COMMONWEALTH OF AUSTRALIA

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Enforcement of copyright

MONDAY, 26 JULY 1999

MELBOURNE

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Monday, 26 July 1999

Members: Mr Kevin Andrews *(Chair)*, Ms Julie Bishop, Mr Cadman, Mr Kerr, Ms Livermore, Mr Mossfield, Mr Ronaldson, Ms Roxon, Mr St Clair and Mrs Danna Vale

Members in attendance: Mr Kevin Andrews, Mr Cadman, Mr Kerr, Mr Ronaldson and Ms Roxon

Terms of reference for the inquiry:

(1) The Committee will inquire into and report on issues relevant to the effective enforcement of copyright in Australia and, in particular, on:

(a) evidence of the types and scale of copyright infringement in Australia including:

(i) the availability and accuracy of data on copyright infringement;
(ii) the scale of infringement in Australia in comparison with countries in our region and Australia's major trading partners;
(iii) the geographical spread of copyright infringement in Australia;
(iv) the cost of infringement and impact on Australian business;
(v) whether there is evidence of the involvement of organised crime groups in copyright infringement in Australia, and if so, to what extent;
(vi) likely future trends in the scale and nature of copyright infringement.

(b) options for copyright owners to protect their copyright against infringement, including:

(i) actions and expenditure undertaken, and that could be undertaken, by copyright owners to defend their copyright;
(ii) use of existing provisions of the *Copyright Act 1968*;
(iii) use of legislative provisions other than those of the *Copyright Act 1968*;
(iv) technological or other non-legislative measures for copyright protection.

(c) the adequacy of criminal sanctions against copyright infringement, including in respect of the forfeiture of infringing copies or devices used to make such copies, and the desirability or otherwise of amending the law to provide procedural or evidential assistance in criminal actions against copyright infringement;

(d) the adequacy of civil actions in protecting the interests of plaintiffs and defendants in actions for copyright infringement including the adequacy of provisions for costs and remedies;

(e) the desirability or otherwise of amending the law to provide further procedural, evidential or other assistance to copyright owners in civil actions for copyright infringement;

(f) whether the provisions for border seizure in Division 7 of Part V of the *Copyright Act 1968* are effective in the detention, apprehension and deterrence of the importation of infringing goods, including counterfeit goods; and

(g) the effectiveness of existing institutional arrangements and guidelines for the enforcement of copyright, including:

(i) the role and function of the Australian Federal Police, and State Police exercising Federal jurisdiction, in detecting and policing copyright infringement;

(ii) the relationship between enforcement authorities and copyright owners;
(iii) the role and function of the Australian Customs Service at the border in detecting and policing copyright infringement; and
(iv) coordination of copyright enforcement.

(2) In undertaking the inquiry and framing its recommendations, the Committee will have regard to:

(a) Australia's obligations under relevant international treaties, in particular under the World Trade Organisation *Agreement on Trade Related Aspects of Intellectual Property Rights*;

(b) the provisions of the *Copyright Act 1968* and any amendments to that Act that have been introduced or have been publicly proposed by the Government, to be introduced into Parliament;

(c) established principles of criminal and civil procedure which apply in cases generally;

(d) Commonwealth criminal law policy;

(e) enforcement regimes for other forms of intellectual property;

(f) existing resources and operational priorities of Government enforcement agencies; and

(g) the possible effect of any proposed changes on the operation of Government and private sector organisations.

WITNESSES

ANDERSON, Mr Ian James, Director, Business Development, Asia Pacific, Mattel Toys Australia 2

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McDONALD, Mr Michael, Partner, McDonald & Associates, Legal Representative, Mattel Pty Ltd 2

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UPFAL, Dr Jonathan, Chief Executive Officer, OVID Australia Pty Ltd 22

Committee met at 9.03 a.m.

Resolved (on motion by **Mr Cadman**):

That submission Nos 34 to 39 be accepted by the committee as evidence to the inquiry into the enforcement of copyright and authorised for publication, and that schedule 1 to submission No. 28 be authorised for publication.

CHAIR—I declare open this first formal public hearing of the committee's inquiry into the enforcement of copyright. I indicate that recently the government referred to the committee the terms of reference, which members and witnesses before the committee are aware of. There are two aspects of this matter on which I will make some brief comment.

Copyright legislation in Australia has been in existence for some decades now and, whilst there have been legislative amendments from time to time, it was thought that this was an appropriate time to review generally questions of enforcement of copyright. That is particularly the case because of developments which are occurring in relation to copyright and information technology, in particular, within Australia. We are aware of the development of the Internet and developments in other forms of information technology; therefore, it is an appropriate time to look at the way in which copyright operates and the way in which it is enforced in this country.

I might say, for the benefit of members of the committee that, two weeks ago, I had three days of discussions with members of government, industry and other representatives of other bodies in Washington in relation to these matters. When I get half a chance I will put some thoughts on paper about those so they will be there for the benefit of the committee as well.

[9.05 a.m.]

ANDERSON, Mr Ian James, Director, Business Development, Asia Pacific, Mattel Toys Australia

McDONALD, Mr Michael, Partner, McDonald & Associates, Legal Representative, Mattel Pty Ltd

CHAIR—I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Can I ask you if you would like to make some brief opening comments in relation to the terms of reference?

Mr McDonald—Thank you, Mr Chairman and members of the committee. We appreciate the opportunity to present to you a number of matters today. I think it appropriate to give you a brief summation of the size of Mattel so you can have an understanding of the issues we are going to put before you.

My colleague Mr Anderson, as well as being an employee of Mattel, is a director. He is also chairman of the Australian Toy Association safety and standards committee. He represents the toy industry on the standards committee of Standards Australia and represents Australia as a member of the ISO in the toy sector. So he is very experienced.

Mattel worldwide see that they have a high responsibility in the toy industry. In six countries they represent their governments—in the United States, the United Kingdom, Australia, Canada and two European countries—in terms of world standards. So they play a leading role in that regard.

Later I will be making a submission on behalf of the Victorian police. I also represent the national police forces in Australia with respect to a review of copyright. I have spoken with the secretariat. We hope to make that submission in September. I will show some examples of how widespread copyright breaches are becoming in the policing sector, and also with respect to the Department of Justice and VicRoads, who I represent as well—but not today.

Mattel is the largest toy company in the world with the headquarters of the Asia-Pacific region being based here in Melbourne with approximately 120 employees. It has a turnover in Australia nearing $130 million, with taxation and revenue to the federal government, apart from income tax, of nearly $18 million. It is involved very heavily in employment in Australia, marketing in excess of $21 million. Perhaps a little known fact is that it is the largest manufacturer of toys in Australia with manufacturing in 1998 of over $10 million. This is hopefully increasing, although parallel imports will have some problems for us there.

In terms of flow-on, being the largest manufacturer of toys in Australia, there is a significant flow-on to the packaging industry and the plastic moulding industry. The largest customer for Henderson McPherson in Australia is Mattel with nearly 50 per cent of their

work being undertaken for Mattel, both in games and in moulded toys of which we have a number of examples here. There are all the Fisher-Price examples. With these large moulded toys, some parts are from South-East Asia, but most of them are from Australia and are assembled in Australia.

Mattel is heavily involved, as I said, with its view of corporate citizenship in terms of its responsibilities to child safety both in Australia and around the world. It is a large donor of funds to charities—to the Smith Family over $400,000 a year. It has extensive testing laboratories, both in Buffalo and in Los Angeles in the United States as part of that commitment to the safety of toys for children.

For the purpose of today's discussion, we have three issues we would like to address. Whilst it is not to the specific point of the terms of reference, parallel imports, we believe there is an impact in terms of copyright breach with pirate copies—which we in the legal industry see as perhaps a direct knock-off—or with breaches of copyright or trademark which are not 100 per cent direct but very close.

In terms of parallel imports, you will have read our submission. We believe the safety issues in the toy industry are quite different to those in the record industry. We can perhaps give you some examples as we go through today's discussion of the significant issues that can happen with toy safety. On any one day you could walk into a large seconds store in Melbourne, Sydney or Brisbane—any large city in Australia—and find 50 toys that do not comply with safety standards in Australia. I know it is an alarming number. Ian, as the Chairman of the Safety and Standards Committee, will give you some evidence on that point.

That figure is rather alarming and it is something that is left to Customs. It is no criticism of Customs, but they just do not have the resources to check goods and they do not necessarily have the expertise to check the goods to know what is in compliance and what is not. Those goods that are not complying are not coming from the major manufacturers or distributors who have a substantial reputation and who put effort into safety of product. Mattel, for instance, has eight full-time staff on its after-sales service counter here in Melbourne answering on a national basis customer inquiries on safety, recalls and things of that kind.

A major toy industry concern is the admission made by the ACCC in a letter to the Toy Association dated 11 June this year. In response to a letter I drafted for the Toy Association, we raised the issue of safety of goods that were parallel imported. A lot of people would ask why we are concerned with a parallel imported good if it was manufactured by Mattel. There are a huge number of goods that Mattel manufactures that are not imported into Australia for a number of safety reasons and electronic reasons—some of which we modify that then become acceptable to Australian safety standards and some of which we do not. With the parallel import changes that will occur early next year, the ability to stop that will change under the Copyright Act. The significant admission of the ACCC is that they got it wrong and that section 74A will still leave liability for the importation of parallel imported toys with the representatives of the manufacturer even if they were not the importer.

Mr RONALDSON—Could I have a copy of that? I am interested in the letter because that is one of the matters I was going to raise with the gentlemen today. It would be useful if that were made available.

Mr McDonald—Unfortunately, I do not have a spare copy, but I can undertake to get one to you later today.

Mr RONALDSON—That will be fine.

Mr McDonald—On that point, the ACCC acknowledge that they do not know what the position of the law is at the present time and it will be subject to court interpretation. Our concern is that we do not want to leave it to chance. Our client's reputation is such that they are not going to let parallel imported goods go unsupported because it will harm their reputation.

If you are not aware of the workings of the toy industry, Europe and the United States normally lead South-East Asia and Australia by about 12 months. The cost of moulds is so significant that they cannot afford to have those. It can cost hundreds of thousands of dollars per mould. We have such a small market in Australia that most of that does need to be manufactured offshore. For that reason, people are aware of the products 12 months in advance of them being made and they are, therefore, easily pirated because of the nature of the goods, or they can be bought from a wholesaler in the United States who may be at a sell out stage of a product that has reached its shelf life. That product can be imported into Australia and Mattel will be left with the responsibility of carrying recalls and even taking back stock that is not sold even if they were not the importer because there would be difficulty in determining which product came through Mattel Australia or which one came through another importer.

In terms of product support and overheads, as I mentioned before, we have eight full-time staff in Mattel in Australia responsible on a day-to-day basis for answering customer inquiries. The area of piracy has just become so blatant that we are involved on a weekly basis in litigation of one kind or another. In fact, this week I will be issuing proceedings in the Federal Court at the Brisbane registry for a breach. It is the second time this year that a breach has occurred on this one topic. Perhaps one of Mattel's most startling examples is their in-television software, which I think I referred to in the submission, which caused a loss to Mattel back in the mid-1980s of $349 million. Ever since then Mattel has moved away from the software industry in toys because it was so subject to breach—it was so easy to copy software. For that reason they have moved back to their core business.

I will give you some examples—Ian, if I may. In Mattel's range of toys there is a product called 'Hot Wheels', which is a range of toys that is recognised and sold throughout the world. This is the logo here. It is probably the second or third largest—

Mr Anderson—It is the second largest wheels brand in the world.

Mr McDonald—And that is a Mattel product. It always has this flame in the swirling letter. I will pass this around and you will see on the pack that this complies with safety standards throughout the world, including Europe, Australia, the US and the United

Kingdom. We have a product that has come in for the second time this year. I will hold them together for one moment to show you the similarity in the products. We do not suggest this is an exact pirate because there are some differences but, for most intents and purposes, the consumer, particularly a child, could be deceived or misled as to which one is the legitimate product. As you will see, we have other Hot Wheels products up the back and that logo applies to every Hot Wheels product that is sold. They do copy other products, but I just brought this one as an example today of where they have used equivalent flame artwork. This is the Mattel product.

One of the other significant factors is a copy of a safety issue. That does not comply in Europe, although they are claiming that it does. It is a breach if it goes beyond a copyright breach into issues of safety. To an untrained eye, one may look at the goods in question and say that they are a very similar size, in terms of children swallowing them. So what is the issue with the copy? The issue in this instance is that the Mattel copy has to go through a safety testing program in the United States which, in many instances, the copy products do not go through in terms of toxicity of paint that applies to the product, as well as to strength, noise and things that we will cover in a moment.

We also have another case that we had to issue in the Federal Court in February of this year, which was for the Barbie range. Barbie is the largest toy product in the world. It is the largest product in the Mattel stable. I think this gives an example. Unfortunately, our photocopies are in black and white but this is typical Barbie packaging. It is pink. The logo and trademark of Barbie here is applied to all the products and it is an accessory brand rather than the dolls of which we have examples.

In February at the toy fair, we found a stall selling toys which were a complete knock off, where they had scanned in the artwork and changed the name Barbie to Gloria. If I may, I will pass this around. It is not quite as effective because it is not in colour but you can see that they have reversed the artwork and copied it. The swimming pool one that Mr Kerr has is probably the most blatant example.

