



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

ECONOMICS LEGISLATION COMMITTEE

**Reference: Designs (Consequential Amendments) Bill 2002; Designs Bill 2002**

FRIDAY, 2 MAY 2003

CANBERRA

BY AUTHORITY OF THE SENATE



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**SENATE**  
**EMPLOYMENT, WORKPLACE RELATIONS, AND**  
**EDUCATION LEGISLATION COMMITTEE**

**Friday, 2 May 2003**

**Members:** Senator Brandis (*Chair*), Senator Collins (*Deputy Chair*), Senators Chapman, Murray, Watson and Webber

**Substitute members:** Senator Ridgeway to replace Senator Murray

**Participating members:** Senators Abetz, Boswell, Buckland, George Campbell, Carr, Cherry, Conroy, Cook, Coonan, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Forshaw, Harradine, Harris, Kirk, Knowles, Lees, Lightfoot, Ludwig, Lundy, Marshall, Mason, McGauran, Murphy, Payne, Ridgeway, Sherry, Stott Despoja, Tchen and Tierney

**Senators in attendance:** Senators, Brandis, Collins, Lundy, Ridgeway, Watson and Webber

**Terms of reference for the inquiry:**

Designs Bill 2002 and the Designs (Consequential Amendments) Bill 2002

**Committee met at 9.31 a.m.**

**LINNANE, Ms Ruth I, Corporate Lawyer, Holden Ltd**

**SCOULAR, Mr Russell Gray, Government Affairs Manager, Ford Motor Company of Australia**

**CHAIR**—I call to order this public hearing of the Senate Economics Legislation Committee, which has been convened to receive evidence concerning the [Designs Bill 2002](#) and the [Designs \(Consequential Amendments\) Bill 2002](#). The provisions of the bills were referred to the committee following a report of the Senate Standing Committee for the Scrutiny of Bills, presented on 5 March 2003. The committee is to report to the Senate by 13 May 2003.

I welcome the representatives of Holden and Ford. Before we begin to take evidence, I remind you that all witnesses appearing before the committee are protected by parliamentary privilege with respect to their evidence. Parliamentary privilege refers to the special rights and immunities necessary for the discharge of parliamentary functions without obstruction or fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by that witness before this committee is treated as a breach of privilege. These privileges are intended to protect witnesses. I also remind you that giving false or misleading evidence to the committee may constitute contempt of the Senate.

A draft program has been circulated and is available in the room. I remind witnesses and members of the committee that the program will be adhered to strictly because members of the committee and, no doubt, witnesses have flights out of Canberra. The committee will adjourn at 12.45 and not a second later.

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ECONOMICS

I take it that witnesses have no objection to their evidence being taken in the brackets with other witnesses provided for in the draft program. If any witnesses do have a problem with that, could they informally intimate that to the secretariat and we will see if we can make some other arrangements. The committee prefers all evidence to be given in public but, should you at any stage wish to give any part of your evidence in private, you may ask to do so and the committee will consider your request. The committee has before it written submissions from both Ford and Holden. Would either of you like to make any additions or alterations to those written submissions before I invite you to make brief opening statements?

**Mr Scoular**—No, my submission will stand.

**Ms Linnane**—No.

**CHAIR**—I now invite you, Mr Scoular, and you, Ms Linnane—or perhaps ladies first: you, Ms Linnane, and you, Mr Scoular—to make a brief opening statement, and then we will turn to questions.

**Ms Linnane**—Thank you very much for the opportunity to participate in the discussion today. Holden has provided the committee with a detailed submission, but I would like to take this opportunity to present a brief overview of Holden's activities and our comments on the draft legislation that is under review by this committee. Holden employs over 8,000 people, mostly in Victoria and South Australia, and manufactures vehicles and engines for domestic and export use. In 2002 Holden sold more than 183,000 vehicles, achieved 22.3 per cent market share in a record market of 824,000 units and produced 203,000 engines.

Holden takes its position as an engineering leader in this company extremely seriously. Holden is one of five centres of excellence within the GM world. As such, the introduction of new designs legislation has been of significant interest to Holden. Holden is supportive of the overall objectives of the proposed legislation and has been actively involved in a review process of the current Designs Act 1906 for some 10 years. However, Holden has continued to express a number of concerns in relation to the proposed amendments.

In relation to intellectual property, we principally believe that preventing automotive companies from protecting their designs, in which there has been substantial investment, is inconsistent with the rights afforded to companies in other industries, such as furniture or other manufacturing industries, to protect their intellectual property rights. Intellectual property protection is a fundamental incentive to research and development in Australia. Holden directly employs some 480 engineers and 90 drafting people at our engineering and design facility at Port Melbourne in Victoria.

In addition, Holden engages a number of design companies within Australia, including EDAG Future and Venture Industries, which provide design and development services for Holden. Holden has a long history of innovation and development activities and is one of the highest spending private sector R&D companies in this country. In 2002, Holden invested around \$227 million in R&D expenses on new product development and innovation. Holden has also invested significant capital to support its research and development activity, with \$6 million invested in 2001 to establish a virtual reality design studio. This studio provides state of the art design facilities and aims to ensure Holden's world competitive position in the automotive industry is maintained.

Of significant concern to Holden is the fact that the provisions contained in the designs bill do not afford intellectual property protection to companies undertaking automotive design in Australia. Each new vehicle designed at Fisherman's Bend generates some 1,600 parts, only some of which embody an inventive and novel step, and those are the ones that can be protected from unauthorised copying under the current designs registration system. The parts that Holden is seeking to protect are those that are visible to the naked eye. The proposal to exclude spare parts registration in the form presently proposed by government would, if implemented, have the effect of denying automotive manufacturers effective design protection for their innovative vehicle designs. The effect of this may be wide reaching economic repercussions not only for the automotive companies but also for the Australian economy as a whole. It has been argued that design rights allow companies to charge higher prices for their products. In fact, this is not the case and has been refuted through a number of detailed price surveys that have been conducted over the period that design rights have been under review—and my colleague Russell will speak further to that.

In addition to its concerns regarding intellectual property rights, Holden is also concerned at the potential impact on the safety of vehicles. Denying the automotive industry design protection will give rise to copy parts which typically would not meet our standards of reliability and safety. To the extent that spare parts are not required to meet similar quality, safety and reliability requirements to those that the manufacturers are currently required to meet, the imported products have a greater risk of being of inferior quality. Consequently, there is a risk in the reduction of safety standards for imported spare parts because, unlike original-fitted equipment components, those parts do not presently have to meet ADR requirements.

In addition, the effect of excluding spare parts from the new designs legislation prevents Holden from protecting its original creative designs for its vehicles. Whilst a 'right of repair' defence enables the owners of a design to litigate and assert their rights based on the manufacture of parts for purposes other than repair, this will not be the case in practice. Owners of designs will be unable to prevent large scale manufacture of spare parts where the end use of such parts is not only for repair but for other purposes, including imitation, as the cost of tracing the use of each part being manufactured will extremely time consuming and impractical.

Section 79 of the bill provides a possible answer to the questions regarding spare parts registration and the availability of spare parts by allowing an opportunity for manufacture of spare parts under a compulsory licence in appropriate circumstances. As such, section 79 could remove the need for specialist provisions in relation to spare parts, allowing a protection of Australian design innovation and ensuring a competitive market structure within the spare parts area. In addition, this mechanism would allow vehicle manufacturers to address issues such as structural safety, testing, certification and validation in accordance with Australian design rules, enabling effective supply of spare parts of the same standard as the original parts of a vehicle.

In summary, Holden advocates that the provisions of section 8(ii) of the Designs Bill 2001 should continue to apply to the design of automotive components with aesthetic features. Holden strongly believes that the visible parts of a design should be protected, as it is the visible features of a product that predominantly characterise its design. This would address

the needs of Australian industry to have appropriate protection for its research and endeavour while, at the same time, not preventing the development of generic parts, which can be sold in competition with the design registered parts. Holden's preferred position is to use section 79 of the bill as a mechanism for addressing the supply of spare parts.

Holden is committed to working with government to ensure that appropriate designs legislation is introduced. Our concerns are driven by our belief that we should be able to protect our innovative vehicle designs, in which we have made a substantial investment and dedicated a considerable amount of our own resources to ensure the future of Australia's largest car maker. Thank you very much for the opportunity to provide Holden's views on this legislation.

**CHAIR**—Thank you, Ms Linnane. Mr Scoular, do you have an opening statement?

**Mr Scoular**—Yes, I do, Mr Chair. Thank you for the opportunity of appearing before you this morning. Ford Australia is an automotive industry leader in Australia. We directly employ more than 5,000 people. Our core activity is the design, engineering and manufacture of the Ford Falcon. We are, like Holden, one of the biggest business R&D investors in Australia. We have nearly 800 product development employees. Our annual investments in new product and manufacturing process R&D exceeds \$150 million. We have also participated in the review of the Design Act through the very many forums and studies that have taken place over recent years. We have done so because of the importance that we place on an innovation and design culture to the competitiveness of a dynamic Australian automotive industry.

We are supportive as a company of the overall direction of the legislation that is currently before you. We are prepared to acknowledge that a tougher eligibility criteria in the registration of designs and a shorter registration period represent a fair and reasonable outcome for all parties in what has been a pretty extensive review process. However, we do not support what we believe would be the effect of exclusion of spare parts from future design registration coverage. It is our contention that no case, based on sound empirical evidence or consistent principle, has been established that would justify such an exclusion. In fact, we would contend that, possibly during the review process, there has been what we would describe as an excessive emphasis on some aspects of economic theory in reaching such a decision. In fact, we would suggest that the emphasis has been largely focused on ifs, buts, maybes, possibles and potentials, but very little on sound empirical data. What we have witnessed during the review process of the Designs Act, in the some 10 to 12 years that it has been running in various forms, is debate surrounding the tensions that sometimes do exist between intellectual property rights and economic theory. At no stage during that process do I recall having seen any real attempt at quantifying what the net consumer benefits of the proposed changes will be.

From our perspective, the facts are that Ford Australia design-registers a number of must-match aesthetic parts. It does so simply to have as wide a base as possible over which to amortise the high costs that go into the design of a new motor vehicle. We would contend that design registration has absolutely no impact on our pricing. Our pricing of our spare parts is among the lowest in an intensely competitive automotive market. Cars like the Ford Falcon have relatively very low operating and repair costs, which has been demonstrated by a number of independent surveys that are published on a regular basis.

We would also contend that motor vehicle purchasers are very knowledgeable, and increasingly so, on aspects of the vehicles, including the operating costs, that they purchase. Some 70 per cent of Australian-made new vehicles are bought by business fleets and government purchasers. Foremost among those buyers are fleet management and leasing companies. I can assure you that they know, right down to the last cent, the whole operating cost of a motor vehicle—whether it be the original purchase price, the running costs, the parts costs or the resale value—because that data is critical to their establishment of leasing and rental charges for their vehicles. In the case of private purchasers of motor vehicles, increasingly many of the very reputable motoring clubs publish, on quite a regular basis, operating cost surveys of different models and different categories of vehicles.

In summary, Ford Australia is committed to providing a comprehensive, high-quality and competitive replacement parts service. We currently supply some 230,000 different individual parts through our parts service. We see our parts service as being an integral ingredient to our corporate strategy of providing strong values and high levels of customer satisfaction. Our submission to you is that spare parts should not be treated any differently from any other commodity when it comes to design protection. In our view, issues of design are most appropriately handled in the intellectual property arena. In our view, issues of perhaps a consumer nature, such as pricing and safety, should be handled in the trade practices, product liability and product standard arenas, and we should not seek necessarily to overlap or to use different aspects of legislation to achieve different objectives. Thank you for the opportunity to meet with you this morning. I am happy to do my best to address any questions you may have.

**Senator LUNDY**—You said in your opening submission that the way in which you use the spare parts market in part helps to amortise the costs of the original design inputs. Can you expand on that point?

**Mr Scoular**—Certainly. Our core activity is the Ford Falcon. That vehicle is totally designed and engineered in Australia for Australia. Obviously, in designing a car of that nature—which, in a global sense, is a relatively low-volume vehicle: we sell 100,000 to 120,000 units a year—we incur significant design and engineering costs. What we then seek to do is to recover that cost, as any business would want to do with such investments, through having as wide an ability to amortise the costs as possible. For example, if we design the front guard of a car, we engineer it and we also manufacture it. So the amortisation is in the sale of those components that we manufacture. In our case the manufacture of those components would be for equipment in the manufacture of the original vehicle. The same dyes and tooling are made for stamping the panels that are subsequently sold in the aftermarket or repair market. So, really, it is that entire spread that we seek in a volume sense.

**Senator LUNDY**—I am trying to compare that process with that of an alternative producer of a similar spare part. An alternative producer of a similar spare part would not have the infrastructure in place to produce that spare part; they would have to make that investment, wouldn't they? They cannot access your manufacturing plant to produce those spare parts, can they?

**Mr Scoular**—It is unlikely.

**Senator LUNDY**—I would think so—highly unlikely.

**Mr Scoular**—They cannot do that, but where they do perhaps get a running start is that they do not have to start from a clean sheet of paper in the design; they can pick up an existing stylised design of a component and copy that design. So they do not incur those costs; the only costs they incur are in manufacturing and distribution.

