your name again very briefly.

35 **MS PHILLIPS:** I'm still Fiona Phillips from the Australian Copyright Council. Just three matters that came up during the course of the day. First, you've raised a couple of times the Israel example and I would fess up that I did actually spend a semester studying at the Hebrew University of Jerusalem. I don't know whether that gives my comments any more  
40 authenticity or not, but I would make the observation that the Israeli Copyright Act was updated from the 1911 Copyright Act and then they updated it and it included fair use. As you've rightly identified, there includes in that regime an opportunity for the minister to regulate to make it clear that certain things are definitely within the exception. The  
45 question I would put to the Commission is how does that differ from what

we currently have, which is fair dealing, flexible dealing, which is an open exception for specific sectors and then specific exceptions that clearly make it clear beyond a shadow of a doubt that something is covered, for example, section 28, which makes public performance in a class a free exception. That was one point.

Way back this morning I think there was a question to the Australian Society of Authors about what's different between parallel importation of books and other material. I think from a practical perspective one observation I would make is that books is one of the few areas where there is still currency in the physical thing. There is actually still, believe it or not, parallel importation restrictions around films. The reality is though the business model has moved on. No one is, as a commercial business model, importing DVDs, let alone videos, into Australia. The business model has completely moved to the digital environment so I think that's a differentiating factor.

Finally, the third thing I think Commissioner Chester you said this morning no one had questioned the ABS data that the Commission had based its statements about 15 to 25 years. I know when Kate Haddock and I gave evidence on behalf of the Council you referred to our submission. I note that the Australia Council for the Arts submission has just been published on your website and I'd refer you, in particular, to pages 11 and 12 where they make some interesting comments in relation to the age of that data and its completeness and whether there are in fact some better data sources around to base those observations on. That was all.

**MS CHESTER:** Thank you.

**MR COPPEL:** Thank you, Fiona, for those further points. Is there anyone else who would like to appear before the Commission today? Thank you.

**MS NAHER:** My name is Gaby Naher. I'm the secretary of the Australian Literary Agents' Association. Unfortunately you haven't heard from many of us over the course of the days but our members have been sitting in pretty regularly. As this is clearly about the law rather than the value of Australian culture, I would like you to tell us how you propose to address the countless Australian book publishing contracts in which Australian authors have licensed Australian and New Zealand territorial copyright to Australian publishers or licensed the right for those publishers to publish their works exclusively in Australia. These contracts obviously go back decades and are worth considerable dollar funds or dollar values. Australian authors will be in breach of those contracts if

you repeal parallel import recommendations or parallel import restrictions, so I would be very interested to hear what your recommendations to the government will be in regards to remunerating authors and publishers for the consequences of all those breached contracts.

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**MR COPPEL:** I think, Gaby, that point relates to transitional arrangements which I think throughout the hearings we've emphasised as being the aspect of parallel import restrictions that the government has asked us to look at.

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**MS NAHER:** Therefore it's a pertinent question, is it not?

**MR COPPEL:** Thank you, yes. Is there anyone else who would like to appear before the Commission today? If not, I adjourn the proceedings and this concludes the Commission's public hearing for the IP arrangements inquiry for today and for the inquiry. This is the last of six full days of hearings. Thank you very much everybody.

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**MS CHESTER:** Thank you.

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**ADJOURNED**

**[12.36 pm]**