We had 12 knock-off products that we had to go to court about at very significant cost. Again the people with whom we were involved in the litigation had little or no money to afford the coverage of the cost. Mattel's attitude is that they have got to protect their integrity in the marketplace and therefore it is not always a cost recovery exercise because they have got used to the fact that it is pretty difficult to recover.

Mr Anderson—Just to come in on that, one of the things that is not quite so obvious is that, when these go out—and Barbie has got such a great name in the trade—the packaging is fairly quickly lost at home. The mother is usually quickly convinced that what they have got is a Barbie item rather than a knock off from Gloria. Our product goes through a series of tests in Asia, the States, Europe and again in Australia. We test against the Australian standard as well because the Australian standard is more rigid than the European or the US standard. The chances of a Gloria product going through any testing is virtually zilch.

What happens is that they print the markers from the bottom of that Hot Wheels pack. I would just about put my 40-odd years in the toy business on the line to say that has never seen a laboratory. You might say, 'Well, what is the difference anyway?' You will notice

that it says, 'Not suitable for children under three years because of small parts.' But even at that, those small parts cannot become available to a child unless certain things actually happen and the stress and the tension tests are designed to make them hard to get off. That is on a legitimate product. Most knock-off products do not go anywhere near that. You pull them apart and they fall apart. The kids have got something that can cause injury or, in some extreme cases, death. That has happened here in Australia. It happened in South Australia with a child who had a product which was a knock off and the child died. That is something that is the great fear of everyone in the industry.

Ms ROXON—When you say the packaging gets lost quickly, presumably the problem that presents itself for you then is people ring up and say, 'Look, I have got one of your products that has done this,' and you need to go through a process of working out whether or not it is one of your products or whether you are going to do whatever you need to keep the customer happy, whether they are yours or not. Is that what happens? You need to go through this process of working out whether it was one of your products.

Mr Anderson—Yes, that is exactly it. The one that killed the child in Adelaide was reported to have been a Fisher-Price product. It was reported immediately in the press. This was a number of years ago; I was MD of Fisher-Price at the time. It was fairly distressing because a two-year-old girl had died. I went there to recover the product, to discover whether or not it was a legitimate Fisher-Price product. It was a knock off which had not been correctly manufactured and it is just lethal. What happens is that, first off, you have the press immediately coming into it and saying, 'Child injured with a Barbie doll.' Whether it was a Barbie doll or not, we are automatically guilty in the eyes of the public. It costs a huge amount of money to develop a good reputation and it costs a hell of a lot more just to protect it.

Mr McDonald—As I said, we are probably getting a breach every two weeks now. I have another example—probably the most alarming one we saw—where a strippers' joint in Brisbane started using the name Barbie. Most people would say that her name was Barbie. We had a letter from either the Archbishop of Brisbane or one of the senior members of the clergy in Brisbane to Mattel complaining about the word 'Barbie' being on a strippers' joint. At first we all had a laugh. I had more volunteers than ever to go and check whether or not this was a breach. If you look at the artwork, you will see my point—it becomes a little worse. In the Brisbane *Courier-Mail*, there was an advertisement 'Come and see Barbie, and enjoy a double bubble bath or some jello wrestling' and again—

CHAIR—I thought this was going to be a pretty dry inquiry, Mr McDonald.

Mr McDonald—When we found it necessary to institute proceedings and put pressure on the other side, initially they suggested that there was no breach of intellectual property rights belonging to Mattel and the Barbie trademark. They immediately gave us all the undertakings we sought. One of the undertakings was that they would return the artwork belonging to our client. There was another thing that then alarmed my clients Victoria Police Force. When we saw the artwork that came back not only was the stripper dressed up as a Barbie doll but also Barbie was dressed up as a police woman on the reverse side. So Victoria police and Queensland police, of course, were quite alarmed to see this. I use that merely as an example to show you just how widespread is the breach of copyright.

Ms ROXON—It is blatant.

Mr McDonald—As recently as the last two weeks, we have had breaches of our client's intellectual property rights in the Scrabble game. I will hold this one up. This was an article that appeared in the *Herald Sun* about superannuation. As soon as you look at it, anyone can see that it is Scrabble. No permission had been sought from our clients to use this artwork. Since that article appeared, we had a breach in the *Age*. Scrabble was used on the front page of the *Age* without our client's permission. This is all in the matter of the last two months.

Here is a copy of an article in *Straits Times* in Singapore. Ian has just come back Singapore. It shows an even more blatant breach in terms of intellectual property. I know it is not relevant to our inquiry, but it shows you just how common this type of breach is, using—

Ms ROXON—What damage do you think this causes?

Mr McDonald—I am not necessarily suggesting that damage is caused by the articles in the *Herald Sun*. I am just talking about how flagrantly people breach intellectual property rights. There could be some damage in terms of the article if it was not controlled. I am not suggesting in those instances that there were, but there could have been if the product was associated, for instance, in terms of the Queensland example that I gave. It may be something that is very undesirable. In the Queensland example, the Barbie doll toys are aimed at the three to eight age groups. Having that associated with adult strip joints is really not quite the image we were hoping to portray. In terms of the Scrabble example, maybe that is not an issue there, but rather it is highlights that no permission was sought, and that has happened twice. Just last week we received in relation to Woolworths—

CHAIR—What precisely is the breach in relation to Scrabble?

Mr McDonald—That is a copyright right belonging to our clients. The three dimensional reproduction of that work still belongs to Mattel.

Mr Anderson—Obviously, if you read through the article that you have there, that is fine. That is one of probably a dozen over the last year or year and a half. Some of the services that that is applied to may not really be kosher. They may indeed be for services for which we would not want our name attached to.

Mr RONALDSON—But you have sufficient protection under the law to address those sorts of things, haven't you?

Mr McDonald—I am just giving you an example of the frequency of this. These are examples of three newspapers within the space of two months, and in the *Age* example it happened on more than one day; it was three days.

I would debate the point that we do have sufficient resources. The law provides resources, but the cost is very, very significant. One of the big problems our clients have is to do with size. Fortunately Mattel have a corporate attitude whereby they wish to protect their name. This is probably shooting lawyers in the foot but if you do not have the

affluence of Mattel you have got troubles in Australia in protecting your intellectual property rights. As a full-time IP lawyer I find that it is okay for my big corporate clients and government clients like the Victoria Police, the Department of Justice and VicRoads, but if it goes beyond those it is a very difficult thing.

For instance, if they were coming up against Woolworths, which this one is, Woolworths had this artwork for a 'Susie' doll. Unfortunately it is in black and white, but if this was in pink you would be able to see the similarities that exist between that and one of the blister packs that belong to Mattel. That is getting a little but further away—it is not an exact copy—but it is the type of example that if you had a client that did not have the resources, what would they be able to do? I do not think the law does provide a remedy to them.

This is another example of a doll trying to knock off on 'Barbie'. It is not an exact knock off, we are not suggesting it is, but it gives you an example of the types of products around where people will put it in pink packaging. I am not saying we own pink, or the right to monopolise that, but it is used merely as an example.

Last year we had a number of fake products brought into Australia. 'Barbie' packaging was stolen in China and fake dolls were put in the packaging, brought into the country and were being sold through markets. We found some in Melbourne and Sydney. Again, it was only that someone was walking through the market and saw this very poor quality doll inside the packaging which alerted us. That is exactly the point that Mr Anderson was referring to before. It is a significant issue.

With one old product, the Teenage Mutant Ninja Turtles that hit the stores some years ago, we had five ANTON PILLER orders that we had to serve around Australia at huge expense. Two of the people with whom we were up against were bankrupt so we had no possibility whatsoever of recovering costs. In one of the cases in the Federal Court, Justice Einfeld provided injunctive relief for us where knock-off T-shirts were being sold and on the T-shirt it had Teenage Mutant Ninja Turtles smoking dope.

Again, some people might have thought that was funny. Justice Einfeld did not and he absolutely flipped with the people manufacturing the T-shirts because the T-shirts were aimed at young children and they were supporting the use of marijuana. We do not necessarily have all the answers to put before you but it is something we are constantly thinking about.

I will pass over to Mr Anderson in a moment for Customs matters because there are a couple of issues there. In terms of the points I made before, the cost is horrendous for people, particularly if they are not large corporations. It is very costly to fight someone who is in breach of your rights. If it is an exact pirate copy, yes, you can go on. But if it is a section 52 action and breach of copyright then there are significant issue. Perhaps I could pass over to Mr Anderson for him to make a couple of comments on the Customs area.

Mr Anderson—When the issue of parallel importation was first raised at the last Senate inquiry it was suggested then that the Customs Service had the authority and the ability to act to prevent pirate copies coming across the border. While they have that power they do not have the facilities or the resources to do that. In fact, with the Customs Service, most of

the entries are entered electronically. The Customs Service never sees the goods at all. It is entirely dependent on the honesty of the declaration that is made. Those declarations can be extremely wide. There is a 0.65 per cent check of any one day's entries. So the chances of anyone being caught bringing in illegal product is almost zilch.

SOCOG has managed to have itself exempted from this law. If the law is so good then I cannot imagine why SOCOG wanted to bow out of it. SOCOG has already had a problem as there has been importation of Olympic product coming through where it is legitimately entered as a plush toy.

A plush toy can be anything. It can be a Winnie the Pooh, a Mickey Mouse or a SOCOG mascot. The chances of it being picked up at the border are nil. SOCOG are concerned that all Olympic merchandise that they will be producing for the Games will have a DNA labelling attached so that it can be immediately identified. That is post the event and that will not happen until it goes through retail, and through a legitimate retailer at that.

A lot of the $2 shops—Crazy Clints, and people of that nature—buy from alternative sources. A great deal of that product is not checked and tested. In fact, a lot of the time they buy it in good faith but find that they bought something which is an illegal import as such.

The people at the $2 shops, for instance, are not members of the Australian Toy Association, but we have been canvassing them recently as we are concerned to ensure that the product brought into Australia is safe. We are, in fact, addressing them on 29 July to go through and show them the types of things they should be looking at to ensure they bring safe product in.

Going back to the copyright issue, it is not unusual—and this again has happened several times and there have been cases against it—that an importer will bring in a 40-foot container of product and the first one or two rows of the product are legitimate; the rest of the container is not because he then does not pay royalties and does not have it checked. It is quite common for there to be labels sewn into products which suggest it was made in a place other than it was, but those things are not picked up by the Customs. It would be a brave man who said that Customs were going to be the answer to piracy—

Mr RONALDSON—I think we would all know that it is impossible for the Customs Service to pick up 100 per cent of this.

Mr Anderson—It becomes much easier to be disguised when we look at the instance of parallel importing. Previously, if you were the owner of a trademark and there were goods which came in and an importer would have, for instance, a Mattel doll on their entry form, Customs would phone the owners of the trademark to guarantee it was their product and then you could realise whether it was legitimate or not. That does not happen any more, or it will not happen after 1 February.

On safety issues: why would a product that we manufacture for another country not be safe in Australia? If you take an item which has connection to the electric mains, you have to change the plugs, for a start, and, secondly, in many cases, the power source. Thirdly, it has to go under the electromagnetic emissions because it will affect television, radio and

phone services. The last one is that there is a radio frequency, and in the states most remote control units have a 49 megahertz cycle. A 49 megahertz cycle is illegal here. Some of the emergency bands are on 49 megahertz so they are all modified for Australia to be either 27 megahertz or 40 megahertz so that you have your two channels.

If you look at a product which is being parallel imported, the chances again of it being picked up are nil until it gets into the retail, and probably not then. The first thing you know about it is when you have some sort of disruption to services, which could be in the form of an accident. We have sound levels in Australia and there has been a move—a very solid move—to reduce sound levels right throughout the environment, and children's toys are no exception.

Let me demonstrate what I mean. Here is an example. That noise goes on and on and the toy works on movement. As it goes along it continues to go. That might not sound much to you but that actually exceeds the Australian sound levels by 10 decibels and would be removed from sale if we had not modified it.

Mr McDonald—A parallel imported good would not necessarily be modified. All of these can be parallel imported because they are all modified here in Australia.

Mr Anderson—That is not going to create a great deal of problems for the child but, if that is recalled under the current situation by the Department of Fair Trading and it has been brought in by someone and not us, we are seen then to be responsible for it. That is against fair trading totally because I do not believe you can be held responsible for something you did not do. The ACCC has suggested that we would need to test that in court and that we are responsible for it. This I believe would have been avoided if there had been more discussion, or had been any discussion, with industry before there was the move to change the parallel importing law.

Mr McDonald—There was a great deal of discussion with the music industry—we can see that—but beyond the music industry there was not a great deal of consultation. We have plenty more examples but we would be just going on and on about the same point.

Mr KERR—I am not sure whether you can characterise what happened in the music industry as discussion.

CHAIR—We will stick to the toys instead.

Mr McDonald—There is one other example which we will address in September. As I mentioned before, I represent the Police Ministers Council here in Australia. We are currently reviewing intellectual property rights and, at first, most people think what on earth has policing and intellectual property rights got to do with one and the other.