**Senator WEBBER**—You said in your opening statement that your spare parts are amongst the lowest in manufacturing costs of any in the market. A new player would not get to amortise right across the manufacture of the vehicle, but their on-costs would be a bit greater anyway because they are much smaller and they have to make an investment in plant and infrastructure that they cannot use to produce entirely new vehicles as well. How would that new player be such a threat if your cost structure is so low?

**Mr Scoular**—We should not necessarily assume that parties that may seek to enter this industry are small businesses. In many cases we are talking about very low-cost manufacturing countries overseas that could copy a design and very quickly get it into a marketplace. Our cost structures are very dependent on our ability to generate volume and, if our volume is eroded, our cost competitiveness is eroded. In a global sense, as I indicated earlier, products like Falcon—and perhaps my colleague's core product, Commodore—are very low volume. But in an Australian sense—in a domestic market sense—there is a reasonable volume available. If I were seeking to enter the market in this manner, I would not necessarily seek to enter it with componentry for a very low-selling model; I would seek to enter it with componentry that was targeted toward a model which was a greater-volume opportunity.

**Senator LUNDY**—I liked your phrase 'the excessive emphasis on economic imperatives'.

**Mr Scoular**—Sorry if I got emotional.

**Senator LUNDY**—To your knowledge, has there been any quantification of net consumer benefits of the spare parts elements of this act?

**Mr Scoular**—I am unaware that any of the various studies that have been done—including studies by the Law Reform Commission, the Bureau of Industry Economics and the Industry Commission—have forecast any possible net benefits, either to consumers or to the wider economy, of such a change.

**Senator LUNDY**—Have you quantified the impact on Ford—or, indeed, on Holden—if this provision were to pass? What would be the worst-case scenario for your respective companies if this provision were to be passed by the parliament?

**Mr Scoular**—It is very difficult for us to quantify, because the act itself is also significantly changing and that could potentially have some impact on us. My professional advice is that, under the legislation before you, there will be less ability to register parts than there currently is. To what degree would depend on case law and how things pan out over time, but I think that the experts and the technical IP experts would not support it.

**Senator LUNDY**—So you are saying it is like a thin end of the wedge thing? Are you saying that these changes will lead to a further diminution in Ford and Holden's right to actually register spare parts?

**Mr Scoular**—Correct. Secondly, I think with the spare parts—

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**Senator LUNDY**—I would like some more information on why you think that is where it will go or why you think that is what it will lead to.

**Mr Scoular**—Can I take that question on notice?

**Senator LUNDY**—Certainly.

**Mr Scoular**—I think the second part is regarding the impact upon us of the effective exclusion of the registration of spare parts with the right of repair. We believe that that could have a significant impact upon us. What we are seeing over time is that it is increasingly easier from a technical perspective to copy designs due to the manufacture of low-cost tooling and that type of thing. We believe it will have an impact on us: it will be increasingly difficult for us to justify the business equation of new model investment. I am not saying that we would not invest in new models; what I am saying and what I think is indisputable is that it makes the business equation that much harder—and it is already a hard business equation.

**Ms Linnane**—We have been unable to put a hard dollar figure on it in quantitative terms, but it is clear that the business hurdle for us will be higher, particularly as one of the things that Holden are looking to do in the future is to characterise ourselves as a niche player, if you like, because we are low volume and because we have the flexibility that we do. Our assessment is that the changing criteria for registration will have an impact. We are not certain yet as to exactly what that will be, but we believe that although there is not an initial examination the hurdles are higher and more demanding. We are comfortable with that but it does mean that, from the point of view of how we cost the life cycle of a vehicle and how we manage that investment over time, it is going to have an impact. We are not absolutely certain of what that might be, but we do believe that it will be a negative one.

**Senator LUNDY**—What proportion of revenue for your respective companies can be attributed to your spare parts market here in Australia?

**Mr Scoular**—Do you mean sales revenue?

**Senator LUNDY**—Yes.

**Mr Scoular**—A very broad number would be approximately 10, 12 or 14 per cent. In one sense, I suppose that does not sound a lot, but we are talking about an industry and a business that struggles to get a one or two per cent return on sales.

**Senator LUNDY**—Is it the same for Holden?

**Ms Linnane**—I would have to take that on notice.

**Senator LUNDY**—I am just trying to get a bit of a feel. You have said that it will have an impact on the company, but I think it is important for the committee to have some sense of the proportion of the impact in financial terms on the company. Can you tell me if there are similar provisions to those proposed in this bill in other countries in which your companies manufacture cars and spare parts?

**Mr Scoular**—I think the global scene is quite mixed, if you like. You get different arrangements in different parts of the world, and I am not personally right across the detail of all of them. What I am aware of and what I have observed in recent years in Europe, for example, is that—and these are my words—the whole process has become very messy and

confusing from a legislative sense. They have had a number of attempts to implement various arrangements and have found it extraordinarily difficult.

**Senator LUNDY**—You will have to be a little less cryptic for me, I am afraid.

**Mr Scoular**—Again, I could supply more information on notice and do that quite quickly.

**Senator LUNDY**—Yes. Can you tell me whether there are any jurisdictions in which either of your companies manufacture that do have a more open regime for the design and production of spare parts that is similar to what is proposed in this bill?

**Mr Scoular**—I can take that on notice.

**Ms Linnane**—I would need to take that on notice as well; General Motors has a number of manufacturing plants.

**Senator LUNDY**—I am sure it is, as you say, a mixed environment, but I am curious to see whether there actually are comparable environments. Perhaps you could also take on notice whether there is evidence in those jurisdictions, which can be quantified in some way, of any negative impact on the company as a result of those provisions. That would also be useful for the committee.

**CHAIR**—Senator Lundy, I do not want to interrupt the flow of your questions but I do want to give Senator Watson and Senator Ridgeway a go.

**Senator LUNDY**—I am right for the moment. I may have one or two questions to come back to.

**Senator WATSON**—Would Holden and Ford be more comfortable if alternative spare parts were compulsorily tested so as to meet standards no less than those that apply to the parts of the manufacturer? For example, should we be looking at complementary legislation to overcome some of the shortcomings generated by the repair section exemptions?

**Mr Scoular**—Do you mean from a product standard perspective?

**Senator WATSON**—Yes.

**Mr Scoular**—I think that is an area worth very close and serious consideration.

**Senator WATSON**—That at least would remove some of your objections about safety issues, quality issues and other concerns.

**Mr Scoular**—I think that is a fair point. Ford's perspective, as I indicated in my opening comments, is that the design and aesthetic appeal of something is appropriately handled in the intellectual property arena—whether that be design, patent or copyright. Issues of product liability or product safety are best handled in other areas. If there were some complementary legislation or a study of what could be done there, a better balance than that which currently exists could well emerge.

**Ms Linnane**—While we share Ford's position on the aesthetic value of a design, in the past we have raised concerns about the safety standards of spare parts. From the point of view of introducing a standard or a testing criteria for spare parts, we believe there would be merit in examining that.

**Senator WATSON**—My next question is for you, Ms Linnane. I believe you inferred that the design rules applying to the furniture trade were somewhat different from those in the motor industry. Could you explain that?

**Ms Linnane**—On a conceptual level, if you look at a chair or a table the aesthetic design of that is protected. It is difficult to think of a spare part for a table. The way that a motor vehicle is designed, developed, assembled and repaired means that it is a very different beast. It is a product made up of parts, and those parts can be seen as spare parts. Our concern is that if you have a right of repair, the things that are innovative about that vehicle are exactly the kinds of things that, in some accident circumstances, are covered by a right of repair. We may get an initial registration for the design but, from the point of view of enforcement, if we are looking at imitation—and we do litigate now for imitation parts—the hurdle that we are required to jump to establish that the parts are not being manufactured for repair but in fact for imitation becomes much higher, and certainly much higher than it is now. The costs of litigation now are significant, which is a factor when we weigh up how we address imitation parts. The right to repair that is being introduced to the legislation means that we feel different from manufacturers of items such as chairs and tables, if you like.

**Senator WATSON**—My third question is: what is the probability of design staff and functions going overseas?

**Mr Scoular**—That is always a risk. The business equation of designing, from a motor vehicle perspective—

**Senator WATSON**—But I am asking you to quantify the risk by asking: what is the probability?

**Ms Linnane**—I would not want to suggest in any way that that is a threat that is being made. For example, the Holden Cruze vehicle is a joint design project between Japan and Australia. One of the factors that was taken into consideration was a design registration regime and the fact that that has meant that there are design houses here that do have the capability and the capacity. If you talk to some of those design houses that do contract work for us, such as EDAG Future and Venture Industries, they will tell you that the industry is very tight, that the work is very variable and that their margins are small. The concern that Holden has is that that regime may change. It may well be that EDAG Future and Venture Industries may question it, given that they are both foreign owned ventures here, and say that maybe it is better to be overseas.

In a sense, design is very transportable. If you understand conceptually what the market is looking for you could design elsewhere. In fact, the Cruze is a classic example because we have designed here for Japan. There are other projects. If you think about what has happened to the Holden Monaro, with the Pontiac GTO for the American market, a lot of the design modifications for the American market were done here. One of the things that I think would be a concern is that that is a very transportable thing.

**Mr Scoular**—I will just add the point that Ford also undertakes extensive design service work for other parts of the Ford Motor Company world. We have a resource in Australia and it is seen as a very capable and innovative resource. We are doing a number of projects for vehicles and different parts of the future vehicles in different areas of the Ford world. In Geelong we have the biggest tool room in the southern hemisphere. A number of you may

have visited it from time to time. We have that tool room because that is, if you like, fed by our design capability and our design activity. If you do not have a very competitive and dynamic design activity, inherently you do not have a toolmaking capability—you import the design and you import the tooling.

**Senator WATSON**—You might be able to help me understand the design rules a little bit more. Could you explain the scope of the legislation. For example, for a design registered initially overseas, with a design life longer than that in Australia, does the overseas law provide protection in Australia if this bill becomes law?

**Mr Scoular**—I would have to take advice on that. My understanding is that, to have protection in Australia, you would have to design register in Australia, as if it were New Zealand, Fiji or somewhere else. To have protection in that country, you would have to do it in that country. So I would imagine, having done that, that the length of coverage of those individual countries would apply.

**Senator RIDGEWAY**—I have just a couple of questions. First, I appreciate the opening comments about, on balance, the need to look at empirical data to back up any claims that might be made. I want to explore the question of spare parts and design, and research involved in that area. To what extent is research and development, in that sense, a strategic part of any investment plan that Ford or Holden may have? I guess I am a little confused at the moment. If it is so strategic to any investment plans you may have for the future then you ought to be in a position to quantify that in some form. I do not know how you want to respond to that. You could take that on board or at least attempt to answer the question. To what extent does design form part of your strategic investment plan in relation to automotive manufacturing in this country?

**Mr Scoular**—I will certainly take that on notice but, as a initial response, the competitiveness of Ford Falcon is fundamental to Ford Australia. We only have to look at the success in recent months of the new Ford BA Falcon, largely driven by what the wider community see as its very attractive design and styling, to recognise the importance of good design to successful automotive manufacturing.

**Ms Linnane**—Similarly, in terms of quantitative information, I will need to take the question on notice but, in general terms, the Holden Commodore—like the Ford Falcon—is sold to a significant degree by aesthetics. I think that can be seen by, if Russell will forgive me, the Ford Falcon AU, whose design was not as successful as the current product and in what that meant for us in the market and the proliferation that we were able to develop across our range in design. We now have a Commodore platform that supports five or six vehicles, all distinctively visually different and each with distinctive market positioning.

**Senator RIDGEWAY**—If you can appreciate where I am coming from, the point for me is that, if the consequence is an unknown one, as you say, either it forms part of some sort of strategic investment process within the companies or it does not. If it does, if you could provide us with that information, it would make it a little easier to assess what you say about an unknown consequence. A couple of other submissions make the point that it is only Ford and Holden that oppose those provisions in relation to spare parts. You are probably aware that the Federal Chamber of Automotive Industries, the Insurance Council of Australia and

Insurance Australia have all come out with views expressing their support for the provisions as they are currently proposed. Why is that? Do you have a particular view?

**Mr Scoular**—I will take that question. It is a question of clarification, I think. The Federal Chamber of Automotive Industries, which represents all the motor vehicle companies in Australia, has made a number of submissions to the various inquiries that have taken place over the years. Its views in this area have been quite consistent with those expressed by Ford and Holden. I think the issue as to why Ford and Holden are and have been so actively, if that is the correct word, involved in this review is that Ford and Holden are the two companies that do the dominant share of automotive design in Australia. Our products are true Australian products. In the case of our other two vehicle manufacturers, they are largely built or taken from existing overseas designs. According to the size of our respective R&D product development design capabilities in Australia, we are the dominant part of the industry at the original manufacturer level.

**Senator RIDGEWAY**—I will ask one final question on that. I understand that Ford and Holden are both involved in registering hundreds of designs in this country. Is that true?

**Mr Scoular**—I can only answer on behalf of the Ford Motor Company. I think I saw that comment in one of the other submissions that was presented to you, and I was somewhat surprised. I have asked our people to check out the number—and I am happy to feed that information to you—but when I asked the question, ‘Is it in the hundreds?’ the initial response was, ‘We’ll check it, but no.’ I should have the data in the next day or so; I thought I might have had it last night. We register on each of our models a relatively small number of ‘must match’ parts. Sure, over different models that goes up cumulatively but over time it also drops off, because it is not for a lifetime registration. In the case of Ford, we have only been registering parts since the early nineties.

**Ms Linnane**—I think that the same thing holds true for Holden. If you were to add up the number of design registrations we have for VS, VT, VX, VY and you look at the W car and some of the variants—the Cruze, the Ute and the Monaro—and you add those over that period of time, I do not know whether it would be hundreds, but it may be close to that. But when you look at each particular model, there are very specific, strategically targeted parts that are the characterising elements of each of those vehicles. It is not a wholesale registration of the whole car by any means.

**Mr Scoular**—I think that in percentage terms, as to the number of parts that a motor vehicle producer has in its replacement parts operations, you are talking, in a design registration sense, of less than one per cent.

**Senator RIDGEWAY**—If you could also take on board, as a follow-on from that question, how many designs are manufactured in Australia and used in Australia, how many are manufactured overseas and how many are not manufactured at all, but the design registration is in existence. I am trying to get an understanding of whether, if we are talking about consumer benefit, it is really in an Australian context or whether we are looking at using a regime here that may have benefit to global marketplaces or other countries.

**Mr Scoular**—Sure.

**CHAIR**—Thank you very much, Ms Linnane and Mr Scoular. You have asked to take a number of questions on notice. I indicate that, because of the time pressure on the committee to report back to the Senate, you would need to have those written responses to the committee by—I know this is not a lot of time for you—the close of business next Tuesday, 6 May. I will indicate that as well to any other witnesses who may wish to take questions on notice. I assume that you have the secretariat's contact details?

**Mr Scoular**—We do, and we will certainly do our best to meet that deadline.

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[10.17 a.m.]

**BODDY, Mr Anthony John, Manager, Parts Research, Insurance Australia Group**

**CROTHERS, Mr Norm Glenn, General Manager, Content and Publishing, Australian Consumers Association**

**ELLIOTT, Mr Kim, Executive Director, Australian Automotive Aftermarket Association**

**SMITH, Mr Dean, Manager, Government Relations and Policy, Insurance Australia Group**

**CHAIR**—Welcome. The committee has before it written submissions from your respective organisations. Are there any corrections or alterations to those written submissions? As there are not any, I will ask each of you to make a brief opening statement. Mr Elliott?

**Mr Elliott**—The Australian Automotive Aftermarket Association has a membership of approximately 680 companies in Australia, with a small number of international members as well. We primarily represent the manufacturers, remanufacturers, wholesalers, distributors, importers, resellers and retailers of automotive parts, accessories, tools and equipment in Australia. The majority of our membership are small or medium sized enterprises, although we do have a number of members of an international nature in their operations.

The automotive aftermarket is generally recognised as that part of the automotive parts, accessories, tools and equipment industry that is not involved in the supply of product to original equipment manufacturers, even though many of the companies that are original equipment manufacturers also manufacture for the automotive aftermarket in Australia. The consistent position of the association over the 10 or so years that we have been involved in the debate over the Designs Act is that spare parts should not be able to be registered. Our submissions previously to the Australian Law Reform Commission, the Industries Assistance Commission—as it was at the time—and other inquiries have taken that position. We see that there are four major issues in terms of this. They are: competition in terms of pricing and the effect that the independent aftermarket has on moderating the prices of the OE parts and accessories industry; the effects on small or medium size enterprises; the effects on employment; and the general economic effects that could arise from this bill.

The independent automotive aftermarket employs some 25,000 people in Australia—I am using round numbers rather than specific numbers—and the independent repair sector employs around the same sorts of numbers. Spare part designs generally evolve over time. Very rarely do we see a quantum leap in the nature of the design of a spare part for a motor vehicle particularly, other than when its specific regulatory requirement requires some generational change. Generally, a water pump has evolved from a very simple device on a model T Ford through to a little bit more on a VY Commodore of today.

I made a comment that the independent aftermarket does moderate the price that OE manufacturers charge for their products. Given that our submission in 1993 incorporated some comparisons, I thought I should update those to today's prices. At the outset, there are some instances where the OE price is actually cheaper than the independent aftermarket price and I will note those when I go through them. For example, I have used the pricing for the two most popular models of motor vehicles in Australia—that is, the Holden Commodore and the Ford

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Falcon. For a set of disc pads, the average price is around \$100 a set in the OE area and \$50 a set in the aftermarket.

I also make the point at this stage that many of the manufacturers of independent aftermarket products are also the manufacturers of the OE for the vehicle manufacturer. For a clutch kit, the OE cost yesterday was \$548 at retail versus \$275 for an independent aftermarket clutch kit. In the filters area, the OE cost for an air filter yesterday for a VY Commodore was \$13.81 at trade versus an independent aftermarket cost of \$11.23. The fuel filter yesterday at trade was \$17.90 versus an independent aftermarket cost of \$10.65. An oil filter at OE was \$6.08 versus a cost of \$6.20 at the independent aftermarket. It is one of those occasions when the price was dearer. I could go on and give you a list for quite some time in terms of that. I also looked at some comparisons between base servicing costs in the OE sector through an accredited dealer and through the independent sector. For a VX Commodore, for example, a 10,000 kilometre service in an aftermarket is around \$128 versus \$145 in the OE sector. At 40,000 kilometres, it is \$210 and \$335 in the OE. Generally speaking, those sorts of cost comparisons go across the range for the four largest volume selling cars in Australia—the Falcon, the Magna and the Camry.

The association is also involved, as part of its regular activity, in representation on a range of standards committees, either through Standards Australia, the Committee Advising on Recall and Safety under DOTARS or a range of other government regulatory bodies, advocating the rights and interests of our members but also quite often the rights and interests of consumers in ensuring that the spare parts that our industry provides generally meet the requirements for which they are provided. I think Senator Watson raised the question about product standards. There are a range of product standards that are already developed under the Standards Australia regime. I said that I sit on the CARS committee, the Committee Advising on Recall and Safety, and there actually are very few recalls of spare parts in any one year. I would contend that the safety of spare parts in the automotive industry is not a major issue. Thank you for the opportunity to meet with you today. I am happy to answer any questions at the appropriate time.

**Mr Crothers**—The Australian Consumers Association represents regular consumers. We have about 150,000 households that pay us and subscribe to our products. One of the things that we get by listening to regular consumers is complaints about the cost of spare parts for a variety of products—not just motor cars but washing machines, refrigerators, computers and televisions. It is an issue that concerns consumers. We also get complaints about insurance premiums. In recent times, as we are all aware, insurance premiums have risen for many reasons but, for motor car comprehensive insurance, the cost of spare parts is an influence. We know from the work of the people from IAG that they do monitor spare parts costs and work with industry in trying to lower the cost of spare parts, because it does in fact influence the cost of insurance.

Conscious of those sorts of concerns of regular consumers, we have seen in the past—and, as Kim Elliott has just pointed out, currently for some parts—that, where there is competition in the availability of spare parts, there tend to be cheaper parts available. Mostly these parts occur in the mechanical replacement sector but, from time to time, there have been body repair parts that have come onto the market in competition with original equipment parts. Where that has happened, there has been substantial downward pressure on prices pretty

quickly. That has not happened a lot in Australia but, when it does happen, it is quite clear that the original equipment manufacturers are quick to respond to alternative suppliers and lower their prices. In the United States we have done quite a bit of research where there is a much larger alternative body parts sector. Where there are competed parts, there are generally much lower prices across the board for that sort of component. Where the original equipment manufacturer has a monopoly on a particular body panel, that panel tends to be two or three times what it might otherwise cost if it was competed.

The Consumers Association is very concerned to try to ensure that there is competition in the spare parts market, just as there is competition in the supply of original motor vehicles. We do not want to deny anyone's right to intellectual property rights for having carried out the design function on any sort of product. We contend that the design right lies with complete product, whether it is a motor car, a piece of furniture or a computer screen. The effort goes into designing the whole, and it is the whole that is sold into the market on its advantages from aesthetics and function. A part of that whole is not really something that is designed in itself. It is not separately designed and it has no real fundamental intellectual property value other than to form part of the complex whole, and we do not believe that intellectual property rights should go down to the spare part to give it the same sort of protection.

We are very happy that the Design Bill and Trade Practices Act protect original designs from being passed off, such as they do, and we are concerned that obviously some spare parts are not used to be passed off as versions of a special kind of car or something else. For general purpose spare parts, we think that there should be competition and we believe that the right of repair provision that has been provided in this bill is a good compromise. We have been involved in negotiations with industry and IP Australia for many years now, and we have looked at all sorts of alternatives that we have tried from overseas examples. IP Australia came up with the right of repair clause and, with a bit of modification, we think it is reasonably workable, certainly worth trying and fair to all parties concerned.

**CHAIR**—Thank you, Mr Crothers.

**Mr Smith**—Insurance Australia Group is grateful to the committee for the opportunity to present today. Insurance Australia Group is the largest general insurance group in Australia and New Zealand, serving more than 3.8 million customers in Australia and over 700,000 customers in New Zealand. Insurance Australia Group provides motor, home, compulsory third party and commercial insurances as well as retirement solutions. It does so under some of the most respected and trusted Australian brands, such as NRMA Insurance in New South Wales, the ACT and Queensland, SGIO in Western Australia, SGIC in South Australia, State Insurance and Circle in New Zealand, and, through a strategic alliance, with RACV in Victoria. Insurance Australia Group is also a significant insurer in regional and rural Australia through its recent acquisition of CGU.

Insurance Australia Group is interested in elements of this inquiry which deal with the spare parts implications of the designs bill for consumers and insurers. We have provided a detailed submission to the committee. In conclusion, that submission states:

As one of Australia's leading insurance groups, Insurance Australia Group has a strong interest in creating and maintaining a commercial environment which empowers consumers and businesses in exercising greater choice.

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Insurance Australia Group believes the Designs Bill 2002 and the Designs (Consequential Amendments) Bill 2002 has effectively and fairly dealt with the complex issues of whether or not spare parts should be eligible for design protection.

Insurance Australia Group believes the legislative effect of guaranteeing the 'right of repair' will be to ensure effective competition in the spare parts market leading to lower prices for consumers, especially motorists in the example of automotive spare parts.

It is important to note that Insurance Australia Group enjoys a strong and constructive relationship with many of Australia's leading vehicle manufacturers, including Ford and Holden, with whom our relationship dates back as far as 1996 on specific engineering programs. These programs aim to contain the cost and upward pressure on premiums. It is important also to recognise that there is a common interest between insurers and motor vehicle manufacturers in containing the costs of vehicle ownership through affordable insurance premiums. This is achieved by cooperating in the areas of engineering, security and repair cost reduction.

Insurance Australia Group believes that the inclusion of a formal review of the operation of the right of repair exemption to be conducted before the end of 2005 should be seen by all interested parties as a sensible and fair means of monitoring the operation of the exemption and the accuracy of the statements that have been made to this inquiry. As part of our opening statement, we would like to comment briefly on some of the views that have been put forward by motor vehicle companies in their submissions.

**Mr Boddy**—I would like to do that.

**CHAIR**—Thank you, Mr Boddy.

**Mr Boddy**—Certainly the car companies and insurers have a constructive relationship—and have had for many years—and there is a common need for us to work together to keep insurance premiums low, to keep cars easy and cheap to repair and to make them harder to steal. Insurance Australia Group spends about \$500 million a year on spare parts to repair policyholders' cars. We like a number of aspects of the bill—it is good that there is a high threshold of novelty, and 10 years of protection down from 16 years makes a lot of sense. We are talking about the right of repair for owners of complex goods; we are not talking about a spare parts exclusion just to try and do something about automotive—this is a lot broader than automotive. Of course, the automotive aspect has been the one that has got the most attention.

It has been claimed that designers will be prevented from protecting their designs, but the bill only gives product owners a right of repair—effectively, the right to replace the parts of a complex design. Customers do not buy piles of parts; they buy complex, working products, so it is the whole design that should be protected. We have never been able to satisfactorily work out why Holden and Ford want to register each individual part rather than the whole car. There is plenty of evidence in IP Australia's files of companies from Porsche to Honda registering the whole outside design of the car so someone cannot register and copy the overall appearance of the vehicle. Other car manufacturers register the whole design, but Holden and Ford register just the individual parts.

I was at IP Australia's office in Sydney on Wednesday afternoon for World IP Day—a little celebration with sandwiches and drinks—and I went through the files there. It is easy enough to go and have a look at which manufacturers are registering designs and what quantities they

are registering. It is certainly true that there are hundreds of registrations in the name of Holden and Ford, but only Holden and Ford do the parts. I still have not been able to satisfy myself why it is that Holden would go for parts whereas other manufacturers would get satisfaction out of registering the whole design. Insurance Australia Group, the Consumers' Association and so on have no problem with registering the whole design, because it does not stop a consumer making repairs to an element of the part.