If you look at this at a distance, most people would think that that is the web site of Victoria police. In fact, it is not; it is a knock-off. It is a person who unsuccessfully applied for membership of Vic. Police and was knocked back and this is his payback time. On the second page of this document there, again, is a breach of copyright. On the second page he has got a hit page for people to give information with respect to the murder of two police

officers in Moorabbin last year. There have had more hits on this site than Victoria Police's web site. There are people downloading information on a daily basis about what happened in that murder—people that witnessed something—and the Victoria Police are not getting that information. It is a very serious breach throughout Australia. Police badges are openly on sale in stores throughout Australia so it is so easy for people to impersonate—

CHAIR—That would be a breach of some law in Victoria, wouldn't it?

Mr McDonald—No.

CHAIR—Are you trying to say that the Victoria Police insignia is not protected by state law?

Mr McDonald—Federal law. There is no state law protecting the insignia. The intellectual property rights vest in the federal parliament.

CHAIR—Let me put it another way: surely, I cannot walk around and impersonate a police officer in the state of Victoria?

Mr McDonald—That is a different issue, the issue of impersonation of a police officer. This is one of the problems here. We are not suggesting that we do not have rights, but I am suggesting just how blatant the breaches are. There are difficulties in terms of e-prosecutions because police forces are moving into the next millennium and are trying to reduce costs of having any prosecutions for minor offences. At the present time we do not think the laws are adequate, and that is an issue we are going to address.

Mr CADMAN—Can you explain this a bit? I would have thought a badge is the property of the government of Victoria and it is their sole property and they could write whatever laws they liked about people copying or reproducing it.

Mr McDonald—The Police Regulations Act in Victoria makes it an offence to possess a badge that was given to a police officer—in other words, a real badge.

Mr CADMAN—That is simply fixed. The one that resembles—

Mr McDonald—I know there are issues in each of the states and territories. They vary from state to state. In Victoria, for instance, it is not an offence to possess a copy of a police badge if you are not impersonating a police officer. In terms of intellectual property rights, it may well be—

Mr CADMAN—The badge they don't worry about; the web site is a different thing.

Mr RONALDSON—Mr Chairman, with the greatest respect, we have got seven minutes left and this is another matter altogether. I would be interested to hear Mr McDonald's views on that but I have got some questions.

CHAIR—Just before you do that, I presume you are going to address the matter of the police web site when you come back with a different hat on, and not a police hat?

Mr McDonald—Certainly.

CHAIR—In relation to labelling, the law makes reference to an accessory which includes: labels, packaging, written instructions, et cetera. Why is that not sufficient?

Mr McDonald—In terms of parallel imports?

CHAIR—In your submission you make reference to it being beneficial if there were protection in relation to labels specifically. Why do you want labels specifically when it would seem to me that the law already covers labels?

Mr McDonald—Our understanding of the amendments that take effect in February or March of next year is that that protection will lapse. This is a view we have had confirmed by senior counsel, Dr Emerson QC, who is the leading IP silk in Australia. Effectively, our ability to control parallel imports via the present legislation will cease on the proclamation of the new legislation.

That goes into issues of territoriality and the exhaustion theory which says that, if you place your mark on a good, are you able to control it territorially or are your rights exhausted the moment you sell it? In Australia, under the Trade Marks Act, the position of the Commonwealth and the High Court is that your rights are exhausted. Therefore, licensed distributors in Australia were relying on the provisions of the Copyright Act to protect them using the label as a means of preventing a parallel import from entering the country. That ability will cease in February.

Mr RONALDSON—Perhaps you could have a discussion with your legal people and see whether they might be prepared to allow release of that opinion.

Mr McDonald—That opinion was with respect to an issue we had with a contractual breach of other issues. I do not think the release would be a problem.

Mr Anderson—No.

CHAIR—It may be possible to release part of it.

Mr KERR—It would be useful to have it. I do not think it is disputed. That is the intention of the legislation, so that parallel importation can occur.

Mr McDonald—That is the intention.

CHAIR—If there are some confidentiality aspects of it then it may be possible to provide those parts of the submission which relate to the law without disclosing—

Mr McDonald—I think Mr Kerr's point is correct. I thought that was the intention of the legislation, that you were going to allow parallel imports and you were trying to prevent or remove any legal barriers that existed for a parallel importer.

Mr RONALDSON—The next witnesses coming forward are a group from OVID Australia Pty Ltd. Mr McDonald, they might be useful to you. They might have the technology to assist you. Have you looked at any other forms of technology that might assist you? This might be the biggest coup you have had in the last 12 months with these gentlemen here.

Mr McDonald—I do not know what OVID do.

Mr RONALDSON—They are soon going to tell us all about it so it might be worthwhile staying. Just as a general point, what technology have you looked at to assist you with that program?

Mr McDonald—One of the problems we face with packaging is that because Australia is such a small market, one of the remedies people suggest is that we alter our packaging and say, 'This was designed for the Australian market specifically.' That is okay for the large moulds that we import for the Fisher-Price type of articles and things like that that are manufactured here but with other products of a 'Barbie' doll nature we would probably represent two per cent of the world's market. Often when it is manufactured it is not known what products are going to end up in which country. There are difficulties in terms of packaging an item. We would have to relabel every product that comes into the country, and the labelling costs are huge in terms of labour expenses if we have to re-do every package that comes into the country.

Mr RONALDSON—Mattel is a very large and well respected company operating right throughout the world. This must be an issue for other parts of the organisation.

Mr McDonald—No, it is not in the US or Great Britain. They have not followed the Australian example. In fact, I have a letter here from a UK government department from about a month ago saying that they did not believe Australia had to honour its obligations to its international treaties. They did not believe—

Mr RONALDSON—No, you have been a bit defensive in that respect. Surely the States and the UK, wherever it might be, have a pirating problem?

Mr McDonald—They have a pirating problem but not a parallel import problem, you cannot parallel import into the UK or the US.

Mr RONALDSON—It seems to me that your pirating problem is probably a relief for consumers but a problem for manufacturers with parallel importation that will lead to greater piracy. What other mechanisms are there overseas to address the piracy question, particularly any technological measures that are used?

Mr McDonald—I would be interested to hear what these other gentlemen have to say if they have a technological solution. Indeed, there will be thousands of manufacturers around the world that will be very interested to hear what their solutions will be.

One of the problems is that it is the consumer who is the person that is being deceived. I cannot pre-empt what these other gentlemen are going to say, so it is a bit hard for me to

guess. But in terms of a deceptive an misleading conduct action, under section 52 of the Trade Practices Act it is about a consumer being misled. That is not a technological thing, they walk in the store and think that is one and the same and they buy it.

Mr Anderson—On the piracy issue, as regards Mattel around the world, we defend our trademarks very fiercely. My area is mostly the Asia-Pacific rim, and recently we have had about 26 successful actions against piracy in India. We have been successful in China, Thailand, Malaysia and the Philippines. None of those countries' laws are anything like Australia's, unfortunately, but we have pursued pirates wherever we have found them. We will hunt them down. That might sound a bit vicious for a toy company, but they are thieves and we are straight into that. The same thing happened in Japan. One of the biggest Japanese toy corporations decided that they could come up with a variation of Barbie and learnt to their sorrow that that does not happen. Yes, we have other areas, and we pursue them.

Ms ROXON—Mr McDonald, you have been quite persuasive in highlighting for us where your problems are. What has not been as clear, to me at least, is what you suggest this committee could do, within the terms of our reference, that would improve the situation for you. You are aware that we are looking at whether or not the laws need to be changed in some way. I do not think you have really presented to us—and maybe it is something that you might want to take on notice and come back to us about—any suggestions as to how changes to the regulatory system would assist you in the position that you are in.

Mr McDonald—I certainly do have some suggestions, but I would like to avail myself of the opportunity that you have suggested, to take it on notice and give suggestions in more detail, because it is something we are researching at the present time—not just for Mattel but for a number of clients. In direct response to your point, one area of concern is section 135 of the Copyright Act, which gives you the ability to seek the assistance of the CEO of the Customs Service to seize goods. It is a real problem. The section is fine in terms of its drafting, but the problem is that—as in the evidence that Mr Anderson has given—if 0.06 per cent of goods coming into the country are actually searched, the Customs Service cannot possibly look at every container containing toys that comes into the country. Therefore, you will find in practice that it does not work. As a legal practitioner, I do not know too many people who bother with those seizure notices any more. For that reason, it is difficult.

Ms ROXON—What change would help?

Mr McDonald—It is something that we have been discussing and it is going to have some people up in arms, but something akin to a show cause notice would help—where there is pressure on the person giving a show cause notice. You can put pressure on the person who is guilty of the illegal import or manufacture of a pirated good, whereby they should show cause notice as to why they should not be fined, rather than on the owner of the intellectual property in question.

Ms ROXON—So they are guilty until proven innocent?

Mr McDonald—At the moment the onus is on the owner and the cost is, as I said, very significant. In contrast with larger owners or larger corporations of intellectual property, it seems to me that smaller owners have little or no rights in Australia. My practice is for

small and large clients, and it is fair to say that you might say to smaller clients, 'I am sorry, but fighting this in the Federal Court is a very extensive thing.' If you take on a large corporation like, say, Coles or Woolworths—I am not suggesting they would do that—then you would just give up and would not fight. If I could, I would like to take that on notice and perhaps send in a written submission on that point.

Ms ROXON—I am not sure what the time lines are for that.

Mr McDonald—Is that all right?

CHAIR—Yes.

Mr CADMAN—Could we pursue that a little further? With these safety standards, it seems a queer thing to allow products into Australia that may be dangerous and to rely on consumers or government departments to pick up that danger. Surely they should be stopped at the front gate.

Mr Anderson—That is our real concern. We have an enviable record in Australia for safety.

Mr CADMAN—Don't these products have to comply?

Mr Anderson—They should.

Mr CADMAN—Why don't they produce a certificate saying that they do comply?

Mr Anderson—That is not required by Customs. It is only required by the major retailers. All major retailers now require a certificate of compliance.

Mr CADMAN—Are you saying that these products do not have to comply with the same rules and laws that Australian manufacturers must comply with?

Mr Anderson—No. I am saying that they do not necessarily comply with them. They should, but they do not necessarily do so.

Mr McDonald—Mr Cadman, what has happened is that, in effect, your major retailers are doing the policing now. For instance, Coles-Myer, Toys'R'Us and those sorts of companies will not sell unsafe goods. This means that the unsafe goods are finding themselves in the markets, at $2 stores and at places of that kind. As we said, Ian was in Sydney working with the Department of Fair Trading the week before last, and they found 50 goods that day that were not complying. It is the responsibility of the different states and territories—in terms of safety of products—to prosecute. At the moment it just comes through customs. If it ends up in those markets, it is up to the consumers or the legitimate toy companies to go to the authorities and say, 'Can you do something about it?'

Mr CADMAN—That is the safety factor, but what about labelling? It seems to me that, if a manufacturer approves a label and the product is okay, why should you have exclusive rights to selling it or importing it?

Mr Anderson—Largely because we have developed that product over a number of years—

Mr CADMAN—No. If the manufacturer approves the label and says it is on the market, why should you use the copyright law to say, 'I have exclusive rights to import and distribute it'?

Mr McDonald—If I may say so, Mr Cadman, there are a number of arguments with that point. Mattel may be an example as it is a wholly-owned subsidiary of the US parent corporation, but that is an unusual thing in itself. A distributor could be a licensed distributor where there is no shareholding commonality whatsoever. That distributor may have invested hundreds of thousands of dollars in terms of infrastructure and support of the product, which they have to go to the expense of supporting, whereas the parallel importer does not. For example, if a Mattel product comes into the country parallel-imported from February of next year and it has a fault, the responsibility is going to fall back on our client, not on the importer, which is what the ACCC thinks is the position. The profit that has been enjoyed from the sale of that product has gone to the importer, not the licensed distributor. Yet the licensed distributor, under the law, could be left with the responsibility of having to support that product.

Mr CADMAN—It is interesting. Thank you.

Mr KERR—I would be interested in your analysis of a couple of questions. You say that the Trade Marks Act remedies are cumbersome and difficult to pursue. How do they fit with the changes in the copyright law with regard to packaging? Will you still have any residual remedies or not? I am not certain about that.

Mr McDonald—In terms of pirate products, yes, we will. I think we have to distinguish between the two. If it is deceptively similar as a product, we could take action. There is this example here: we could take action on three bases. Firstly, we could take action for a breach of copyright in that it is a substantial reproduction of an original artistic work. Secondly, we could take action in that it has a deceptively similar mark in terms of our 'Hot Wheels' logo, so we will still have that remedy. Thirdly, we would have the remedy under section 52 of the Trade Practices Act, if it was a corporation, or section 11 of the fair trading act, if it was not a corporation, that the conduct of the parties is deceptive and misleading. So we would still have that.

The problem with the Trade Marks Act is in terms of parallel importation. The principle that the Australian courts uphold is one of the exhaustion theory: once the mark is placed on the goods by the manufacturer, their rights cease. So, if I buy it somewhere else and bring it into Australia, it is not a breach under the Trade Marks Act. That is the current position of the law today. It is only under the Copyright Act that you have been able to prevent that parallel importation. However, in the UK they subscribe to the territoriality theory. There is a famous case—the Colgate-Palmolive case—where inferior grade toothpaste was being made by Colgate in Brazil for the Brazilian market because of affordability reasons. Someone started to import that into the UK to sell it against Colgate, and Colgate succeeded in the House of Lords or the Court of Appeal in restraining them. That has been the basis of

the law in the UK ever since under their trademarks act. There is a similar position in the United States.