It concerns me that some car manufacturers cannot quantify the investment they put into design. Certainly billions of dollars are spent on engineering and research and development in Australia each year, but that is not linked to design. Design can take place anywhere. Cars and parts can be designed in Detroit and Tokyo and can be manufactured in Australia, but they can be manufactured just as easily in New Zealand, China or Europe. The Designs Act as it stands at the moment and the bill that we are looking at for the future do not require the design to be intrinsically Australian and do not require the design to be made in Australia. So you can design and make it overseas and still get a monopoly right under the current act. It is important to separate the two, because decisions car manufacturers make about where they are going to make a product—where they are actually going to assemble it—are made on quite a different set of criteria from where they choose to source the design.

We suspect that the investment in design itself is fairly minimal. The Industry Commission, in its inquiry into the automotive industry in 1995, estimated it as being less than two per cent of total investment. We also suggest that this investment would be made anyway, irrespective of whether car manufacturers have a monopoly right on spare parts. It beggars belief that a monopoly on spare parts is necessary to cover a half a billion dollar investment in a new car. That is, I cannot see the cross-subsidy between parts and new cars being that big. In fact, GM operates the Chevrolet, Buick, Pontiac, Saturn and Cadillac brands in the US, and there are no design monopolies available on spare parts over there. It is not possible for Japanese car manufacturers to register the design of spare parts, but GM operates Subaru and Suzuki divisions there. Ford operates Mazda in Japan. GM has its Vauxhall operations in the UK, and there are no spare parts registrations over there. They got an exemption on spare parts in 1998. Mitsubishi and Toyota are the other two major Australian manufacturers. In fact, Toyota is No. 1 in Australia now based on car sales in the last couple of months, but they are not represented here today because they do not register parts. Only two of the 30 car manufacturers operating in Australia feel the need to register the individual parts. The Cruze that was mentioned earlier is built in Japan. It is not built in Australia. I notice the Federation of Automotive Products Manufacturers, which is a division of FCAI, has submitted to the committee that they have no problems with the bill. The FCAI represents the people who supply the parts to the car manufacturers for original equipment.

There is a kind of catch-22 in the argument that is put up by car manufacturers. They claim that they do not charge their customers monopoly rents on those spare parts where the designs are registered, but they say that, if they do not have a monopoly on those spare parts, it will seriously affect their business operations and have serious consequences for the Australian economy. It does not make sense to me. Either they are not charging monopoly rents and therefore change in the design law will not make any difference to them or they are charging monopoly rents and therefore consumers are paying more for the spare parts and for repairing cars.

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I point out that Insurance Australia Group is not particularly picking on car parts. The bill is to address far more than just car parts, but within the context of the bill we have a number of comments to make on car parts. We suspect that there will be negligible economic impact in the years to come, because there are not all that many parts registered at the moment, although the potential is certainly there for manufacturers of complex products to register as many parts as they want under the current act. The new bill is not retrospective, so all of those parts that are registered at the moment are going to have up to 16 years of protection still to run. Even if this bill is passed into law in the next 12 months, we are still looking at about 15 or 16 years to gradually wind back the tail of all the spare parts where monopolies are in place.

It has been claimed that a number of detailed pricing surveys have been conducted to show the benign nature of monopoly pricing, but they are not referenced. I would like to see them because they have not been submitted to any of the inquiries we have seen. I disagree with one of the car companies that the Bureau of Industry Economics study that was carried out in 1995 for the Law Reform Commission did not show that there were any deleterious effects of having a monopoly on spare parts; I would argue that the BIE did indicate that where monopolies exist prices go up; where competition exists prices go down.

I would be concerned about the idea about compulsory licensing. Holden said in its submission that it would prefer to see compulsory licensing in place. That is a new one. It has not been suggested before; it was not in any of the previous submissions Holden made to any previous inquiries. Compulsory licensing was rejected by IP Australia because it looked like it would be quite expensive to administer and it would be very difficult to determine a reasonable royalty to be paid for the licence. I cannot imagine an independent spare parts manufacturer, who is generally a small to medium enterprise, trying to negotiate the legalities of it with a big organisation like General Motors.

It has been implied that that there is no innovation possible without a design right. Insurance Australia Group would argue that innovation is imperative for successful products. Whether they be a car manufacturer, a computer manufacturer or a white goods manufacturer, they have to innovate to stay in business and to keep ahead of the competition in the primary market, which is the sale of the complex product. In contrast, there is no innovation possible for spare parts—the part has to be exactly the same to fit in with the rest of the shape of the complex good—so I would imagine that innovation will continue unchecked. In fact, with no protection, it is more likely that innovation will be stronger in the future as a result of this design bill.

The argument that has been put that there could be serious economic consequences if a design right were introduced does not make sense in the context that Ford and Holden have said that around 1,600 parts are new to each new car that comes out on the market but that only a few parts are registered. If only a few hundred parts have been registered in the last 10 years, I cannot see that it would make much difference to the economy at all unless the monopoly rent is astronomical.

**CHAIR**—Your organisation has had more than 10 minutes for its opening statement. Before handing the call to opposition senators, let me ask you one question arising from your oral submission. You said that you did not see why Ford and Holden required a monopoly

over their spare parts, and you drew comparisons with other companies in other economies such as America and Japan. My question is simply this: do you know, have you done some economic modelling of your own, or is that just surmise? You were in the room I think when we heard the evidence from Ford and Holden and they spoke about the relatively small size of the Australian motor car manufacturing market and the importance of amortising their investment costs over the aftermarket, which includes, as I understand it, the spare parts market. Are you in a position to say from knowledge of the economics of the Australian motor manufacturing industry that they do not need a monopoly over spare parts in order to make the economies of their industry work or is your assertion to that effect merely surmise?

**Mr Boddy**—By looking at the global industry—

**CHAIR**—But the whole point is that they say, ‘Australia is a small country—a small market—and comparisons with the larger volume markets in the United States, Japan or Europe are, for that simple reason, misconceived.’

**Mr Boddy**—I would estimate that, if the car manufacturers have a monopoly on their spare parts, they will use it. If Ford are not exporting any cars overseas, they would probably make the most of a monopoly if they could get it.

**CHAIR**—Is this conjecture on your part or do you point to any economic evidence?

**Mr Boddy**—I do not have economic evidence that I can table. I can only say that Ford has not disclosed the internal transfer pricing and cross-subsidies between the parts market and the new car sales market.

**Senator LUNDY**—On the issue of insurance premiums—which, you are quite right, are of concern to a lot of people—can you say to the committee that, if this bill passes, insurance premiums are likely to go down? I am happy for all of the panel to reflect upon this.

**Mr Boddy**—Absolutely. It is a very competitive market. Last year Insurance Australia Group put out a joint press release with Mazda Australia. We had been working with Mazda Australia to try to contain the cost of repairs, and on their new model 626 they incorporated a number of design features and pricing initiatives to ensure that the car debuted as best in class in terms of cost of repairs. As a result of that, NRMA Insurance reduced the insurance premium on that model. We put out a press release on that, which is available.

**Senator LUNDY**—Could you provide that press release to the committee?

**Mr Boddy**—There have been other examples over the years of insurance premiums coming down as a result of direct actions by car manufacturers to try to position their cars as either cheaper to repair, harder to steal or cheaper for spare parts. The insurance industry is very competitive. If you make your premiums too expensive, customers will go to other insurance companies. So it is very important for insurance companies to get their premiums right, and it is not a situation whereby you can just name your price.

**Senator LUNDY**—Can I get some feedback from the Consumers Association on that question, please.

**Mr Crothers**—We are reliant upon information from the insurance industry about the effect of spare parts on premiums, but it seems pretty clear from extensive discussions we have had with the industry that their prices are reflected in the premiums. This is partly

because, as Mr Boddy has pointed out, the current monopoly on spare parts will continue for 16 years anyway on any parts registered before this bill is enacted, if it is. So it will not be a sudden effect and we are not necessarily going to see competitive parts enter the market instantly on a whole range of goods; it is a bit theoretical. What we are trying to do is lay the groundwork so that, as far as possible, there can be competition.

**Senator LUNDY**—Mr Elliott, in your statement this morning you gave some price comparisons that seemed very significant, yet you also said that quite often it is the same manufacturer that produces those. Can you explain to what extent Ford and Holden outsource their manufacturing components and how that fits in with why the same manufacturer could sell the same set of disc pads for \$100 and for \$50?

**Mr Elliott**—I cannot tell you how much of the componentry of motor vehicles they physically outsource. I do not know those figures, and they would change from model to model, but suffice it to say that a fair proportion of the motor vehicle componentry in Australia is outsourced. There is a very large component manufacturing sector in Australia.

**Senator LUNDY**—For comparative purposes, how many people would be employed in that sector of the automobile industry?

**Mr Elliott**—My recollection is that there are about 30,000 people employed in the components sector and about 20,000 now employed in the vehicle manufacturing sector. I am a little hazy on that.

**Senator LUNDY**—Everyone else probably knows that, but I thought I would get it on the record.

**Mr Elliott**—It changes a fair bit. One of the issues in terms of the competitive nature of aftermarket pricing is that generally other importers or smaller manufacturers are also in the marketplace. To use the example of disc pads, there is a very large manufacturer based in a regional centre in Victoria that manufactures most of the OE product. At the moment, they have about 70 per cent of the market share of the aftermarket product—the only thing is that it is going south for them. There are another two smaller manufacturers in Australia that manufacture disc pads, then there are a whole range that import them anywhere: from Europe, South-East Asia and even from the United States.

There is a fair amount of price pressure in our sector of the industry. Even though in most instances they can buy the same product for a lower price than our distributors and wholesalers can, I suggest that one of the reasons the car manufacturers are able to maintain a higher level of price is the general reluctance of a consumer, particularly in the first three years of a motor vehicle's life, to take it anywhere other than the dealership. I think we heard evidence earlier that some 70 per cent of Ford Falcons are sold to the fleet market. That vehicle is usually held for between two and three years and then released into the second-hand market, where the perceived obligation—it is not a legal obligation—to go back to the dealer for servicing and repair ceases to exist.

**Senator LUNDY**—Can you tell me the next step? What is the actual mechanism for those manufacturers to be able to charge different prices? Does the manufacturer have any differential pricing or is it just the retail cost of those pads through the Ford dealership? You are going to have to really spell this out for me. I think it is an important point.

**Mr Elliott**—A car manufacturer will have a contract with a component manufacturer to supply a certain number of parts at a particular price, and they are very aggressive in their pricing strategies. Generally speaking, in car manufacturing and auto component supply there is a cost-down process where during the life of the model the price of the product will actually be lowered. In the independent aftermarket, how attractive a price you can gain depends on the volume you purchase. As it goes through the distribution chain, obviously everybody has to add their profit component. At the end of the day, the price of the product will have some impact on where people purchase from in the marketplace. To use industry language, the purchase of brake pads is a 'grudge purchase'. You do not buy them because you want them, you buy them because you have to—they need to be replaced. That is different to a set of seat covers, which have a higher premium. For a set of seat covers, it is about aesthetic value or comfort so you can put a bigger premium on them.

The competition from both cheaper imports—because that is a factor in the market—and amongst the retailers and resellers themselves continues to drive our price down. Generally speaking, very few second-hand vehicle owners would go back to the dealership for the general model motor vehicles—the Commodore, Falcon and other popular motor vehicles. They will go to their Repco, Auto One or Bursons outlet or their repairer will have an account with Repco or Bursons and bring in those products. I will not use figures, but many of those products are manufactured to exactly the same specifications, and in exactly the same manner, as the OE product.

**Senator RIDGEWAY**—I have two quick questions regarding product standards. Are those alternative parts manufactured in Australia or overseas?

**Mr Elliott**—Both.

**Senator RIDGEWAY**—Do the overseas products come up to the same standards? You are probably aware that Holden said those products do not meet the safety, reliability and quality standards of this country. Do you agree with that or not?

**Mr Elliott**—I do not agree with that. In fact, some aftermarket parts far exceed the requirements in Australia because they have to meet European quality and performance requirements that are stricter than what Australia provides for. Some consumers will purchase higher specification products, and that applies across a range, particularly in the consumables area. For example, you can buy Kevlar impregnated disc pads rather than organic or asbestos based ones.

**Senator LUNDY**—Indulge me, because I am going to embark on a bit of a hypothetical here. Say you have a local manufacturer who has negotiated with either Ford or Holden and they have come to a really good price, and that price is comparable to what they negotiate with someone like Repco or one of the other sellers of automobile products. I guess the difference in the retail price with that of the OE product—what does OE stand for?

**Mr Elliott**—Original equipment. It is the product that is manufactured for that vehicle. The industry shorthand is OE.

**Senator LUNDY**—Thank you. I knew what it meant; I did not know what it stood for. Is that margin of \$50 between those two products pocketed by Ford straight up?

**Mr Elliott**—I do not know their business model with the dealership. The retail price is purchased from the dealership.

**Senator LUNDY**—So the money goes somewhere between the dealership and the manufacturing company?

**Mr Elliott**—Yes.

**Senator LUNDY**—I am curious. A lot of that service through dealerships is in the fleet market anyway. I presume that will continue. Not much is going to crack the fleet market and their service policies. Will that diminish the impact of this bill if it were to pass, given that fact? Seventy per cent of the market will still go back to the dealership, won't they?

**Mr Elliott**—It is 70 per cent of the new vehicle market. The new vehicle market is 800,000, in round figures, of a car park of 11½ million.