Mr KERR—In Australia, the most recent case was a case regarding tyres, wasn't it?

Mr McDonald—That was the Montana case, but it was slightly different. In the Montana case you have a situation where there was an assignment of the trademark from the parent Japanese company to an Australia distributor. In the first instance, that was thrown out on appeal to the full Federal Court. The position was reversed. In that instance they held that, if the trademark is assigned to the person in Australia, they can prevent the parallel importation. That has some real difficulties with it. Will the person who owns the trademark in another jurisdiction transfer it to a person who may only be their distributor in whom they have no shareholding? Perhaps at Mattel they could, but certainly they will not be too keen to transfer the trademark to someone they do not have a shareholding in.

Mr KERR—I understand that. But it seems to me that, presuming you did transfer the trademark to an Australian distributor, you could prevent parallel importation.

Mr McDonald—That is a possibility. The Federal Court case is a little bit unclear on that at the moment. In fact, I have a brief out, on behalf of Mattel, with a senior barrister in the trademark field and we are debating that very point at the moment. It is still not what I would call clear-cut. We are hoping that—

Mr KERR—It seems pretty clear-cut because in Montana they injuncted the importer, the alternative distributor, from bringing in those tyres after the point at which that transfer had come into effect.

Mr McDonald—I appreciate that point, but there are still some issues that we are a little bit concerned about on that judgment. I hope the point you are making is right because it certainly—

Mr KERR—I am sure it is. It seems that, if that is correct, there is a substantial policy inconsistency because I think the intention of the government—not one which we subscribe to in opposition—was to facilitate parallel importation.

Mr McDonald—Correct.

Mr KERR—My reading of the Montana case, which I just looked at—I think it was about a month ago it was published—

Mr McDonald—It was recent, yes.

Mr KERR—suggested that in fact you could use the Trade Marks Act for that purpose, provided you went through a minimal process of assignment of the trademark to your Australian distributor—

Mr McDonald—Correct.

Mr KERR—and presumably any Australian distribution that was going to put in the kind of investment in infrastructure would require that, so parallel importation could be stopped.

Mr McDonald—If counsel supports the view that you hold and that I think I hold at the moment, but I am just reserving judgment.

Mr KERR—Does that not apply to sound recordings also?

Mr McDonald—To be honest, I have not looked at it in terms of the sound recording issue, but it could be a possibility. Certainly in terms of the toy industry it is something we are looking at. Indeed, it is an inconsistency because if it was the government's intention to effectively allow parallel imports then those people who can have an assignment of the trademark to the Australian distributor are at a distinct advantage. I would think there is not going to be a great rush on those because there are some significant issues behind the scenes in terms of control of a trademark if it is transferred to a party. But in the Montana case, as you may recall, there was an option back to the Japanese company.

Mr KERR—I do not recall that. I remember reading the case but I do not recall the details.

Mr McDonald—There were some other complexities to it in terms of options back. But, yes, in terms of Mattel, one of the issues we are looking at now is the transfer of the trademarks, but then there are enormous tax ramifications with that as well.

Mr KERR—I just remember reading it and saying that this is the end of parallel importation if people chose to use that.

Mr McDonald—That you will be able to prevent it, yes. There are, of course, the other issues though. If the law enables you to do it our clients are looking at it, but there are the tax ramifications of that as well.

Mr KERR—What are those?

Mr McDonald—The asset vests in the US parent company—the intellectual property asset. For the transfer of that asset to Australia there are going to have to be considerations of what consideration has been paid for the transfer of that asset and how that is to be treated. To be honest, I do not know the answer to those questions—I am not a tax lawyer. It is something that we are going to have to seek advice upon, once we determine whether or not your interpretation and my interpretation of Montana is correct. But it is an anomaly, I agree.

Mr RONALDSON—Mr Chair, while Mr McDonald is trying to tie the parallel importation and the piracy into the one issue and hoping that by addressing the parallel importation the piracy will be addressed, it seems to me that they are actually two distinct issues. To take up Ms Roxon's point before, we would be interested to hear what views you might have on assisting with the piracy aspects. With the greatest respect, I think that parallel importation is a matter that the ACCC is quoted to the committee as saying that they

are going to keep an eye on it. It would seem to me you will need to pursue that as well, but I think they are two separate issues. We would be interested in what alterations to the law you might see are appropriate, particularly in relation to the piracy aspect.

Mr McDonald—Certainly I will provide that to you. I do think they are inextricably tied. Perhaps I will have a copy made of this document I have here which is from the Competition and Enterprise Branch of the Ministry of Commerce in New Zealand. I will quote from the page where they tie the two together. They say:

Irrespective of whether or not control of parallel importation is an intellectual property right, lack of control over parallel importation of itself increases the risk of covert import of counterfeit goods.

Mr RONALDSON—With the greatest respect, you are, to take Mr Anderson's words, chasing people down rabbit burrows at the moment, quite rightly to protect what you have got, under a piece of legislation or a legal scenario that is not giving rise to the loosening of parallel importation, but the piracy is obviously an issue for you under the present law. I accept you are saying that it will worsen when the parallel importation rules take place, but you have a distinct piracy problem at the moment—

Mr McDonald—Indeed.

Mr RONALDSON—and, as Ms Roxon said, we would be interested to see what you think might be appropriate to take up.

Mr McDonald—One of the suggestions I had was the show cause one, but that is something we would have to examine a lot more closely before I could make it a firm recommendation.

CHAIR—We need to finish up and move on but, when you are giving consideration to what more information and submissions you would like to put before us, can you tease out the possibility of some system of certification? What you are saying to me now is that there are goods such as those that you have demonstrated this morning which can be imported into the country which do not meet any of the safety standards necessarily and then there is no way of checking that, and that the Customs Service only picks up one half of one per cent in terms of inspection so that is not doing the job either.

What about some system whereby there is a certification on every article, whether it is made by Mattel in a quite authorised fashion within Australia and appropriately under all the laws, or it is imported by anybody else, so that certain things would flow from not having a certificate? For example, if you do not have a certificate it could not be sold, or some other provision like that, but if somebody then provides goods under a certificate which is false then certain penalties could flow from that. Can we take out of this equation one of the elements, namely, the safety element, and deal with that in a way which, whilst maybe not addressing all your concerns about what I would call the economic aspect of copyright protection, nonetheless would provide some greater protection to consumers and, I would have thought, as a consequence, while it may well not address all your copyright enforcement issues, would address them to some extent because you would be removing

some of the economic incentive to pirate or to provide products that seemingly meet a safety standard but in fact do not?

Mr Anderson—That basis of certification would be well worth while. I believe it would most likely need to be checked at the point of entry though, rather than further down. It needs to come directly on to the customs documentation, and several of those items are not a matter of Australian law, they are a matter of—

CHAIR—We will come back to this, but one way of doing it would be to tick a box on the customs declaration that you have got the certificate. If you tick the box without the certificate some penalty might flow from having done so, and then later on—because it is ultimately going to be later on when this is checked—if it had been ticked and somebody had falsely declared that the certificates were in place, maybe some penalty could flow from that. I am not necessarily advocating this, but it seems to me that there may be a path that could be explored and at least teased out in your thoughts, and then perhaps have some further discussion with us.

Mr Anderson—That would be well worth while for us.

Mr McDonald—We would welcome that. In fact, we discussed this very point last night. The reason we did not tackle point of entry so much was that we perhaps wrongly assumed that the current environment was a less regulatory one and that the committee may not welcome extra regulation of that kind, and we thought it was going to be after the event that we would be left chasing them. But we would welcome that.

Mr CADMAN—It does not mean to say the rules are not there though—less regulatory does not mean to say the rules are not there.

CHAIR—The committee does not have any fixed views about anything at the moment. We are very much at an exploratory stage of looking at these issues. I cannot necessarily speak for all the members of the committee, but for myself I can say that I will at least address whatever matters are put before us and that we can explore. We might not agree with it at the end of the day; we might say it will not work for a variety of reasons, but at least we will consider all these matters, just as we will consider the matters you have put before us.

Mr KERR—It would be useful to have that show cause idea developed because, if it were put forward as a significant option for us, it would be helpful for you to at least say how you would see it operating in practice and in what circumstances. I think it has been raised before, I am not certain.

CHAIR—I am going to have to draw this aspect of the hearing to a conclusion. Before we conclude is there any documentation or other exhibits, if I can put it that way, that you wanted to put into evidence, to use a legal expression?

Mr McDonald—Yes, there are. Perhaps I could check with the secretary after we have completed evidence.

CHAIR—If you could do that, that would be helpful.

Mr McDonald—A couple of them are exhibits for a court case at the moment which I need, but otherwise we are quite happy. Unfortunately, I need these for the Federal Court this week. Perhaps they could be sent in after the event.

CHAIR—Yes. It may be useful for the committee to have a couple of them. We do not necessarily need a toy collection, but a couple of examples may be useful in terms of the report itself. If you need the pages as exhibits for a court case, maybe at some stage you could send us copies with your further submissions.

Mr McDonald—We certainly will. Thank you very much for the opportunity to appear today.

CHAIR—Thank you for coming along this morning. We look forward to the further material which you will provide to us.

[10.09 a.m.]

FRASER, Mr Andrew, Director, Legal Affairs, OVID Australia Pty Ltd

HORTON, Mr Edward, Director, Marketing, OVID Australia Pty Ltd

UPFAL, Dr Jonathan, Chief Executive Officer, OVID Australia Pty Ltd

CHAIR—I welcome Mr Fraser, Dr Upfal and Mr Horton from OVID Australia Pty Ltd. I advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We are in receipt of your submission No. 23 in relation to this inquiry. Can I invite you to make some brief opening comments?

Dr Upfal—Thank you for having us here today to make a submission on this very important issue regarding copyright and intellectual property protection. We have formed a company called OVID Australia, which has the aim of commercialising a suite of technology developed by the CSIRO which has the capability of preventing the extent of the piracy that we know is already occurring in a number of different areas. We feel quite comfortable that this technology is capable of forestalling such piracy and thereby protecting intellectual property.

For the purposes of the discussion, I would like to start by making a distinction between physically embodied and digitally copied intellectual property. The technology that we are talking about does not protect digitally copied intellectual property. In other words, the transmission of music via the Internet on MP3 compression standards is not something that this technology is capable of preventing. What it is capable of preventing is the physically embodied intellectual property. By that I mean tapes, CDs and DVDs, and also quite a number of other products such as cigarettes, spirits, perfumes, designer clothes and even pharmaceuticals.

Mr Horton—And toys.

Dr Upfal—From the point of view of a person who is intending to counterfeit intellectual property it is worthwhile looking at the criteria that they would be selecting to counterfeit a product. The criteria are: low cost of production or replication; where a significant proportion of the value is in the intellectual property, copyright or brand value; the product has a high selling price compared with the production cost; the technology for production or replication is available; there is no mechanism to distinguish a real from a fake product; there are a list of distribution channels by which the fake product can enter into domestic sales; and there are relatively minor penalties if a prosecution is successful, or a low risk of detection. Those criteria really describe music software, film and video. They also describe cigarettes and so forth.

To give you an example of the existence of this type of activity here in Australia I would like to ask Andrew to discuss a case that he was involved with in relation to

pharmaceuticals. Because of the nature of the case and the way in which it was distributed you can see how this actually severely damaged the German producer of the goods.

Mr Fraser—All the examples I will give you this morning are actual cases that I have appeared in. My background is as a criminal lawyer and so none of these are apocryphal stories, they are actual cases.

The classic example relates to a former Mr Universe who was involved in the bodybuilding industry. Steroids are hard to get hold of, they are expensive and they are highly regulated. He came to another way of doing it. He purchased a particular steroid, which you can buy quite openly on the veterinary market, that was intended to stop pizzle rot in sheep. It can be bought in 44-gallon drums and is perfectly legitimate. It is a veterinary steroid.

He then forged perfectly the boxes, the labels, the caps, everything, and sold 44-gallon drum lots of this pizzle rot steroid through the gymnasiums. You could not tell the difference between the Upjohn product and the false product. He was caught and subsequently convicted. The point is, he got the last barrel back from the police because that had not been packed.

The point is that this was being done in Moorabbin. The boxes were being printed in Moorabbin, packed in Moorabbin and then sold. Upjohn were devastated by this, because it ruined their market. It was packed as Nandralone, I think, which is a steroid, and no-one could tell the difference. Apparently the properties of this particular steroid and the genuine one are similar and have a similar effect when used on a human being. There was no way a person buying that in a gymnasium could tell the difference, and he had sold tens of thousands of dollars worth. There was no way of telling the genuine box from the other box.

Dr Upfal—That is an example where people's health and safety were seriously at risk from that approach. Obviously the packaging was not sterile, the product was not guaranteed and it was not the thing it was said to be. It was sold through channels where people expected to be buying an illicit product. They were paying $30 per ampoule for it, expecting it to be the real thing, whereas in fact the cost of production was 5c or 10c.

Ms ROXON—Just to put it in context, it would be helpful for me if you explained to us how your technology would work in a practical way in that situation. Presumably the buyer at the gym does not have the scanning equipment, or whatever might be required, to check whether or not this is a legitimate product. I do not properly have my head around how your technology would help with that, and it might be useful if you could explain that to us.

Dr Upfal—I would like to come back to that, because I would like to discuss another case which is probably even more directly relevant that has to do with tobacco excise and tobacco products.

Ms ROXON—You probably need to understand that the other committee members are in the same position in that we are clearly interested in finding out how your technology actually works.

Dr Upfal—Okay. The technology itself is a foil which is applied to products and, when rotated in light, shows a number of different graphic representations. That is called an optical variable device. The significance of this is that it is capable of doing two things which a hologram is not capable of doing—which is why I do not use the term 'hologram' for it. It is capable of very fast switching effects and it is capable of combining graphical effects with line portraiture effects. That means, for instance—and I will show you an example in a minute with the AMEX check—that you are capable of superimposing a graphic representation on an actual portrait, which is what happens with the AMEX. No holographic technology can do that at the present time, probably for technological reasons.

The ability of the optical variable device to do this, once seen by even an untutored eye, will make it quite clear that any attempt to fake an optical variable device by using a hologram will be quite transparent. Everyone will be able to see how this effect is generated in the authentic security device compared with a non-authentic one. If you have never seen one, you would not know. But once you have seen one, you will know and you will be able to say, 'That is not authentic.' That is one aspect of the technology.

This technology is a suite of products which have been developed. One other aspect is one mentioned in the submission, and that is what I call a spectral convergence technology. This is quite remarkable. What you see is what looks like a sleeve of plain, greyish aluminium foil. When you apply a special lens to it, you will find that a particular image or set of words or a graphic will appear out of that area. That cannot be done by holograms, and it provides a degree of security. Because the effect is immediate once you look through a particular lens on this spectral convergence type OVD, this provides the opportunity to check on the shelf or anywhere at all whether or not the product is authentic.

Mr Horton—It is not a big, massive lens. It is just a very simple way of doing it. It is impossible to counterfeit. When you look at the product, essentially you are just looking at a very small grey strip of foil. But in actual fact, because of the way CSIRO have developed this, you can put any image or any words there you would like to. It is genuine.

I am sorry we are chopping all over the place here but, from most of the things I heard earlier, it seems to me the consumer really does not have any safeguards. These products get on the shelves, they buy them, and then we try and stop them through Customs or whatever. It is trying to create technology that actually makes it quite obvious that these things cannot even get onto the shelf. Products should not be able to get onto the shelf. The trouble is that most of these products are getting onto the shelf. It is a matter of trying to stop them beforehand.

Dr Upfal—That gives you a brief understanding. In terms of how it is generated, the CSIRO has a facility at Clayton in Melbourne called the Marco Engineering facility. That facility is shared or used also by the Department of Defence for generating different types of circuits. The facility has what is called an electron beam lithograph. An electron beam lithograph is a tool by which they can lay an etching of a line with such a narrow range that they can generate these multiple effects and they can vary the angle and the transition zones within the line and then combine three lines together so that, when you look at it from different angles, the diffraction patterns yield different channels or representations of an image. Yet, because they are so close together, the detail and the combinations that are

possible are quite extraordinary and certainly far in advance of any kind of holographic technology at the moment.

That is the nature of a discordant diffractive grating pattern and that is what is generated by the electron beam lithograph. It etches onto glass; the glass is used to make a master stamp which is a metallic thing; the master stamp is then used to stamp foil. And this is the other issue about the product: it is a very cost-effective product for protecting intellectual property. The technology is extraordinarily clever but it is very cheap in execution, and that is a critical point, obviously. It is not much good if it costs $10 for a $10 CD. The foil for this particular type of product is stamped out only in certain Interpol rated security plants in Europe. It is a fairly highly specialised printing job. Those plants are in Switzerland, Germany and the UK.

Mr Horton—One in each.

Dr Upfal—One in each, yes, that is right. They produce the foil. The foil can be produced in thousands of metres at a time and stamped out and applied at the point of manufacture, but it can also be applied at the point of importation—which comes to the issue of how you deal with the products coming in from overseas if they are not specifically assigned for Australia. The previous person from Mattel said that it was too expensive to apply by hand. I do not believe that is so. I think it is possible, but it is a cost and it is tedious. If the losses are significant for the manufacturer I think they would be willing to assume those costs if they believed that they were going to have a way of excluding pirated goods from the market.

Mr KERR—They would, but for the fact that you might rule out parallel imported materials which would clearly not require this.

Mr Fraser—To use the example we have just been hearing about, if it is a genuine Mattel toy but it is a Mattel toy manufactured somewhere else in the world that is coming in under parallel importing, our idea would be that every Mattel toy would have one of these strips on it so you could tell whether it was a genuine toy or not, so parallel importing would not be affected. What we are talking about is the example he was using about the pirating of poor quality dolls, for instance. They would not have the strip on them, so immediately they came into the country—

Mr KERR—You would not put it on by hand on something that has already been manufactured, so the assumption is that you are manufacturing a large amount of this material without these strips.

Dr Upfal—In that particular case it may or may not go ahead. The one I would like to talk about is tobacco because the same issue is relevant—or spirits, for example. You cannot sell a packet of tobacco in Australia without health warnings. There are quite a number of cigarette packets that come into Australia for which health warnings have to be applied by hand. Certainly, with spirits it happens as well. So the issue is not that people are not doing this. They are doing it already, and they are doing it because they have to comply with Australian law regarding health warnings. So it is feasible.

To go back to the tobacco issue, there are obvious reasons for protecting intellectual property which are being canvassed around here today, but for the government the loss of revenue from parallel importation and piracy of brands is a looming and very dramatic issue, in my opinion. A survey was conducted by Imperial Tobacco in the United Kingdom in February. They collected all the litter from six soccer matches and found that illegal contraband cigarette packaging comprised 20 per cent of the packets that they recovered. They estimate that the loss to excise in the UK on smuggled cigarettes is £1.5 billion per annum.

CHAIR—Do you have a reference for that survey?

Dr Upfal—Yes.

CHAIR—Can you provide us with the reference?

Dr Upfal—Yes.

CHAIR—Thank you.

Ms ROXON—Presumably the problem is quite different, and I am not sure that it would even be comparable in Britain to Australia, particularly with the sort of ease with which you can get contraband product like tobacco into England that you might not be able—

Mr Horton—Actually I could go right—

Ms ROXON—That is what I am asking.

Mr Horton—Right now, just as an example, we could give you a tour of Victoria Avenue in Richmond. You can pick any three shops that sell cigarettes and go and buy a pack of cigarettes. I will guarantee that you will find contrabands that they will be selling. One of them will be selling contraband cigarettes. That is an absolute fact.

Dr Upfal—I bought contraband cigarettes in South Yarra, in Abbotsford and in Footscray. They are already on sale. The focus at the moment for the government is backwards, I think, in terms of the chop-chop market, but packaged cigarettes will be a serious impost on the revenue. To give you some idea and to talk about the scale of the problem—

Mr KERR—Are these imported or manufactured in Australia?

Dr Upfal—They will be both.

Mr Horton—They are both.

Mr Fraser—But the ones he is talking about are imported.

Dr Upfal—Primarily imported but there is going to be manufacturing done here too.

Mr Horton—There is a factory in West Footscray that is doing 10 tonnes of it.

Ms ROXON—That is in my electorate. You had better tell me where it is.

Mr Horton—There was 10 tonnes.

Mr KERR—That is the chop-chop one.

Mr Horton—No, not chop-chop. Packaged—manufactured cigarettes.

Mr RONALDSON—I have some questions about chop-chop. It is actually quite involved but basically it is illegal tobacco which is sold in bulk via—

Mr Horton—Yes, but this was not. West Footscray was not.

Mr RONALDSON—No. Some of my colleagues were asking what chop-chop tobacco is.

Mr Horton—Sorry.

Mr Fraser—I think a lot of people are looking away from the main game by talking about the chop-chop market. Chop-chop is legally grown tobacco which is then not taken by the companies. They keep it, they stockpile it and sell it, effectively, into the pipe smoking and roll-your-own market. While it is a problem at the moment, that section of the market is small. We are talking about a section of the market that is the bulk of the market—that is, tailor-made cigarettes.

Dr Upfal—In discussions with Customs, they also told us that their physical inspection rate is less than one per cent. For every container of packaged cigarettes which can be landed in Australia at 25c per packet—for every container of those cigarettes that comes in illicitly—the government will lose $1 million in excise revenue for every container.

Ms ROXON—I can understand why the government would care about that. I do not fully understand why the consumer necessarily would care. But is it the proposal that you would have your foil or your marking on every cigarette or on every packet?

Dr Upfal—On every packet.

Mr Horton—You have seen packages where they do the old US thing, so it is no different. Why the consumer would be worried and why the government should be worried—

Dr Upfal—And is worried.

Mr Horton—is because of health problems. You have got no guarantee or control over what the product is. Cigarettes are a dangerous product anyway, but actually they can bring in anything providing they are under that label.

CHAIR—Can I just take this a step further? What you are proposing, as I understand it—to take the example of cigarettes—would be that every packet of cigarettes sold in Australia would have to have, say, this foil labelling on it.

Dr Upfal—Yes.

CHAIR—So you can tell immediately whether it is legitimate—appropriately, properly and lawfully imported—or not.

Dr Upfal—That is right. By the way, cigarette manufacturing packaging machines are already set up to do this.

Mr Fraser—It is already done in some states of America.

Dr Upfal—That is right. Quite a number of different places have this. The difference is that they are usually just paper tax excise stamps, whereas this would be a technology which could not be as easily replicated, not by a long shot.

CHAIR—I take it you would say to this argument, 'It is only a minor problem in Australia when you take into account the global market'—that it would be to the advantage of cigarette manufacturers, for example, to do this right around the world.

Dr Upfal—It would be to their advantage but we believe it would also be to the advantage of the Australian government and industry to pre-empt the developments that are going to occur otherwise. The reason for this is that within a year there is going to be a 20 per cent rise in cigarette retail prices. That is the combination of a shift from per weight to per stick excise and also the application of the GST. That means the cost of a packet of cigarettes is going to increase—the standard now is $7.25 for 25—to around $8.50.

CHAIR—That is $8.50. What do you say it costs to import a packet of cigarettes?

Dr Upfal—It costs 25c. That is fully packaged from China.

Ms ROXON—This is exactly the point. Why will the consumer care if they can see the legitimate stamp on a packet that costs $8.50 or they can buy a packet for $2?

Dr Upfal—That is true. You are right—they are going to get an advantage. The question then goes to enforcement and cooperation. I think I would like to ask Andrew Fraser to talk about that, particularly in relation to another similar problem.

Mr Fraser—Years ago in Victoria when SP bookmaking was rife—I am probably talking 15-plus years ago—some of the big SP bookmakers were turning over $10 million a year. The government here introduced clandestine legislation in relation to SP bookmaking. Back then they made a first offence about a $2,500 fine. Then it doubled and doubled again. I actually appeared in about 1980 for a bloke who was fined $90,000 for his third offence. It finished him. The disgruntled punter was the main source of information. So we draw the analogy here: it is the disgruntled cigarette consumer. For instance, Jonathan told me once

that he bought a package of these cigarettes at his local milk bar, took one out and the contents fell out on the floor. He was a disgruntled consumer.

Dr Upfal—And the price. This is the point about a lot of pirated products—they are not necessarily cheaper.

Ms ROXON—You were just doing it for research purposes, I assume.

Dr Upfal—Yes, for somebody else.

Mr Fraser—He has a friend who smokes. The government introduced these enormous heavy fines, and they pursued them vigorously. They had a special task force within the Victorian police and they pursued it vigorously. They fined these people out of existence. SP bookmaking virtually does not exist now. The government was losing a lot of revenue as a result of people betting SP as opposed to betting through the TAB. The analogy here is that consumers are consuming 25c packets of cigarettes, and the government is losing a lot of excise on every packet of cigarettes. So it was an offence to bet with an SP bookmaker and it was an offence to be an SP bookmaker. The idea here is that it is an offence to possess the cigarettes and it is an offence to sell them. If you provide some sort of reward system for dobbing them in, you will—in my opinion and in my experience in this industry—be trampled in the rush. People will be dobbing in people who they know are dealing in these contraband cigarettes.

Mr Horton—In the end, they have to be distributed.

Mr Fraser—Why would the consumer be better off? The consumer would not get a chance to buy those cigarettes much after a while because they would not be available. At the moment, if you go into a shop now down in Victoria in Footscray, you can go and buy them. You can do it today. But if you introduce the technology, they will not be sold. What is one of the biggest problems? Policing. The easiest thing to do for someone is to have those cigarettes there. People can walk straight in and just see them. If they are not there, you cannot sell them.

CHAIR—With the cigarettes, presumably most consumers are unsuspecting. They do not know whether they are buying a genuine packet.

Dr Upfal—I think they know now. They do know because the Chinese have not yet caught up to the idea that we have health warnings, and these packets are sold without warnings.

Mr Horton—It has special naming manufacturing in packaging.

CHAIR—They are sold for the same price, if you walk into a shop—wherever it is.

Dr Upfal—They are usually sold either at the same price, if they can get away with it, or they are sold for a small discount like a dollar off. Obviously, if you want to get rid of a carton, you would probably give them away at $4.