**Senator LUNDY**—We have heard the concerns of the motor vehicle companies about the impact but, from what you have just told me, it seems to me that it might have perhaps less of an impact because of that dealership factor.

**Mr Elliott**—The issue from our point of view is, if motor vehicle companies are able to register the design of spare parts, that will be a severe brake on the ability of the independent aftermarket and even of some of the OE component manufacturers to be able to compete with the other product. I think we are all reasonably aware of what happens in a monopoly type situation. If there is no moderation on pricing, the price escalates. We see that in Australia. Australia has a very broad car park and, in the areas of some of the less well-sold models where nobody bothers to compete, the cost of spare parts is astronomical.

**Senator LUNDY**—I think we all know someone who has been there.

**Mr Elliott**—Yes. It is our view that, without the moderating influence of the independent aftermarket, there is nothing to put a brake on the cost of repairs.

**Senator LUNDY**—I am not challenging that. I am trying to get a better understanding of how it works for that new vehicle market.

**Mr Elliott**—Even today, it is not unlawful and does not breach your warranty to have your warranty book service done in a private or independent garage. You are able to do that. For matters of convenience, the nature of the new vehicle market being primarily fleet and because generally the consumer believes that they have to take their car back to the dealer, they take it back there. After three years, the number of people who take it there drops dramatically.

**Mr Crothers**—All consumers are absolutely horrified by the price of a service by a dealer. They all know that they are paying two and three times as much.

**Senator LUNDY**—Mr Crothers, I would like your comments, particularly on that last part of Mr Elliott's statements, on the changing patterns of consumer behaviour, particularly for new vehicles. Are consumers aware of the fact that it does not void their warranty if they do not go to the licensed dealer?

**Mr Crothers**—A lot of work is being done, and the ACCC and our organisation have both tried to make the public more aware of their rights, because a lot of dealers probably tell

consumers that they should always bring it back and imply that they have to when they do not have to.

**Senator LUNDY**—Or they will risk losing value on their vehicle.

**Mr Crothers**—Yes. Some independent chains now have television ads where they emphasise that you can get your servicing done there and not void your warranty. They do have to carry out the servicing according to the manufacturer's specifications. They have to use parts that meet the specifications and so on. Sometimes the only way to avoid a dispute is to use a genuine part, even if it is identical to a third-party part, because how do you as the individual consumer prove before a tribunal that the part did meet specifications? You cannot test it. It is too expensive to do that sort of thing.

We need to go back to the whole concept of monopoly of spare parts, though, because if the industry say they need a monopoly to make enough money to support the industry then clearly they are charging monopoly rents. They cannot have it both ways. If they are charging excessive prices for spare parts then that means, in effect, that we are paying much more for these cars than we think we are paying, that Australia as a whole—the economy—is paying much more to have these cars there than we really think we are. So that brings a very challenging economic task, to ask: is this appropriate; does Australia really need this much investment in design and R&D if it is going to cost us as much as it really does cost us? There are an awful lot of other things that money could be doing in the economy other than propping up what are, in fact, wholly overseas owned corporations. Remember—all the profit goes out.

**Senator LUNDY**—That takes me to my final question, Mr Elliott. You mentioned SMEs as one of four important considerations. Can you explain to me what you see as the positive impact on SMEs arising from this bill or the potential—and I guess you would argue—ongoing negative impacts if in fact this bill does not pass?

**Mr Elliott**—If the bill does not pass and car companies begin to register spare parts as designs then that is going to have a major impact on the capacity of smaller manufacturers to manufacture the product and compete in the marketplace. Our current estimation is that our industry employs something like 25,000 people. Probably 40 per cent of that is in retail. But if you have a spare part design, it has consequent effects right through the industry. Your Repco does not sell genuine parts. So if they are unable to sell, for example, a brake pad, then they have to trim the numbers in their outlet. If a small company in rural Victoria is unable to produce disc pads to fit a Commodore or a Falcon, which are the bread and butter products of the industry, then they have to question whether they continue to manufacture. If a small manufacturer of disc pads and rotors in Queensland is unable to produce them then that has its consequent effects on the economy. No-one can detail what they are.

Whilst we think that the bill is a little clumsy in the spare parts area, and our position has always been that spare parts should not be registrable, nevertheless we do think that the bill can work. I am mindful that there is a review period encapsulated within the bill and, from the point of view of those companies that innovate—because we do have members that register designs as well—and design innovative products, they are still able to register their design. If it is a spare part, it is just not enforceable.

**Senator JACINTA COLLINS**—Just whilst you are speaking about disc pads, I want to clarify one issue. Holden and Ford currently register their disc pads, do they?

**Mr Elliott**—No; not that I am aware of.

**Senator JACINTA COLLINS**—I think Holden earlier said that they would seek to register visible parts. Precisely what are we talking about when we are talking about ‘visible’? Can you inform us on that?

**Mr Elliott**—I cannot answer for Holden.

**Senator JACINTA COLLINS**—I understand.

**Mr Elliott**—But I would read that as being anything that is viewable in any part of the motor vehicle, whether it is a seat, a water pump on an engine—because that is viewable—or the panels. Depending on how hard you look, you can view the whole braking and suspension componentry, the interior light and the sun visor. They could conceivably be registered if they met the other design tests. I do not know that they would do that to that extent. I know international car companies do not. But in terms of what they would register, that is a question only Holden or Ford could answer.

**Senator JACINTA COLLINS**—Mr Boddy, perhaps you might comment.

**Mr Boddy**—There are brake pads registered. It is just that Ford and Holden have not registered them. It is not a case of Holden and Ford versus the rest; lots of companies register designs. Holden and Ford happen to have registered most of the external panels on the car, the parts you can see when you stand 10 feet back from the car—the headlamp, the bumper bar, the mudguard, the bonnet and so on. But there are lots of other parts that are registered. Pistons are registered. There are all sorts of internal mechanical parts of cars which we would say that—

**Senator JACINTA COLLINS**—By Ford and Holden?

**Mr Boddy**—Not by Ford and Holden, but by other companies. The important thing is that the designs bill that we are looking at is not just there to stop Ford and Holden doing one thing or another. The designs bill we are looking at is going to give consumers the right of repair, in contrast to the Designs Act, which enables any designer to register any part. It happens that, at the moment, Ford and Holden have registered a negligible number of external cosmetic parts, which probably have a bigger effect on an insurance company than they have directly on a consumer. But the potential is there under the current act, if we do not see any change, for any manufacturer or any designer to come along and register a design, whether it is made overseas or designed overseas, and take a 16-year monopoly. That is the greatest risk for consumers in the future.

**Mr Crothers**—There have been cases of other products where parts have been registered and used to stop third-party supply and the original equipment supplier was charged enormous monopoly prices on the original part. So there are cases outside the automotive industry that have significant impacts.

**Senator JACINTA COLLINS**—But just so I understand what is occurring in the sector, Holden and Ford would be registering parts more to protect the cosmetic design than the internal spare parts of the vehicle?

**Mr Boddy**—I would suspect, based on the evidence they have given, that they are registering it to get more revenue out of the parts market as opposed to the new car sales market. That is to say that, if they wanted to protect the whole external design—and I am guessing here—I would imagine a car manufacturer would register the whole external design, as other car manufacturers like Porsche and Honda do. But the effect of registering it part by part is that it gives you a monopoly in the after-sales market, where you can exclude competitors. That is the key difference—there is an effect on what you call the ‘secondary market’. Once a customer has bought a car and is locked into that particular shape of bonnet or mudguard, they have to buy a replacement part that is that shape. No innovation is possible in that shape, so it is a matter of: are there any competitors out there who are making the same shape? If the opportunity to make a copy for the purpose of repair is excluded then it is difficult for an owner of a vehicle to repair their car without going and paying a monopoly price.

**Senator JACINTA COLLINS**—Let me ask the question this way: are you aware of any of the motor vehicle companies registering a spare part for design protection where it is unlikely to be seen by a consumer?

**Mr Boddy**—Do you mean any motor company at all?

**Senator JACINTA COLLINS**—Let us use the main examples here—Holden and Ford. Do they register any spare part that is not likely to be seen by a consumer in relation to—

**Mr Boddy**—Not that I am aware of, no. Holden and Ford are not registering the designs of parts that are hidden in under the bodywork out of sight, and we have no problem with that. I must make it clear that we have no problem with Holden registering parts; for instance, brake pads. The concern we have is that, without any change to the law, there is enormous scope for an increase in the number of parts that are registered in the future.

**Senator JACINTA COLLINS**—It is okay, Mr Boddy; we understand your submission. I am just seeking to explore a couple of questions. The final question, because you have raised the issue of how the market is operating, is: whilst you say that only two of 30 manufacturers are doing this, those two would be the ones principally involved in design in Australia. That would be fair, wouldn't it? Another company with a reasonable level of design carried out within Australia would be Mitsubishi, particularly around the Verada. Why would Mitsubishi not have sought to do the same within the Australian market? Can you inform us of that?

**Mr Boddy**—I could take a guess, but each different car company has its own particular business model. Mitsubishi, Toyota and Holden are exporting like mad overseas, so they have got revenue coming in. Ford is not exporting overseas, and maybe their business model is different in terms of where they get their revenue from—from the parts' secondary market versus income from new car purchase. You are right: Mitsubishi do not register any parts but they have got a car that is relatively unique in the global marketplace. Maybe they are getting their revenue from a different balance and the way their cross subsidies work is different.

**Senator JACINTA COLLINS**—I am sorry—we are short on time—but that essentially brings us back to Senator Brandis's question.

**Senator WATSON**—What do we mean by ‘spare part’? I can see some definitional problems leading to litigation. For example, does the definition include a feature such as

cruise control in the more expensive cars? In a conceptual sense, it is spare or incidental to the car itself. Is that a spare part or is just the parts of the cruise control?

**Mr Crothers**—I believe that is why IP Australia chose to go down the path of right of repair, because defining what is a spare part is in fact a very big problem. We did wrestle with this many times.

**Senator WATSON**—Is that a problem with the act, though—the definition.

**Mr Crothers**—If it is a right of repair, you do not have to define a spare part. You simply say that the consumer has the right to repair their vehicle and, therefore, they can obtain whatever components they require to carry out that repair of a faulty or damaged part of the car. You do not have to define a spare part; you simply say they can get whatever they need from whoever is willing to supply it, because they are repairing.

**Senator WATSON**—So that overcomes the problem of the definition.

**Mr Crothers**—You are avoiding the definition problem.

**Senator RIDGEWAY**—Wasn't that designed on purpose so it is the product rather than what it does?

**Mr Crothers**—It has to be a repair, not an augmentation. You cannot put a wing on the back of your car that is a copy of a genuine HSV wing and claim that you have an HSV. That is not a repair.

**Senator RIDGEWAY**—To follow on from that, would you run into problems in this scenario? You have purchased a new vehicle. The tyres form part of the vehicle. You get a flat tyre, and you put the spare on. Is the spare tyre a spare part?

**Mr Boddy**—It is arguable, but the bill does not require that argument to be taking place because, as long as you are repairing, you are in the clear.

**CHAIR**—Since we are ahead of time, we will have a 2½ minute morning tea break. Thank you, gentlemen.

[11.15 a.m.]

**MACAULEY, Mr Colin Douglas, Convenor, Designs Committee, Institute of Patent and Trade Mark Attorneys of Australia**

**McMASTER, Mrs Susan Gaye, Senior Associate, Allens Arthur Robinson**

**PIPPARD, Mr Lee Dorset, Member, Designs Committee, and Fellow, Institute of Patent and Trade Mark Attorneys of Australia**

**CHAIR**—Welcome. Mrs McMaster, as I understand it, you do not appear on behalf of any body other than Allens Arthur Robinson.

**Mrs McMaster**—We have had a fascination with designs reform for many years.

**CHAIR**—So you represent no cause; you merely represent the expertise arising from your firm's practice.

**Mrs McMaster**—That is quite right. I should disclose that we do act for Ford, although we are not appearing on Ford's behalf and they have made their own submissions.

**CHAIR**—The committee prefers all evidence to be given in public, but should you at any stage wish to give any part of your evidence in private you may ask to do so and the committee will consider that request. The committee has before it your written submissions. Are there any alterations or corrections to those submissions? No. May I invite you each to make a brief opening statement.

**Mr Macauley**—The Designs Act 1906 is the poor relation of the IP laws of patents, trademarks, designs and copyright. The terms of reference for the Australian Law Reform Commission were issued in 1992 and a final report was issued in 1995. In 2003 we still do not have the implementation of a new designs act. The institute has two particular problems to address today. These are, namely, the term of the design and the spare parts issue. In keeping with the 'poor relation' tag, the designs bill proposes to reduce the term of design protection from 16 years to 10 years—that is, to reduce it by 38 per cent. When the Patents Act was reviewed, we went from 16 years to 20 years. When the Trade Marks Act was reviewed, we went from seven years to 10 years. When the petty patent became the innovation patent, we went from six years to eight years.

Why are we so stingy? Because the TRIPS says the minimum term should be 10 years. The ALRC recommended a 15-year term. Based on its brother and sister laws, you would expect the term to be at least 15 years, as was recommended, or up to 20 years, as happened with patents. Who gets punished by this reduction from 16 years to 10 years? Only the 66 per cent of Australian residents—as opposed to the 34 per cent of foreigners—who file for designs. Under the patents system, 91 per cent of Australian patents belong to foreigners. Whereas Europe has recently increased the term of registration for design to 25 years, Australia proposes to go backwards and punish instead of reward our innovative designers by meeting the minimum term recommendation. There is no justification for this reduction.