Mr Horton—We could take this technology and apply it to CDs and CD-ROMs, because right now no-one actually knows what is real and what is not.

CHAIR—There is a difference with CDs, isn't there? With cigarettes there is a health aspect of it, and even people who smoke generally acknowledge that there is a potential health problem associated with it. To use a gambling analogy, they bet that it is not going to happen to them. With the CD, if you are going to listen to your favourite musician, you are not going to worry about the health aspect of it, are you?

Mr Horton—You are not protecting the Australian consumer.

CHAIR—I am not asking about protecting the consumer. I am asking: what is the incentive?

Dr Upfal—For the consumer not to buy a pirated copy?

CHAIR—Yes.

Mr Horton—If they can buy a CD for $5 and they think it is real, fine. This way, when they go into a shop, at least they know that it is a legitimate product, a legitimate artist, that the excise is paid, that the money goes back to the Australian artist or whomever. It is actually all legitimate. No-one knows that at the moment.

CHAIR—Isn't a further problem with CDs that the technology is advancing so rapidly with the Internet, et cetera, that nobody is going to buy a CD in the future, that they are simply going to download it?

Dr Upfal—That is true. I believe it is still probably three to five years out before that crosses over. I think physically embodied product is going to remain available for some considerable time yet. The other point I would like to make is that the sale price of pirated goods is not necessarily very cheap. In fact, one of the things that happens, for instance, with Microsoft software is that it is pirated but, through retailers, it is sold at exactly the same price as a usual, standard Microsoft product.

Mr KERR—It is exactly the same product.

Dr Upfal—It is exactly the same product. That is the key point.

Mr Fraser—The problem is that the government is missing out on its slice.

CHAIR—Were you going to show us the technology?

Dr Upfal—Yes, I have an example. This is the American Express travellers cheque that carries the Australian developed OVD technology. That has led to a 100 per cent elimination of forgery and counterfeiting of American Express travellers cheques or the denomination for which it was applied. It was not applied on the $20 and that is the only one that is being forged now. As a result of that experience, which was validated by Battel research in the

United States, Amex has now taken on board the technology for its Euro series travellers cheques.

Mr KERR—You know already that a lot of these security devices can be forged. Why would this not be just the next in the chain of sophisticated forgery?

Dr Upfal—There is always that risk. It is a matter of constant development to stay ahead of it. The actual manufacturing electron beam lithography machine is a unique product that was designed specifically by CSIRO and produced by a single company in the world. In order for this technology to be replicated and to do some of the things that we have said it can do, a pirate would actually have to commission a machine like that.

Mr Horton—That is not the best example.

Mr KERR—No, it is very persuasive. I see no reason why it would not be a useful device. Let us assume that you are putting it on every cigarette packet, which means you would have to have this tape widely available right round the world because this stuff is distributed everywhere. If China can develop the neutron bomb, it can probably manage to get up to this pace.

Dr Upfal—The point is taken. I agree, there are no absolutes in technology, it is always possible for people to surpass something. That is the reason why you have to keep the R&D side of it going, and that is what CSIRO does, and has done, and will continue to do at Clayton. They are further advancing this and we would, obviously, seek to keep at the forefront of the technology. Even at the present time it is way ahead of what can be done by any pirate, and in a distinctive way that is quite apparent to the eye, without having to go to the microscopic level.

Mr Horton—There is one technology that is purely grey—you look at it and all it is is grey. But then you just go like that with a very simple device and up comes all the images that you want. But the answer to your question is that no-one can guarantee anything. However, CSIRO believe that it is impossible to counterfeit it, even in the medium term, and even with organisations like American Express worldwide adopting it.

Ms ROXON—Isn't that the point, that even if it was impossible to counterfeit, won't you have to have millions and millions of the little labels that are going to get stuck on, if we are using the cigarette packs as an example. Isn't that going to have to be distributed to huge numbers of manufacturers who apply it? Isn't there the opportunity to do exactly what Mattel said? They had a situation in China where their packaging was stolen and had imitation Barbies put in. So even if you cannot actually produce the foil, won't there be a security problem if it has got to be applied at so many points that it will just get applied to counterfeit products or low quality products?

Dr Upfal—It may well do. This is not necessarily a protection of a brand, it is protection of excise. Any product that comes into Australia will have to carry it. Even if there are more sent out than come in, that will be meaningless in terms of the revenue forgone because so long as every packet carries it, every piece of revenue that is owed will be collected because of sale in Australia.

Mr Fraser—A company in America may say, 'We are going to print two million of these for Australia.' They then pay for the stamps, which means whatever the excise is paid. If only 1½ million of those turn up or end up getting applied to packets because someone over there has stolen them, that is a different situation altogether, that is a security problem over there. But the government has still been paid its appropriate duty because you pay it per item.

Dr Upfal—Because that is how many were sold here.

Ms ROXON—For the purposes of this committee we are looking at the enforcement of copyright, not the securing of excise for the government—

Dr Upfal—I understand that. That is true.

Ms ROXON—although we are all interested in how that works. I am interested in how you take the further step, how you actually make it work for the protection of the people's copyright.

Mr Fraser—It is a security delivery. These plants that print these foils are Interpol rated. They are secure facilities that often print banknotes for other countries. It is a secure facility. They would be taken and delivered under appropriate security. They just would not be posted or something like that.

The idea is that they are then applied during the printing process for whatever the packet might be. If somebody steals 5,000 of those packets then there is nothing we can do about that. There is always a human element in all of that. The idea is that they are applied at the point of printing and then it shows that it is a genuine product.

Just to use the Mattel thing, it will have a strip on it that says, 'Genuine Mattel'. If some of those packets get stolen then there is nothing we can do about that. That would be something the retailers would have to be on the lookout for, but we say that it makes the protection of the person's intellectual property easier to enforce because it is going to be apparent, sitting on the shelf, whether it is a genuine article or not.

Mr RONALDSON—It just seems to me that you need an ease of policing, probably in the retail sector as well, to really continue the enforcement of that. I suspect that the great bulk of retailers would probably be retailing some of this pirate stuff, not appreciating that it is. There would be many members of VECCI who certainly are not looking to break the law but, because of the very good reproduction of product which Mattel showed us today, it is probably impossible for them to do so. Are you in a position to provide ease of retail policing, which I think is going to be required to make this work?

Mr Horton—It would not even get on the shelf.

Mr Fraser—If it has not got the OVD on it, it does not get there because it is not a genuine product.

Mr Horton—It does not get on the shelf.

Mr RONALDSON—But if you have got a strip, why cannot someone just reproduce a strip that looks exactly the same?

Dr Upfal—If you have an inspectorate system, you can have specialised things like the strip which require, firstly, technology that is not available elsewhere, and, secondly, they are visible only to that inspector using their lens, or whatever. If there are visible qualities apparent on the OVD that, once seen, are not able to be mixed with, say, a fake hologram that has been applied, the consumer and the retailer will know when they have been dudded. They will know they have been supplied goods that are not authentic because they will be able to check them. As Ted says, they will not put it on the shelf if they are able to check it.

The reason the AMEX worked is that they have a protocol on the back now which tells them how to look at the OVD and how to determine whether or not it is authentic. The AMEX will not accept a fake hologram because they know that, if you follow that protocol, it guarantees the product, the OVD, is an authentic one, therefore the check is real.

Mr Horton—This is going in to so many areas. Right now, if you made the right sort of phone call—to people I grew up with, but no longer know, of course—I could probably get a passport, a driver's licence and everything within a week, and you would not be able to tell the difference. And this is happening on everything. The way printing is nowadays, it is practically impossible not to be able to replicate everything. But with this technology—the top end with the grey strip—it cannot be done. We are not talking about major technology to look at this. It is just a piece of glass. But it is the way the glass is done. If you saw it now, you would say that it was remarkable.

Dr Upfal—Much of the discussion that has been generated is around the parallel importation and the World Trade Organisation treaties. Obviously, as a country we have signed those agreements and we have enacted legislation to make our laws conform with the treaty. What we are proposing does not in any way interfere with the free flow of goods under the obligations that we have assumed.

What it does do is to guarantee—for example, in the tobacco excise case—that the government in its legitimate and sovereign right to raise revenue as it sees fit does not lose out because of the increased availability of piracy and pirated products.

A similar case can be made on health and safety grounds, which is what Mattel said. Safety issues are paramount. It is a legitimate right of the government to require that products conform to safety laws applicable in Australia and the means by which that conformity is demonstrated may well be a technology such as the one we are talking about.

Mr CADMAN—I would have thought that the real effect of this is a straight commercial one. It is a great advantage to the manufacturer of legitimate products to know that their products are being handled by appropriate people and that they can identify fakes or pirated copies.

Dr Upfal—That is right, yes. They have an interest in seeking out and identifying fakes themselves and, if they have the means to do so, it is an advantage.

CHAIR—It is obviously in the interests of American Express to use this technology. Why isn't it equally in the interests of Philip Morris or one of the cigarette manufacturers, for example, to do likewise? If 20 per cent of the world's market—if it is 20 per cent in Britain, it is probably who knows what in some countries—in packaged cigarettes is counterfeit, it would seem to me—and I do not know what the cost is of putting one of these labels on—as a prima facie excursion into the area, that it would be cheaper for Philip Morris, to take an example, to put one of these things on every packet of Philip Morris cigarettes.

Dr Upfal—I agree. I think—

CHAIR—My question then is: why aren't the economic forces driving this forward rather than us saying that government regulation should drive it forward?

Dr Upfal—The reason in this particular instance is that the government actually takes 75 to 80 per cent of the revenue. The companies probably do not want to have two stamps, one which is a brand protection and—

Mr CADMAN—This is a point you make in regard to excise and other duties where the government is involved.

Mr Fraser—Tobacco is a classic example because an extraordinarily high proportion of the cost of the unit is excise.

Dr Upfal—There is a compelling reason why Philip Morris will do this in their own right. They have a problem and we have already had considerable discussions with them about it. It is likely to be a worldwide decision rather than a local decision and that is possibly the reason why they may well be preparing such protection in New York now; I do not know.

CHAIR—We have to draw this discussion to a conclusion. If there are any further matters that arose out of the discussion, that you have not included in your submission or that come to mind after today, provided it is not too long a period, we will accept any further submission you want to put forward to us. I thank you for your submission and for speaking to us this morning.

Proceedings suspended from 10.50 a.m. to 11.01 a.m.

HARMER, Ms Suzanne, Victorian Employers Chamber of Commerce and Industry (VECCI)

CHAIR—I should advise you that, although the committee does not require you to give evidence under oath, the hearings today are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. I invite you to make some opening comments.

Ms Harmer—Thank you again to the committee for the opportunity to make this submission on behalf of the Victorian Employers Chamber of Commerce and Industry. First of all, for those who may not know, I would like to open by making some preliminary remarks about VECCI. The Victorian Employers Chamber of Commerce and Industry was formed in 1991 as a result of the merger between the Victorian Employers Federation and the state Chamber of Commerce and Industry. VECCI is the largest peak employer body in Victoria. It is also the largest multi-industry body in Australia and the largest member of the Australian Chamber of Commerce and Industry, which you would know as ACCI.

VECCI's constituency is drawn from almost every sector of industry and commerce, including manufacturing, retail, tourism, leisure, hospitality, health, business services, local government, road transport and related industries, and of course the trade sector. VECCI has just under 8,000 members in this state. These also include those who subscribe to services like award information. Approximately 90 per cent of our membership are SMEs—small to medium sized enterprises—and approximately 30 per cent of the membership is in fact in the retail, hospitality and commercial services sector, which is the fastest growing sector. Eighty-two per cent of VECCI's small business membership employs less than 20 staff.

I would just like to follow on in relation to the terms of reference. VECCI has not had cause to extensively survey its membership in relation to the issues canvassed by the terms of reference. We would certainly like to have done that and still may do that in the future. We understand that the terms of reference govern the ambit of this inquiry's investigation, and we say that, as a result of not being able to survey our membership in considerable detail, we do not possess a store of empirical data on copyright infringement as far as our constituency is concerned. We would say that, usually, VECCI favours forms of self-regulation where that is possible in preference to black letter law, but it recognises that, in this area of intellectual property, more effective measures are certainly required.

From a policy point of view, we believe that there should be a balance between them, that is, black letter law and the ability for enterprises to have copyright material available to them, not only in the public interest, but also so that they can be continually innovative in the public good. I have to say that on a continuum of issues of concern to VECCI's business and industry constituency, the enforcement of copyright issue is not a pressing one. I say that and qualify it by also saying that it is not a pressing one relative to other ever-present issues such as compliance costs and more topical controversial issues such as tax reform and the accommodation by small business of the GST.

Where VECCI members have complained about copyright infringement, it has fallen into two main categories: firstly, a very deliberate attempt to pirate a product and its particular

get-up by going offshore to do it. It seems to us from our member feedback that this is usually done in China or Taiwan, sometimes Korea. The product is then reintroduced to directly compete with the local product so as to encroach on market share or market niche. Secondly, there is an attempt to copy a product for similar reasons. We often find it in a less sophisticated manner which is more often than not done out of ignorance of the law and loosely justified in the spirit of competition.

To us, just at present, it would appear that the Internet age has not necessarily brought with it a commensurate increase in knowledge about copyright. The reality appears to be that small to medium sized businesses do not seem to have the time or the resources to devote to educating themselves about copyright and usually are reactive rather than proactive.

In recent times ignorance about copyright has been nowhere more evident to VECCI than in the small business reaction to the copyright issues which have been associated with playing music in workplaces for the benefit of clientele. As this committee would no doubt be aware, this occurs by way of having the radio, tape, CD player or television set on.

After the publication of an article by our organisation on this topic in a national magazine last year, following on from the findings of a previous inquiry conducted by this committee, the response from small businesses right around Australia was overwhelming in terms of the queries we received, in terms of both voicemail messages left and also the emails we received. Most small businesses admitted to being in breach. They wished to rectify the situation immediately, but still could not easily grasp the concepts of copyright and the legal interpretation given to them. For example—and the committee will no doubt recall this—the notion of a public performance and the playing of a CD might breach three different forms of copyright.

Another recurring example of small business legal ignorance in relation to intellectual property is when an enterprise engages a contractor to design, for example, tailor-made software packages for database management without ensuring that all the appropriate contractual checks have been conducted. This becomes even more complicated when subcontractors are in turn engaged and disputes arise as to which party owns the intellectual property thereby created and the uses to which it may be deployed.

The SMEs often do not have the internal managerial checks in place to properly audit their valuable intellectual property. Generally this is only done out of necessity when it is threatened by a competitor, or piracy has occurred and legal advice is then sought, often with some dread, given the technical nature of the area and the cost of professional advice and remedies.

The small to medium sized business sector is a source, we would say, of much ingenuity, innovation and enterprise. It is gradually being won over by the attractions of electronic commerce in all its forms in terms of discovering markets and offering unique products for sale.

VECCI is of the view that the Internet will be a substantial forum for copyright infringement as already evidenced by the challenges posed by pirate Internet sites. The

problems and the solutions, as with privacy issues, will continue to be increasingly internationalised, and we appreciate the reality of that.

Our recommendation to this committee may certainly seem simplistic, given the scope of the issues you have to come to grips with, but we do appreciate that the loss of revenue to piracy markets cannot go unchecked because it undermines, from where we stand, business initiative, incentive and capital expenditure. However we submit that the prospects for effective enforcement can be greatly improved by more concerted efforts to convey, in conjunction with the private sector—which must take some responsibility for this—that intellectual property is a valuable business asset which must be safeguarded and protected. Although, arguably, technology is outpacing the law, the allocation of resources to educate about copyright might be an additional effective weapon, albeit a more gradual one in the long-term war against piracy and the wasted human and financial resources exhausted in fighting it.

One of the frustrations of small to medium sized enterprises is the complexity of the legislation as a first point of reference. Perhaps a case might be made for a more user-friendly primary act. That concludes our submission.

I would just like to say in passing that in the submission we have not touched extensively on the issue of parallel imports. We certainly have been involved in some extensive discussions on this particular topic, particularly with established brand named companies. The reality to VECCI is—I was pointing this out to Michael—that we recognise that the legislation is on the books; we do see some positive benefits for markets and consumers. We see some repercussions that, perhaps, were not anticipated from the act and we have already taken those up in discussion with Professor Allan Fels directly. Most of them are trade practices repercussions concerning defects in products whereby the manufacturers might be exposed, and some other matters, for example, like consumer warranties which some of the established brand names feel might be compromised if their brand is compromised.

CHAIR—Can I take up your primary recommendation then in relation to education and ask: what does VECCI do in this regard? Do you publish materials which outline copyright law in a simple way? I am not sure whether you have training seminars or information seminars for members. If you do, do they include issues like copyright?

Ms Harmer—Yes, they do—all of the above. We certainly have a magazine that goes to all of our membership, the *Business Forum*. We endeavour to educate our members about the more controversial issues of copyright in that magazine and we certainly did that with the last committee of inquiry's investigations in relation to music in the workplace. We also have in-house training sessions and seminars. In this area of electronic commerce we have been particularly preoccupied with doing that more recently with the year 2000 issues, which are a very big worry and concern for small business. Some of them—certainly not all any more—are still coming to grips with being fully computerised, let alone worrying about the year 2000 legal exposures.

CHAIR—I presume that an increasing number of your members would be concerned about protecting their copyright?

Ms Harmer—Yes.

CHAIR—If one goes back 20 years, to traditional manufacturing and assembling and those sorts of industries dealing in goods, for example, it was probably more the case that those involved in the industry were using somebody else's copyright, whereas increasingly with information technology, many of your members must be the actual producers of products to which a copyright attaches.

Ms Harmer—Yes, that is true.

CHAIR—To what extent are those who have a vested interest in the protection of copyright helping to educate those who may be in different aspects of business and industry and do not appreciate copyright? Is there any cross-fertilisation occurring?

Ms Harmer—It is hard for me to say; that is the short answer. I am not really sure. Suffice to say that within this constituency we have those, it must be admitted, who infringe, often out of ignorance, and we have those who increasingly want more protection for their labours, their efforts, their enterprise and their capital investment. They are very valuable resources to small to medium sized businesses. We refer quite a lot of our members to the intellectual property office. They are particularly concerned when they have an invention or a process, which might be as simple as imprinting a logo on a windcheater but is done in a very high-tech way. They do not know how to protect that; they do not know the level of protection that exists for that in Australia; they do not know what the next step is if they want to prevent people in other countries exploiting that, without the requisite protections in place.

The intellectual property office is a place we often advise them to go to, to see what is there and to have a look at whether a particular invention or process may already be patented. The area of patents—not just copyright in art, literature, music or software—is also a very big concern for small business. Small business people do not often know the first step. They know that to go to a patent attorney is expensive, and they often put off going until the very last moment, sometimes when it is too late and their process is already being knocked off, so to speak, by foreign competitors, which is very devastating for a small business person.

Mr RONALDSON—In relation to the access of your members to the court system, I understand from the committee secretariat that there is a view that people go into the higher courts as opposed to the lower courts. Are there problems, as far as your members are concerned, about going into the lower courts? Is the thing just all too difficult and they steer clear of it? Is it a lack of resources or information? Also, I understand that in the US and Canada, there is a form of statutory damages. Is that something that you think would be attractive to your members?

Ms Harmer—To be honest, I doubt whether many of our members would have turned their minds to that as a remedy. Without denigrating the membership, it is made up of a vast cross-section of businesses, many of which have different levels of knowledge and expertise. Generally, there is a dearth of knowledge in relation to what they know about the copyright area and what they know about their legal rights. We find that they often act too late. They

are possibly too busy endeavouring to make a dollar, find a market and break into a market and too preoccupied with marketing their product to always worry about their legal rights. The protection they must necessarily give themselves often comes further down the track. As I have said in my submission, it is at the point that they find somebody has either copied their product or threatens to do so that they go and get professional assistance.

Like everything, the area of copyright is fairly specialised. If they are seeking to have that protection in place, many small business people possibly do not appreciate—and there is also a cost factor in this—that they really do need to go and see a legal person specialising in this area who can deliver the best service and outcome for them. As far as courts are concerned, small business people worry a great deal about stepping inside a court. It means they have stepped outside their business; it means that, whilst they are there, they are not in their business. It costs them: sometimes they have to bring in other staff to manage the business whilst they are litigating in court, and they are very concerned about the cost of litigation.

Mr RONALDSON—One of our terms of reference is the adequacy of civil action to protect the interests of plaintiffs and defendants. What you are saying is that your members cannot even comment on that because they are reluctant to take the initial step to get into it, so the adequacy or otherwise of the system is of no relevance because they do not actually take the step to get into the system at all. Is that what you are saying?

Ms Harmer—They will, of course, if they have to; if everything is at stake, then they can be expected to do that. All I am saying is that they do not do it proactively; they do it as a reaction usually.

Mr RONALDSON—Because of the view—

Ms Harmer—Because of the complexity of the act; because they know that if they are to win and have the outcome they want they will have to get specialist legal advice from a copyright specialist. They also know that litigation is going to cost them a great deal of money, particularly, for example, in a federal jurisdiction. Most small business people would like it resolved in another way if it could be. One of the things that we have found has worked increasingly well is alternative dispute resolution and also the advent of mediation.

Mr RONALDSON—What you are saying is that, if the process were simplified, you think your 8,000 members in Victoria would be more likely to access the system and more likely to protect their copyright. Is that basically it?

Ms Harmer—Yes, that is what we are saying. Also, it would be of assistance—and I am sure this is already being done; it is, in Victoria, increasingly being done in terms of government online services—if small business people could visit a government site where there was some educative comment on copyright and what the next step might be and some avenues to explore, without giving specialist legal advice but maybe just taking small business people on a short trip through the act, some of their remedies and some of the first points of call. That would be of great assistance.

CHAIR—You are suggesting something like a web site that answers questions like: what is copyright; what forms copyright takes; how could you breach copyright; what are the remedies?

Ms Harmer—Yes, that sort of thing. The intellectual property office does do some of that, it has to be said. I think it would greatly assist small business. The private sector also has to have some responsibility in doing this—we acknowledge that. But we are continually amazed by legal ignorance about copyright in this constituency.

Ms ROXON—Wouldn't the hesitancy that you describe your constituents having in going to the courts, or the lack of understanding about their legal rights, accurately describe most of your constituents' views about laws relating to most issues other than copyright? Isn't it actually a general community problem that people are hesitant to go to the courts, that it is expensive to go to court, that it is confusing to know what the laws are, whether it is industrial relations, copyright, the GST? I just do not really understand why this is any different for your constituents than any other issue.

Ms Harmer—It is probably not so different. We have just found that there is more ignorance about intellectual property than, for example, about basic contract law. Many employers, particularly with sizeable staff, have more knowledge about industrial relations, unfair dismissal, awards.

Ms ROXON—That is because you advise them on that, isn't it?

Ms Harmer—Yes, we might advise them on that, and in the past in particular we have been a specialist on that, but they do not necessarily have to be a member of our organisation to know about those things. We have found that some of the concepts of intellectual property are just a little more nebulous. As I have said, a prime example is understanding the notion of public performance and how that has been interpreted, that you can breach copyright in at least three different ways by playing a CD in your business. Trying to explain some of those concepts and coming to grips with that level of ignorance in this area of the law we have found to be quite interesting and frustrating.

With a lot of the problems with computer software, for example, when small businesses get into legal problems with having their computer software tailor-made, intellectual property issues often arise there. Sometimes, you are right, it is also ignorance of contract law, not doing the legal checks to find out whether or not rights have been assigned, for example, or licences given. That is certainly true. But we have found that intellectual property is a new legal area that the small business community does not know much about—and perhaps they do reflect the wider community in this respect. As I have said, 82 per cent of our membership employs less than 20 staff. I am not saying that all of them are 'mums and dads' businesses, but I am just saying they are small outfits.

Mr KERR—Can I raise the other side of the coin which is the point you raised about people not registering their rights or taking any steps to protect themselves, and often losing those rights. Have you any suggestions that might assist us in that area? The focus of the discussion this morning has been largely about piracy and things of that nature, from the point of view of established manufacturers who asserted their rights. One of the problems

with Australia in the past has been that we have not really seen ourselves as producers of intellectual property having an economic value in itself.

Ms Harmer—Relative to, for example, America?

Mr KERR—Relative to almost anywhere—the United Kingdom, the United States, Japan. I am just wondering whether you have any suggestions to us about that side of our terms of reference which goes to options for copyright owners to protect their copyright against infringement.

Ms Harmer—We recognise that this area is very complicated; it is very sophisticated. We feel it is quite simplistic making the recommendation we have, but we feel that, long term, education of the small to medium sized business sector is very important. We feel that there is often a great deal of frustration in this sector when they find that processes or inventions in particular are being copied, particularly in countries around Australia, in Asia. They find they then end up having to compete with their own process which can be imported much cheaper. Had they had more knowledge and education on the fact that they even had some rights in this area, that might have made them a little more proactive more quickly. That is why we are putting quite a bit of onus on education.

We are not an organisation that always advocates black letter law, as I have said, and we still have as an organisation some problems with, for example, section 51AC of the Trade Practices Act. It was a section that we were not very amenable to, but we recognise in the submission that, increasingly, intellectual property rights have to be protected, otherwise small business acumen in this country is sapped. A lot of the talent and expertise is going overseas, and we are the losers in that.

We see education as being a primary recommendation. We are not really sure whether more stringent customs law or more regulation will necessarily make it easier for small business. Perhaps the converse: it might be something which means that they then have to find their way through the maze of regulations to see how this act is governing them, and that is not something we necessarily want. We want the act to be understandable and accessible and we do not necessarily want more regulation governing it, if that is going to increase the web or the maze of small business.

Mr KERR—It seems to me to be not only wanting one's cake and eating it, but trying to straddle two extremes of the impossible conundrum. If Australian business is going to be able to take economic advantage of intellectual property, there has to be black letter law. You cannot have self-regulatory arrangements where essentially the non-participating side can simply take advantage. It is either a case for black letter law or no law.

Ms Harmer—That is something we do not disagree with. We are just saying that we do not always see black letter law as being the answer for everything. For business, that creates red tape and compliance costs and I think both of us are at present talking generalities. But we are not saying that we are against black letter law—perhaps some. What we are saying is that, if it becomes all too complex and too regulated, it does not necessarily make it easier for small business to protect their rights.