The second issue is the spare parts restriction. This aspect is discriminatory. If a patentee has a patent for a bumper bar and a third party bumper bar is fitted after a collision, there is an infringement of the patent. According to our poor relation, the Designs Bill, there would be no

such infringement. That is clear discrimination and the situation is the same. This situation does not occur with the current Designs Act.

The new Designs Bill provides for a Clayton's monopoly rather than a proper monopoly. There is no need for spare parts legislation. Who is pushing for this unnecessary reform? It is the non-innovative insurance companies and third-party suppliers. According to the latest figures on design registrations, there were 315 registrations in class 12 out of a total of 3,755 registrations. Class 12 includes anything to do with motor vehicles but it also includes planes, boats and trains. A maximum of 8.4 per cent of designs may fall within a definition of automotive spare parts. Why should such a small number be singled out for special attention that affects all design registrants?

The proposed legislation is not limited to vehicle parts; it would also apply to a food processor bowl or a shaving blade cartridge. Why should manufacturers of these things also be discriminated against? We believe that, with an appropriate amendment to the term of the design and the removal of the discriminatory spare parts legislation, Australia can continue to reward innovators and back up the government's support for innovation. If you still wish to include spare parts legislation, please listen to my colleague Lee Pippard, who will discuss a better implementation of such a policy, and other matters.

**Mr Pippard**—I will address the spare parts issue in particular. There was much discussion from earlier speakers about the cost of spare parts and the variations in prices between original equipment manufacturers and aftermarket suppliers. The interesting aspect of that discussion was that at no time did any speaker identify any particular part as being design registered. They are all designs, certainly, but the issue is whether they are registered. There was no indication as to whether or not registration resulted in an inflated price.

The issue of spare parts has two aspects. There is the issue of components that must fit or must match other components. This will be understood, for example, with respect to a motor vehicle fascia. I have here a drawing from the ALRC report of such a registration. This registration has features which must match other features on the motor vehicle that will be on the periphery of the fascia. It will also have in its implementation features which must match—that is, the components that enable the fascia to be coupled to the bumper bar and the chassis of the motor vehicle. Under the present arrangements, the entirety of that fascia is registrable, along with those features that must fit and must match. But a swag of other features in that registration which limit the scope of the registration may be altered, if desired, by any other person seeking to supply a product to the market. It has not been shown, in my opinion or in any of the submissions, that the rights of a person seeking to supply a product to the aftermarket area have been stopped by the presence of a design registration. I am not aware of any specific litigation in respect of design registrations for spare parts, certainly over the last 15 years of my practice.

The issue of must-fit and must-match components raises the question of whether or not something can be replaced. Former speakers talked at some length about disc pads and the fact that a disc pad might be designed to fit a Holden Commodore or a Ford Falcon. The fact that that disc pad will have features that must fit and must match to enable it to be fitted to the braking assembly of the motor vehicle does not necessarily mean that it does not have other features that can be designed around—even if it were to be registered as a design—and

therefore enable the aftermarket supplier to actively compete in the marketplace, even in the face of a registered design. For this reason, we think that the concept of the right of repair being proposed in the present legislation is inappropriate and the intention of the government could be better implemented in another form. Our institute previously proposed an alternative form of dealing with must-fit and must-match components which does not involve excluding such spare parts from registration. This point was widely discussed in the explanatory memorandum, in my opinion erroneously.

The proposal that the Institute of Patent and Trade Mark Attorneys put forward was that, under considerations of infringement by a court, any features which either must fit or must match in a design registration would be excluded from consideration. As a consequence, the court would then be in a position to consider issues of infringement based solely upon the aesthetic and salient features of design. That would enable the aesthetic appeal of design—which the previous speakers from Ford and Holden have discussed—for which they invest so much money, to continue to be protected whilst allowing aftermarket suppliers to effectively design their own replacement part that can either fit or match the part it is intended to replace or the other parts of the complementary product.

We believe that the presentation to the parliament in general has been somewhat one-sided. I do not think it has been done with an entirely clear grasp of what the law is and what people are presently able to do. As Mr Macauley just indicated, the number of registrations for motor vehicles in that area represents eight per cent of the total number of design registrations. As we have seen earlier, the number of registrations applied for by Holden and Ford for their spare parts is less than one per cent of the total number of spare parts that they supply. So, firstly, there is no clear showing that we need this legislation and, secondly, under the proposed right of repair this would basically provide for legalised copying of a design registration.

With the new proposed legislation we have also seen that the rules are to be tightened for obtaining registration. That will probably, as submitted by the representative from Ford, reduce the number of designs that they would be able to register anyway. This will act as a further filter on the issue, making the idea of spare parts and specific exclusions for them practically unnecessary. The further extension of this legalised copying that is being proposed is how it might extend on to further industries. We have seen a great interest by government over the last few years in protecting copyright. It must be remembered by the committee that the design law that we have before us arose out of copyright law. It is effectively copyright law in relation to industrial designs. The spare parts issue could then well extend to general copyright issues. I draw an analogy where one person purchases an operating system, pays the upfront price for it, and then seeks to obtain an upgrade sometime later. Can that upgrade be paid with royalties to the original copyright owner or could it be supplied by some aftermarket supplier? Therein lies a real issue. That is why this spare parts issue is not one that is just limited to motor vehicles spare parts; it transcends all industrial designs and, in my opinion, it could extend to general copyright.

**Mrs McMaster**—One of the things that we were concerned with was the reduction of the term of protection. We did not quite understand why that was regarded as necessary, particularly in light of the increasing terms of other intellectual property rights. I should also mention that there is an international move to increase the term of protection of copyright to

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as much as 70 years after the death of the author. In that context, why designs is decreasing is questionable.

The other area we had concerns with was the formalities only examination process. It seemed to us that you were raising the bar significantly. The sorts of things that are going to be able to registered as designs are going to be different to the things that get through these days. That should have been wonderful because you would have had some certainty that what you had on the register was the boundary that you could not step over. You should have been able to tell that. You will not be able to now. We see there is potential for abuse of the system.

When the petty patent system was introduced for the formalities only examination process, one very smart young patent attorney filed and obtained a patent for the wheel. On formalities only, it is an abuse of the system. That is silly; he withdrew it. But it is silly to allow that sort of a thing because you cannot bring any action in respect of these designs until you have gone through a substantive examination process. Let us think about that. I register a whole lot of designs. Some of them are my main designs, if you like, and some of them are sort of little bits on the edge. But they all have to meet a standard. They all get registered, and I find someone infringing and I cannot do a damned thing until I go to IP Australia and say, 'Please would you substantively examine this against a whole world of prior art now?' That is going to be a time consuming procedure and I wonder what the impact will be for people being able to get immediate interlocutory relief in those circumstances. That is a worry.

The other thing is that you will have people on the register who would not get over the high boundary but they are on the register; they are registered and they can go away and say to you: well, I have a design registration. It is all very well to say that there are threats provisions in this legislation. In my practice I see people who are threatened with intellectual property infringement. There are threats provisions in most statutes. It is often economically much easier just to stand by and say, 'Look, we'll change it; we'll do something different.' You are letting people get away with things that they really should not be able to get away with. That is the problem with the examination process.

Then we have the spare parts right of repair. Policy is not really something that lawyers are always very good at, but I will say this: it seems to us that, where you have a system that allows for registration of valuable designs, you should enable the owner of those designs to fully enjoy the benefit of having achieved that standard that you have set. If you then decide for various consumer type reasons to take away rights, then please let us make it certain. Let us make it perfectly clear what they can and cannot do. Our concern here is that a design owner is put to the proof of showing that someone did something for a particular reason.

I will draw an analogy with the trademarks area. Years ago you used to get a trademark removed because it had not been used and you had to try and prove nonuse. The person who is on the register did not have to really do anything. We are moving to a similar situation now with designs. It was changed in the trademarks area because it was shown just to be so difficult to get rid of a trademark for nonuse, for that very reason; why are we doing it in the designs arena? Why are we doing it when the person who is using the design and who claims the benefit of the carve-out is in the position to bring to court evidence of their intention? Why are they not required to do that? It just seems to me to be tipping the scales too much in favour of someone who has made no design innovation, who is getting an economic benefit

from it because they are able to sell it commercially, deal with it, and I just do not see the point in that.

The other thing I would like to say is that I think there has been a lot of misconception this morning about what we are talking about when we are talking about how this exception will operate. We are only talking about registered designs. To bring an action they are going to have gone through that big test. So the ones that we are talking about that are really going to be important are going to have to have been examined against a pretty stringent test. It is only those designs that can be the subject of this carve-out. Disc pads and stuff—the fact that they are out here and being used displays that there are no IP issues with those. They are here, they are going to stay here, no-one is going to lose their jobs; disc pads are going to be there and disc pads are going to be there and it does not matter, they are still going to be available. What we are talking about is the really important aspects of design. Look at a car; look at its bumper bar or whatever. I go out and I choose a car for all sorts of reasons, and one of the main reasons I choose a car is because I like the way it looks; I am a woman, I like the way things look. Why shouldn't the person who has put a lot of effort into designing that car get the full benefit of that? If as a matter of policy we say, 'Designs law protects appearance and enables design owners to get the full benefit through exploiting their designs,' why do we say, 'Oh, but, um, er, if it is a car, no, you cannot do it.' It does not make pure policy sense. Really that is all I would like to say.

**Senator LUNDY**—Regarding the reduction to 10 years from 16 years, your submission is quite clear that that seems to buck the trend of what has been happening in IP law, not just here but in other places around the globe. I am interested in particular in the impact on the European market, the changes that are taking place in Europe with respect to the management of IP law, what specific concerns you have about this proposed change in the bill and how that will potentially impact upon Australia's ability to perhaps conform with some EU standard or the standards of individual countries in the European Union. Are you able to shed a bit of light on that for me?

**Mr Macauley**—Certainly the British have introduced the match system, so obviously if we have that sort of system then we are conforming with something that is already adopted overseas anyway. So there is no difference there, whereas if we introduce the spare parts thing we are really going out literally on an island, because no-one else has that sort of provision.

**Senator LUNDY**—In the European Union?

**Mr Macauley**—No. It is also going to be extremely difficult to implement, as Sue said, because you have to prove a negative.

**Senator LUNDY**—But are there any specific treaties, negotiations or agreements in the European Union that would make this change have a direct and identifiable negative impact on Australia?

**Mr Macauley**—Obviously they already have it, so, if an Australian wants to export a bumper bar to England and has a design registration over there, he will run into that aspect of it. In Australia he runs into the spare parts and cannot stop anyone from putting that bumper bar on a car, but when he goes to England he can stop someone putting that particular bumper bar on as long as the particular arrangements of slots, air vents and things like that are shown. But you cannot protect aspects like how it bolts on, the clips that you need, the shape of the

hole where it is going to fit on the chassis and things like that. However, there is still plenty of provision for getting a legitimate registration.

**Senator LUNDY**—Mr Pippard, in your opening statement you talked about how long the design is protected for. Are you able to give the committee a snapshot of what the design protections are in other jurisdictions and what the recent changes have been?

**Mr Pippard**—Yes. The Australian design law is interesting when considered in the suite of intellectual property laws encompassing patents, trademarks, copyright and design. There has been great effort over many years to ensure the conformity of, certainly, our patent and trademark areas with the laws of other jurisdictions, and there are a lot of good reasons for that. Interestingly, Australian design law has evolved to have some reasonably significant differences from other jurisdictions—although this is neither because of neglect nor of specific design. For example, in Australia the functional features of a particular article or product are able to be registered, and that is a specific piece of our legislation. It is in our existing legislation. It has been reproduced in the proposed bill. That is something that is expressly excluded from registration in the United Kingdom, and there is some dirty big case law about all of that from about 1970. But that provides a basis by which Australian designers can, for example, obtain registrations for those designs that are functional, and they can include, amongst other things, components for motor vehicles—dare I get back to the spare parts? But it can include a lot of other things as well. That is one aspect of difference.

Generally, the other differences are fairly minor. The term that we are talking about—of 10, 15, 20 or 25 years—is one that has always varied around the world for the various types of intellectual property. But, as indicated previously, around the world there has been a general focus on certain terms for patents and trademarks. When we signed TRIPS, we changed our patent term from 16 to 20 years, because that is what TRIPS was all about, and other countries were doing it as well. The United States changed theirs from 17 to 20 years. Other jurisdictions changed theirs to 20 years. There was a general convergence on 20 years.

With the designs legislation, the TRIPS requirement says that 10 years is a minimum, but that has to be read in light of the right of government to legislate whatever term it likes. It is appropriate to look at other jurisdictions, the terms they have and our previous term. Fifteen years, as recommended by the ALRC and many others, and being consistent with our present laws, is quite reasonable. I feel the 10-year term came as a bit of a fallback from the spare parts issue, where the people arguing against protection for spare parts were saying, ‘If you are going to provide for registration of spare parts, let’s chop the term down a bit, thereby providing a little more of an incentive to the economy.’ If the spare parts provisions—the right of repair—go through, I would suggest that that argument is countered and we should have at least a 15-year term. Personally, I believe we should have a 15-year term anyway.

**Senator LUNDY**—Do you think the legislation might contain a bit of ambit in including both aspects—the spare parts and the reduction to 10 years?

**Mr Pippard**—Frankly, the reduction of term is in the hands of the registered proprietor. Designs are a little different from patents. Once patents are registered, you have an initial five years and then you have to pay a renewal every year thereafter for the 20-year term. For designs, it is currently six years, then five plus five, which gives 16 years. The present proposal is a single renewal at five years, to give a term of 10 years. The ALRC proposal was

two renewals at five. Those renewals provide a mechanism by which the designs register is self-purging. People will not pay money to renew those designs that are not commercially valuable; they will let them go. That is what happens, and I am sure the speakers after me from IP Australia will be able to provide a bit more meat to that argument.

**Senator LUNDY**—Can you point to anywhere that is looking at reducing the term for design protection?

**Mr Pippard**—I am not aware of any jurisdiction where they are considering a reduction. To be frank, until the publication—or immediately before the publication—of the bill, I was not aware of any proposal to reduce the term below 15 years.

**Senator LUNDY**—Up until this bill?

**Mr Pippard**—Yes.

**Senator LUNDY**—So there was no consultation?

**Mr Pippard**—Not on this particular one, to my recollection.

**CHAIR**—At least not with you.

**Mr Pippard**—Certainly not with me or the institute, as far as I recall.

**Senator LUNDY**—Are you aware that the Hague Agreement on Industrial Designs provides for 15 years and that, if Australia were to join that agreement, we would need 15 years for our design protection?

**Mr Pippard**—That is correct. If we were to sign that agreement, we would need that.

**Senator LUNDY**—Can you tell me a bit about the implications of signing that agreement and how that is important to Australia, our economy and our designers?

**Mr Pippard**—The Hague agreement is a separate form of registration that relates to, dare I say, a fairly select group of countries. They are predominantly European, but I believe the group also includes one or two Asian countries. It is basically a file and forget system, if I can call it that: it is actually a deposit system where one deposits a design with the international bureau of WIPO in Geneva—or through the national office—and then that is registered, but the rights accruing from that are effectively mere copying. So you have to have almost direct copying to be able to enforce your rights.

The rights under the present designs legislation and the proposed legislation are intended to extend beyond more than mere copying—direct copying. Unfortunately, in practice they have not done so in general. The intention is for there to be a scope of protection surrounding the registration; hence, joining The Hague agreement would, I think, represent a step backwards for design rights in Australia.

**Senator RIDGEWAY**—I have a couple of questions. I am a little concerned about the comments in relation to what you perceive as the committee presumably looking at this in a very narrow form—that is, only in relation to the automotive manufacturing industry. If you believe that this has implications for others in relation to industrial design, are you able to talk more about that? Where there might be a change in the law, what sort of percentages are we talking about in terms of impact? The issue, as far as I can see, is one of coming up with some perfection in the law and then the substantive application of that. I hear what you say in

relation to possible applications following on in relation to copyright and other areas, but are you able to provide the committee with some comment about other industries or individual designers that might be affected by this? So far not only today's inquiry but also the four previous major inquiries that were held on the question of spare parts—or replacement parts or repair parts—all covered predominantly the automotive industry, with perhaps a little bit on the marine industry. Other evidence has not come forward, from what I can see. If you could make some comment about that, I would find that useful, because that evidence is simply not there. It does concern me that the others that you talk about in terms of needing that protection in law have not come forward and provided submissions, so it would be useful if you could talk about that.

**Mr Pippard**—The issue with spare parts is that there is not great empirical evidence as to its impact upon any area of business apart from the motor vehicle business. The main push for the spare parts legislation came from the automotive area, notably the insurance groups. As a consequence, it is only reasonable to understand how the automotive manufacturers have responded to that. Whilst the law is intended to be general, the seeking of its implementation is focused upon them, and today's proceedings bear witness to that. All that has really been discussed has been motor vehicle spare parts.

There is, as you can imagine, a great swag of components or products from other industries that could well be captured by this legislation. The legislation merely refers to a complex part as comprising two or more replaceable parts. The tables we are sitting at arguably could be considered complex parts for that purpose. Yet all of the submissions that have been made revolve around the economics and issues relating to motor vehicles. Nothing else has been presented to show that this spare parts legislation is necessary for other industries, that other industries—or the choices of consumers—are being damaged by exorbitant prices created by monopoly rights in parts in other industries. The entire argument, frankly, has been focused around motor vehicles. I must confess that I cannot really draw upon anything quantitative that could really refer to any other industry. I cannot discuss the motor vehicle industry—I am not skilled in that particular area.

**Senator RIDGEWAY**—Are you aware of any cases over time that have dealt with these issues?

**Mrs McMaster**—That is the point that I was interested to make. You have a new system being proposed here. Currently there is no defence for you to go away and make a replacement part. It is not a defence under our existing designs legislation. So this is something that is going to hit industry as a new thing. There is the potential for people whose manufacturing plant can make spare parts for Sunbeam Mixmasters or whatever to then go into that area knowing that they can claim the benefit of the defence. That is the benefit of having a review a few years down the track, although I query whether the time span is going to be sufficient. I think we will find out whether it will have an adverse impact. Certainly, for people who have built into their costing the ability to supply spare parts, it may come as a terrible shock that suddenly there is a defence that appears to apply to an enormous range of products.

**Senator RIDGEWAY**—From your own experience, Mrs McMaster, and looking at the question of design and designers, and given the way that most of these things develop, are we

talking here about rights that are owned by corporations as a result of contractual arrangements or employment arrangements, or are we talking about individuals or both? If so, what is the differentiation between them?

**Mrs McMaster**—In my own experience, most of the design owners that I deal with are corporations who take it on either as employers or through assignment from independent contractors, so they are corporations that are paying for the design work in the sense that it is a cost to them. We do not normally deal with individuals.

**Mr Macauley**—A client of mine that is big in designs is Decor—you are probably familiar with their plastic gardenware and pots and pans and things like that. A lot of their designs cover things like plant pots with clip on bases to prevent the water from coming out. Obviously they are going to be greatly affected by this sort of thing. In their instance, Decor employ a contract designer; Decor themselves do not design but their designs are contracted out. That is a fairly common thing, because that is what a lot of these design houses do for a lot of companies. There is plenty of that happening in Australia. There are a lot of Australian companies and individuals that do so. Obviously, a two-part component that goes together will be caught by this legislation.

**Senator RIDGEWAY**—What would be the normal practice? For example, Alessi, which I presume is a company, designs innovative products—anything from clocks through to kitchenware. How would it go through the process of design by an individual through to registration of the design and then the product? Presumably there are many out there in the marketplace that are doing similar things or doing variations on that.

**Mr Pippard**—The thing you have to appreciate, Senator, is that, whilst there are many designs out there in the marketplace—and we have seen many of them discussed in respect of motor vehicles already today—not all of them seek design registration. Indeed, most of them do not seek design registration, because for one reason or another they do not see themselves as having any rights that they particularly want to protect. That is their choice. Those people who develop a new product that is distinctive in design and who wish to protect it against copying will seek design registration. They have traditionally done so. As Mr Macauley said, there are 3,000-odd registrations every year in Australia at the moment. Many of those come from overseas corporations. Most of them come from Australia—from individuals and corporations as well. With spare parts, if the right of repair provisions come in, that will protect the original equipment manufacturer. The original equipment manufacturer will have a contract or some agreement with the manufacturer of the product. Under that arrangement, he may not therefore need to protect himself against design registration if third parties can come into the aftermarket and sell competing products without infringing any rights.

One thing I foresee with this new provision is that those people who do manufacture spare parts that they would otherwise register as designs probably will not even bother now, because there is no point—because they have their contractual arrangements in place, with Ford or Holden or whomever, and those contractual arrangements would probably supersede the specific legislative requirements anyway, and they would be actionable if there was ever a fight between the two.

**Senator RIDGEWAY**—I think I accept the views that have been expressed about the difficulties of the examination process, but what do you say about the reversal of the onus of

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proof, particularly in terms of the registered designer having to prove the case, as opposed to someone else? Do you have a view about that?

**Mr Pippard**—The reversal of the onus of proof applies in respect of the registered proprietor of a spare part—dare I say—in the exclusion provisions. There, the registered proprietor has to prove that the supply of the product by the other party was for something other than repair purposes. That will be very difficult because obviously the third party who will be supplying the product could be anywhere in the marketplace. Arguably, they could be supplying to the original manufacturer. It is very difficult for him to assess, unless he has direct access to that manufacturer. That would require their licence agreements to be explicit on that term. Many things can be resolved by a proper contract, but the purpose of the legislation is to protect the rights of individuals and corporations in the absence of those other, formal agreements.

**Senator WEBBER**—You have explored the issue of the focus on automotive parts. It seems to me, though, that for most households in Australia, obviously a car is their second most expensive asset, so they are more likely to get that repaired than their kitchen or what have you. Apart from cars, obviously industrial equipment is therefore most likely to be repaired, but that would be covered—certainly in my experience—by the contractual arrangement with the supplier. How realistic is this concern about the supply of spare parts for things like kitchen equipment and what have you, with growing evidence that, as we are becoming more of a consumer society, we are not getting things repaired; we are throwing them out and going and buying new ones? Apart from that top end, expensive asset market, is it a realistic concern?

**Mrs McMaster**—I think it is. I will give you an example. We have talked about Decor; let us talk about something like Tupperware. They sell by party plan and, if your lid gets burnt on the stove, you have to send it back to Tupperware to replace. What if I were a plastics manufacturer and I made Tupperware lids and sold them through supermarkets? All of a sudden they are cheaper, they look the same, the clips work and people think, ‘I’ll buy that.’ That is potentially a real issue, in my opinion. I do not see that we can judge this at this point in time. I think it is something we are going to have to look at over a period. I do not understand why, if we have identified one particular area as a problem, we are making generalised reforms without knowing exactly the answers to the questions you are raising. That seems to me to be silly.

**CHAIR**—Thank you, Mrs McMaster. Thank you, gentlemen.

[11.59 a.m.]

**GOULD, Mr Richard Baxter, Deputy Director-General, Corporate Strategy Business Unit, IP Australia**

**McCARTHY, Ms Caroline Anne, Acting Director, Development and Legislation Section, Corporate Strategy Business Unit, IP Australia**

**PORTELLI, Mr Victor John, Deputy Registrar of Designs, IP Australia**

**WYERS, Ms Jessica Mary Jane, Assistant Director, Development and Legislation Section, Corporate Strategy Business Unit, IP Australia**

**CHAIR**—The committee has before it a written submission from IP Australia. Before I invite you to make a brief opening statement, are there any amendments to that submission?

**Mr Gould**—No.

**CHAIR**—Who will speak on behalf of IP Australia?

**Mr Gould**—I will. I think most of the points we want to make are set out in our submission, which is a comprehensive explanation of the processes that have led to where we are now, including an extensive consultation process and explanation of some of the key and more contentious issues. I want to try and hit on some of the key points and, if I can as I go through, pick up some of the things that have come out of the earlier discussion. Clearly, with something that has taken this long to get this far, there has been an extensive consultation process starting with the ALRC and since the government's decision was announced in 1999. The consultation process, I should add—picking up the spare parts issue—has gone well beyond the motor vehicle industry but, for obvious reasons of commercial importance and consumer interest, that area is where the spare parts issue is focused. For example, we have spoken to pump manufacturers and the alumina industry, to name a couple that have been right through the process, including when the ALRC were doing their review. These people have been contacted and have shown a little interest in it.

The other thing I should pick up on and point out is that the government's decision in 1999 was very comprehensive. It did in fact announce a 10-year period and there have been numerous discussions with interest groups on that topic since. I think the only issue that was not announced then was the details of the spare parts exclusion. That was announced somewhat later. The point I want to make is that these issues have been aired for some time and I think, again, as was evident from the discussion this morning, there are some fairly contentious issues, particularly around spare parts.

Just to pick up on a couple of other things, I think it is worth noting that the design system is applicable only in Australia, so you only get protection in Australia. If you need to go overseas, you have to go through the systems over there. It protects appearance only. So, while we have heard earlier that you can get registration for functional items, you do not get any protection for their functionality. You get protection for their appearance, and that is all you get out of the system. As came out this morning, the real issue I think behind developing the whole system and revising the whole system is the balance between encouraging an economically optimal level of design in Australia and the impact on consumers of price and choice, as well as the opportunity for other third-party suppliers to enter the market. So the

whole design of the system, including things like term threshold tests et cetera, all go to add up to that balance. I will comment on those quickly as I go through.

The first thing perhaps worth picking up on is the new registration system. There is a change from the current system. Under the new system we do not do up-front so-called substantive examination. This is I guess the costly time consuming part of the current registration process where you actually compare each registration against all the threshold criteria. You search databases, various sources of literature. The idea of the new system—and it builds on the approach used with the innovation patent—is that you can register, as long as you meet all the formality requirements, and you only actually go down that substantive examination path in cases where it is necessary. This would principally be where people want certainty for some particular reason or if they want to challenge somebody or enter litigation over infringement. In fact, one point worth noting is that, if you want to challenge somebody for infringement or make any threats, you have to firstly get the thing examined. So you cannot just go off on the basis of the unexamined right to do that.

We recognise that it was an issue. As one of our previous people mentioned, there was a bit of fun and games with the introduction of an innovation patent because you can now get something on the system that is unexamined. There is an issue of a trade-off there between uncertainty and, on the other side of it, ease of access to the system and cheapness, particularly for SMEs. They are really the two trade-offs. I think it is fair to say that the innovation patent system has now settled down, but we do recognise that there is a potential issue of uncertainty. One of the things that is planned to be done there is a big education campaign, so that people actually understand what is sitting on the registration system. If a right has actually been examined substantively, it will be marked accordingly and have a different status from something that has just been submitted to the system.

The next thing I would briefly touch upon is term. We have heard some discussion on that already. A point to make at first is that the term in any of these issues is part of the balance. It is pretty much a rough justice system, and that would apply for patents as well. The reason I say that is that it would be hard to argue that each design has the same economic intrinsic value or whatever. Each design in itself would be somewhat different. You could have a simple design or a complex design for something like a motor vehicle. The resources that it takes to do it are different. In fact, everyone gets the same reward, so it is a pretty rough system anyway. I guess it is a fair matter of judgment as to what the term should be: 10 or 15 years? The draft legislation proposes 10 years, which is the minimum standard under the TRIPS agreement, and that is the same for patents and trademarks. Effectively, that is the rationale behind that.

The other thing worth mentioning in terms of the whole balance is that we are now moving from a system where it is very easy to get protection but, once you have the protection, it is not very effective. It pretty much provides protection against direct copying and not much more. In actual practice, you are moving to getting 10 years from something that should be worth somewhat more than the 16 or 15 years you get now. I think you need to look at the whole thing in balance.

The last thing to quickly touch upon is spare parts. Obviously, this is a most contentious issue and I guess that is one of the reasons it has taken quite some time to get this far in the

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process. Clearly, there are polarised views and, again, I think it is a matter of getting the right set of judgments and balance in the whole system. It is important also to remember that we are now moving from a system where the protection is not very effective to one where, if the proposed legislation works, the protection should be worth somewhat more. I think that needs to be borne in mind as we look at all of this.

As to the proposed approach for having an exclusion, clearly it is a complex issue. The government took the policy view that the potential impact on the consumer should be the overriding feature in this particular area. I guess it is probably worth explaining in an example as to why that might be so. To take an automotive example, a motor vehicle, you can register the whole appearance and shape of the new motor vehicle so that the manufacturer would get protection for that. That is fine because, if I go out into the market, I can probably buy a Ford, a Mitsubishi or a Holden—they are all competing out there. But when you actually register a mudguard for, say, a Commodore, if I want to have my Commodore repaired, and that part is actually design protected, I then have no real choice. I have to go to General Motors to buy that component. In other words, there is no consumer choice in the market. I think that is the important distinction.

The other issue in here is that it is very hard to come up with an exclusion that is going to be administratively effective; that is not going to have—to use an American term—significant collateral damage. For example, if you went down a ‘must-fit, must-match’ path, which is an approach that was used in the UK until last year when they actually moved to a right of repair, that particular approach would mean that, if I wanted to, I simply could not register a mudguard. A better example would be a spoiler for a car. Under ‘must fit, must match’ I would not be able to get registration at all for that part. If I went to the proposed system, if I wanted to use that spoiler for a replacement or repair, that would be okay. But if I wanted to use it to, say, upgrade a vehicle or as a new piece of equipment, it would not be okay.

What the approach here is attempting to do—and again it is not perfect, clearly—is to allow initial registration of something. If it is actually used as original equipment, it has protection. If it is used for repair purposes, the people using it say that they have a defence against that infringement action. There are a few balances in there. A number of other options have been looked at. The important thing with the approach is that we are actually trying to give as much protection under the registration system as we can while still meeting the objectives of the competition concerns. They are my opening comments. I will take questions.

**CHAIR**—Thank you, Mr Gould.

**Senator LUNDY**—Can you go through the logic behind the government’s decision to include a 10-year maximum term for the registrations for designs.

**Mr Gould**—I guess, as I mentioned in my introductory remarks, it is a fairly rough justice system anyway, in that all designs are not technically equal. In an ideal world you would probably match the period depending on the merit of the design. Under the TRIPS agreement, we have a 20-year minimum period for patents. Again, that is the logic with designs—it is basically a question of why we are going above the minimum that we need to have. Again I think there is the issue of what a fair balance in the system is, given that the new system, with a higher threshold and infringement tests, should mean that once a designer has something registered it is going to be worth more to them.

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**Senator LUNDY**—Do you think it is a fair reflection that the proposed changes will favour importers and not exporters?

**Mr Gould**—I am not sure whether I quite follow that question. If you have a shorter period of registration—I mean, anyone whether they are an importer or a local or an overseas firm can get registration.

**Senator LUNDY**—We heard earlier today that design protection is a factor in companies' choices about where they do research and so forth. We are currently a net importer of intellectual property, are we not?

**Mr Gould**—We are a net importer of intellectual property. It is a bit hard to judge, but currently we have more designs locally—

**Senator LUNDY**—I think you do understand the question, in the sense that we have heard evidence today that this will make it that much tougher for Australia to present arguments and incentives, if you like—or at least to not present disincentives—to people investing in the production of designs.

**Mr Gould**—Yes, sure. But I think you have to look at it in the broader context of the total design system and what sort of protection you will actually get.

**Senator LUNDY**—But that is the point: does it only make sense if you look at the big picture and you do not actually narrow down on that pros and cons issue?

**Mr Gould**—You really have to look at the effectiveness of enforcement, and you have got to look at the threshold test. The threshold test in this new system is significantly higher than in the previous system, so it is hopefully going to be much easier to prove an infringement. At the present time it is fair to say the system provides very little protection against anything much more than copying. The courts have pretty well read the test down to the point where minor differences will avoid infringements, so you could argue there is something significantly better there.

I guess again it gets broad, in that you have to look at what markets you are going to exploit the design in—and we are complying with TRIPS here, so people based here can get design protection in other countries. Different countries seem to have different periods of protection—for example, in Canada and China it is 10 years; in the US it is 14 years. It goes up from there: the new European directive is moving all the Europeans to 25 years, but again within Europe there is a very broad range in the types of protection and what you actually get.

**Senator LUNDY**—Are you aware of any jurisdictions that have moved recently to reduce the period of time for the protection of designs?

**Mr Gould**—No. I think that is probably a fair point. I do not think there are others that have moved—there are others that are at the 10 year level.

**Senator LUNDY**—Obviously you can confirm that the ALRC's recommendation was for 15 years. Do you agree with the proposition that the ALRC has that the majority of submissions to its review supported a 15-year maximum term?

**Mr Gould**—Off the top of my head, I think that is correct. It was pretty much maintaining the status quo. Certainly, going back to the time when they were doing their review, I do not

think they were overly strong one way or the other in private discussions. It pretty much went to the status quo.

**Senator LUNDY**—So has your consultation process for this bill been more comprehensive than the ALRC review?

**Mr Gould**—I think we went over a lot of the same ground.

**Senator LUNDY**—Do you think it was more comprehensive—or less?

**Mr Gould**—I would guess it would have been at least as comprehensive, if only for the reason that we have been at it a lot longer. They had a very comprehensive consultation; we tended probably to focus more on some of the key interest groups. We did not, for example, go out and do a major survey of designers.

**Senator LUNDY**—Did you draw from the ALRC review to inform your decision to go with 10 years?

**Mr Gould**—Of course, yes.

**Senator LUNDY**—Obviously, you did not agree with it, but how much did it impact?

**Mr Gould**—Clearly, the debate was between two options: do you go for the status quo or do you go for the TRIPS minimum? What is a fair thing?

**Senator LUNDY**—I guess I am trying to just get a feel for it. Given the weight of evidence in the ALRC review, did the evidence that you found outweigh that or equal that or offset that view in any way, or did you find that a significant body of the submissions that you sought supported 15 years but, because of your own views, you went for 10 years?

**Mr Gould**—There was certainly plenty of support for 15 years, but it did not come up to us as an issue people were really hot under the collar about. As you saw from some of the people who spoke earlier, there seemed to be general support from a number of people for the 10 years.

**Senator LUNDY**—I asked the previous witnesses a question about the Hague agreement. I presume you are familiar with that.

**Mr Gould**—Yes.

**Senator LUNDY**—My understanding is that there are implications if we move to 10 years.

**Mr Gould**—The Hague agreement is 15 years. I guess—and the previous speaker, I thought, made the point quite well—that we do not have any particular intention of joining that scheme in the foreseeable future. Unlike the schemes there are for patents and trademarks, which have significant advantages for Australia, the designs one does not.

**Senator LUNDY**—Is there any room for consideration of a greater number of years than the 10 years—although perhaps not 15? I do not want to go into the hypothetical, but is there any point in considering a time between 10 and 15 years? What are the issues surrounding that potential outcome?

**Mr Gould**—I guess it comes back to the rough justice argument. My best guess is that 10 or 15 years would seem to be—I do not think it is a precise science, if that is what you are asking. My guess is that you go for 10 years largely because that is the minimum period we have to meet to be in the TRIPS, which then gives us the advantages of all the protection in

other jurisdictions, or we go for 15 years because perhaps we think that 10 years is not enough in terms of the advantage the designers are getting out of this vis-a-vis the impact on the consumer.

**Senator LUNDY**—Can you tell me what the Law Reform Commission recommended in relation to spare parts?

**Mr Gould**—The Law Reform Commission recommended basically an exclusion. The way they wanted it to operate—and I am perhaps a little rusty on this—was that, where there was a potential competition issue, they wanted the registrar of designs to refer it to the ACCC for review on competition policy grounds. Theoretically, it is a very neat solution. In other words, where there was an issue, it would focus on that issue and everything else would be clear, and everything could be registered and it would be dealt with at a competition policy level.

I do not think that particular process was favoured by too many, if any, of the interest groups. It was fairly administratively complex and costly, particularly if you bear in mind that it is effectively shifting the costs back onto the whole design system. It is a fairly small system and it is likely to be a contentious area. Bearing in mind that if we have a process that they were envisaging, there would need to be appeals at probably the referral stage and appeals of some sort at the ACCC stage. It could actually be administratively quite complex and expensive.

**Senator LUNDY**—It could become an administrative nightmare.

**Mr Gould**—Given that we are a cost recovery organisation, and we are really only looking at 4,000 designs at the moment, while we think the new system may well be a lot more attractive and could lead to increased demand for registration, there are not many people to support the cost of court appeals and things like that.

**Senator LUNDY**—Just generally, in relation to the issues covered in this bill, are there any provisions that do relate directly to recommendations by the ALRC review or reflect recommendations from that review?

**Mr Gould**—I think the ALRC had 188 recommendations, and this bill basically follows it pretty faithfully. There are key exceptions—the 10 to 15 years. We have accepted their recommendation that we need to do something about spare parts. We have proposed a different mechanism. I could not tell you exactly how many recommendations, but by far the bulk were picked up.

**Senator LUNDY**—Thank you.

**Senator RIDGEWAY**—I presume you have had an opportunity to look at the submissions that have been provided to the committee so far.

**Mr Gould**—Yes.

**Senator RIDGEWAY**—The submission from the Institute of Patent and Trade Mark Attorneys of Australia, in their first submission, on page 2, draws the attention of the committee to an inconsistency in section 15 of the Designs Bill. They suggest it can be readily rectified. It talks about the issue of public use in Australia; the other provision refers to publications published anywhere else in the world. Could you clarify the scope of what 'publication' means in that sense, particularly in terms of considering the prior art base and

given that all publications, both in Australia and overseas, will be considered. I guess I am trying to establish the purposes for which the bill is currently being drawn up on that issue. If something is published in a magazine in the Ukraine, for example, will that constitute publication under the legislation as it currently stands as distinct from, say, something that might be published in an academic journal?

**Mr Gould**—Basically, ‘publication published anywhere in the world’ means just that. As long as it is published somewhere in the world, it is picked up in that prior art base.

**Senator RIDGEWAY**—Does that provide an advantage or disadvantage to registered designers?

**Mr Gould**—Basically it means that what is being registered in Australia is new in terms of the world. If you look at most design systems, they have what is called ‘universal novelty for publication’. Now we are moving in that direction. Effectively it recognises that we are moving into a world market. There are things such as the Internet, which means that something that is published in most parts of the world is almost instantly available in Australia. That is the basic rationale for the published information, but the balance in the system is that we would limit it to use in Australia. We think it is probably a little bit harsh to have its use in, say, the Ukraine taken into account. If you do not have something like that, you could effectively have a good business by going around the world looking at the latest designs, bringing them into Australia and claiming a 10-year monopoly. It has just been pointed out to me that it is recommendation 40 of the ALRC report. Does that answer your question, Senator?

**Senator RIDGEWAY**—Yes, that is all, thanks.

**CHAIR**—That concludes the evidence. Thank you, ladies and gentlemen. That also concludes the hearing of the Senate Economics Legislation Committee inquiry into provisions of the [Designs Bill 2002](#) and the [Designs \(Consequential Amendments\) Bill 2002](#).

**Committee adjourned at 12.25 p.m.**