Mr KERR—Coming back here, a lot of the things you are speaking about are not just copyright; they are patent law and trademark, I assume—

Ms Harmer—Some of them.

Mr KERR—Invention and originality are the issues. But the underlying point that I detect from you is saying, 'Look, Australia is losing a lot of economic activity that would otherwise occur here, simply because, whilst we are very inventive, we have not been quick to secure the rights to continued usage of that inventiveness.'

Ms Harmer—Yes, that is right. It does not follow, though, that our laws are lacking or bad or we should not have ratified or signed international treaties. What I am saying is that we have found our constituency does not really know about this particular area of law very well at all.

I would be submitting that it is a different area of law from other areas of law that people might be familiar with in their businesses and, increasingly, they have to be familiar with it, otherwise they are legally exposed and the product of their efforts is going to be knocked off, so to speak, by a competitor.

One of the things we are keen to see the government do, and one of the things that organisations like ours also have to come to grips with, is educating the constituency about the law—this area of law—and the rights they have under it, and the protection they can seek under it.

Mr RONALDSON—It is not so much adequacy as accessibility.

Ms Harmer—Yes, it is also accessibility, of course.

Mr RONALDSON—It is almost the stage before, looking at whether the law is right or wrong, it is whether they are getting into it to make a value judgment about the adequacy of it, I suspect.

Ms Harmer—Yes.

Mr CADMAN—Could I ask a question about the inquiries you get. One thing I cannot get a grip on from your submission is to what extent you get inquiries from people who feel they may have had their businesses damaged or who are under threat because of breaches of any of these areas that Mr Kerr has mentioned, whether it be trademark, copyright, patent or whatever, all of those intellectual property areas. Do you keep any statistics of inquiries that you get?

Ms Harmer—It is done, basically, across the organisation. We do have a database of all of our members and we do endeavour to log inquiries.

Mr CADMAN—Could you give us some sort of indication, perhaps over a 12-month period, of the number of inquiries you get? To what extent do people feel that their livelihood is being threatened by somebody rorting the system to their disadvantage?

Ms Harmer—As I said, those inquiries are maintained by different sections of our organisation. We have a database of all of our members. I will certainly see if we can extract some information, particularly for the committee.

Mr CADMAN—If you could put an interpretation on the particular slant that you think your members were concerned about in those areas, that would be very helpful to us.

Ms Harmer—I have certainly endeavoured to do that just from the calls that the legal department gets. Again, this is symptomatic of being reactive. Often a small business member will not phone their own lawyer if they feel that their copyright is being infringed, but they will phone our organisation and speak to the legal department in our organisation because they are a member organisation. We have quite a business law approach to it. They will often speak to us before they will speak to their own lawyer because, of course, their own lawyer—

Mr CADMAN—They are going to charge them.

Ms Harmer—is going to charge them. We have to be very careful about what sort of legal advice we give our constituency via the phone.

That is the small business reaction. They will speak to us where it does not cost them—and this might be a benefit of membership—before they will go to a specialist. Maybe, at this stage, that is all they need to speak to. It is often hard for us to charge, but that is a typical reaction. What I have said today is based on the calls that we get to our legal department, which is often their first port of call, as I have said.

Mr RONALDSON—In some respect your members, and other employer representative groups as well, are also in a unique position to be community watchdogs both in relation to product safety, product health and all those sorts of things. Do you think the wariness of this whole question is impacting on their preparedness to report glaring examples of product defect, whether it be safety or otherwise? It is probably a difficult question to answer but I was wondering whether it might have ramifications a lot further downstream than just access for their own individual matter, that it might have greater community ramifications as well.

Ms Harmer—They often are not backward in coming forward and advising our organisation. For example, if they are importing product they will tell us what the defects might be in that product. They will certainly raise concerns about that. We might need to get only one call and if we consider it serious enough we are happy to pass that on to, for example, the ACCC for the ACCC to take action if it can. But we find that most of our small business membership are very wary about dealing directly with the regulator as such, whether that is the ATO or the ASIC or the ACCC.

They will first of all come to us and tell us what their concerns might be as far as defects in products are concerned, what they think their exposure might be, whether or not they are producing a bona fide product and somebody else is importing one that is not so and yet they are competing in the same market. Those sorts of things worry them very, very much.

Mr RONALDSON—If they are not going to you, they are probably not going to anyone.

Ms Harmer—I can only say that often we are a first point of call, so that is the only gauge we have, and sometimes it is very, very concerning to them. Sometimes we have members ring up in high states of aggravation when they have found out some of the things that are going on. We endeavour where we can to pass some of those queries on to the ACCC, as I have said, or, if they really need specialised help, we might even refer them to a legal firm that we have a strategic alliance with who are specialists in this area. But again we do not do that lightly because, if they are specialists in the area, more often than not it is going to cost this member a lot of money.

Mr RONALDSON—Do we need to look at some enhanced reporting mechanism then? It seems to me that it is really hit-and-miss. If they do not go to you, it would appear from what you are saying they probably do not go anywhere. It is fair to say they probably do not go to anyone. Are there problems with the reporting mechanism with these breaches?

Ms Harmer—No. Prima facie, no. I suppose it is just what the reporting process is going to be.

Mr RONALDSON—At the moment it is you, which would indicate to me that they are uncomfortable about pursuing any other form of reporting.

Ms Harmer—They think twice about phoning the ACCC; I can say that quite definitively. They are very concerned about dealing with the regulator directly. They might feel that they in fact might be exposed in some way if they have an ACCC investigator coming out to talk to them because of what they are aggrieved about. So I suppose, yes, that is why they probably feel more comfortable, if you like, talking to our organisation before perhaps even going to their own solicitor.

CHAIR—Can I thank you for coming along this morning and for the discussion.

Ms Harmer—I will just tender this. It is a finalised submission. There are copies there too. Thank you very much for the opportunity.

CHAIR—Can I just ask you to check with Hansard as to whether there is any terminology that they need to clarify.

Ms Harmer—Certainly.

CHAIR—Is it the wish of the committee that the submission from the Victorian Employers Chamber of Commerce and Industry, dated 26 July, be received as evidence to the inquiry and authorised for publication? There being no objection, it is so ordered.

[11.44 a.m.]

STEPHENS, Mr Julian, Stephens Lawyers and Consultants

CHAIR—In what capacity do you appear before the committee today?

Mr Stephens—I appear as a partner of the law firm Stephens Lawyers and Consultants, and the comments that I am putting to the committee today are those of the firm.

CHAIR—Thank you. I should advise you that the committee does not require you to give evidence under oath, but hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the houses themselves. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Can I ask you to make some opening remarks about the issue.

Mr Stephens—Certainly. The reason I am here is that I am a member of the Victorian Law Institute Intellectual Property and Trade Practices Committee. The Law Institute unfortunately was not in the position to have formal submissions to put to you, but I am a member of the committee which has had a long history of dealing with the issues which are your terms of reference, so the other members urged me to come and speak before you. I do admit this is the first time I have ever appeared before a parliamentary committee, so I am a tad nervous, but you all seem to be very—

CHAIR—I reckon we try not to be—

Mr Stephens—It is probably a more friendly environment than the courts. I have some opening comments. Firstly, I have been involved for a period of 14 years in the anti-piracy activities of Autodesk who are a member of the BSAA and the fourth largest software house in the world. Their CEO has authorised me to speak openly about what actions have been taken with Autodesk because I cover a period from 1984 to today in terms of their specific problems in Australia and New Zealand.

As an opening comment, I would just like to quickly pick up on the VECCI submissions before I go to mine. I agree with a lot of the comments that were made and, as an intellectual property lawyer, from small business, the questions that I am asked by people who are concerned about the intellectual property issues are very basic. For example, I will receive a phone call from a business person saying, 'How do I copyright something?' Then they will say, 'I have registered a business name; that is all I need to protect my brand name.' The level of knowledge with smaller businesses is scant and I agree with everything that was put to the committee. I understand why the comments were made.

This is an area of black-letter law, and I agree with your comments, Mr Kerr, that it is an area where you just cannot have a quick fix. There is no quick fix. I will make some very broad-ranging comments about what Australia does have to do at the international level and at the domestic level. Firstly, at the international level, we have to have intellectual property laws that can be enforced and we have to have intellectual property laws whereby large corporations can invest in Australia with confidence that their intellectual property is going to be protected. I will return to that issue because we have run the last two major High

Court cases to determine what is computer copyright under the Copyright Act, and it causes a lot of angst with international corporations if there is not certainty in our law.

I am not suggesting that this is an easy area. The United States, with the explosion of the information technology industry, has a lot of litigation. We are a much smaller country. We are a country that under both Labor and Liberal governments is encouraging and trying to stamp our imprimatur in this area as a high technology society, and we see that as a major economic imperative to the future. Therefore, in my submissions, this area and the issues which you are looking into at the moment are critical in terms of where we go in the future. You will note that every time we are put on the watch list there is a lot of concern in terms of how safe is Australia. I know that everyone believes that we are an honest country and we have a very stable legal system, but the legal system does get tested when you have large organisations who are prepared to invest in Australia but then raise as an issue, 'How good are your intellectual property laws and what are you doing about enforcing them?' I just raise that as a preliminary issue.

The second issue that I think is extremely important for small business which was not touched on in the VECCI submissions is not covered by your terms of reference. It is an area that smaller business does not understand. There is the area of confidential information and trade secrets. When you are a small business, small business people do not have the money to go and see an intellectual property-trade practices lawyer and pay a fairly hefty hourly rate, or they do not perceive that that is money well spent at that stage. Some of them can afford it but, in terms of their priorities, it is to get the business going and then play catch-up legals which quite often is deadly. That really I think is the essence of a lot of the submissions being made by VECCI.

One thing that is very important is to have a good document that enables a person to speak to other people, a deed of confidentiality, that is enforceable. That is what the large corporations do too when they are dealing with each other. A lot of people do not understand this. For example, a comment was made about a patent. You do not want to have prior publication, but on the other hand the main aim of smaller businesses is to get the deal off the ground. That is when they find out that it is a *Titanic* situation—it does not matter what you do, the ship is sinking.

The one issue that I totally agree with in the VECCI submission—and it is a major thrust of my comments to the committee today—is that education is extremely important. What role the government plays in education in relation to intellectual property issues is for you to determine, but I believe the major problems one has out there in broad Australia are that, firstly, people do not understand what intellectual property is and, secondly, a lot of these people do not genuinely believe that they are doing anything wrong. They do not equate it to theft. I have said to many people, because I have executed many ANTON PILLER orders, 'Give me the keys to your car.' And they ask, 'What do you mean?' To which I say, 'You've stolen something—we'll steal something.' And they then say, 'But that's mine. You take that car and I'll call the police.'

They do not understand what intellectual property is and they do not understand that it is theft of property. It is not real property; it is intangible property. A lot of them also feel that this is an international conspiracy by large organisations to make unholy profits at their

expense and they have a God given right to provide the Australian public with other people's property.

Mr KERR—It is not too far from Alan Fel's position really, is it?

Mr Stephens—Yes, absolutely. Therefore, we have a major problem in comprehension. If you are, say, an intellectual property lawyer and you are at a function with other lawyers, quite often the conversation dies. A glazed look comes over their eyes when they ask what you do and you explain. Therefore, even within the profession it is an area which a lot of people have a lot of difficulty coming to grips with.

Coming back to how people access this area of the law and how they protect their own intellectual property, there is no simple solution. I believe that one of the major problems with the educative process comes back to organisations like VECCI, the Chamber of Manufactures and other organisations that represent a broad section of industry and their ability to convince their members. I heard the comments about the cost of it, but quite often the cost is not that great because an hour's conference with somebody who knows what they are doing can certainly avoid a lot of pain in the future.

It comes down to how people view the issues that are important to their business and the importance of getting the legals right, getting the contracts right. The explosion in franchising is where small business people in Australia are relying on using other people's intellectual property to make a living for themselves. Understanding what they are contracting for and understanding what their rights are is extremely important. Coming back to the small business that has come up with some gee-whiz way of manufacturing or putting logos on T-shirts—or even the design of the T-shirts—and where you go from here, it is critical that they understand that there are certain things that you have to do.

Coming back to the business name, so many people say to me, 'I have registered the business name of Victoria or Fred's Food Shop,' for example. I say, 'That gives you a registered business name pursuant only to the provisions of the business names act in Victoria. It has no other force. You may end up with a common-law trademark if you trade for long enough, but then you get involved in another area of dispute. If you make an application to register a trademark, that trademark is available and you get through the examination process, you then have protection within the Commonwealth of Australia and its territories against anyone who infringes that mark unless the mark is challenged for other reasons—that is, if it should not have been granted or whatever.' Even at that level, they have no idea, really, what a trademark is.

With copyright, most people do not understand—and I am not in any way denigrating the intelligence of business people, but these are the facts—that copyright is automatic under the act as long as it is a literary work and you are the author. They believe you have to copyright material. These are the types of issues you are dealing with at the small business level. You are dealing with people whose comprehension of what needs to be done in the area is almost nil or nil—even in the copyright area. One submission from VECCI was that there is a greater comprehension of copyright law. I beg to disagree there. I believe that people have a vague idea of what copyright is about and that if you infringe it you could be in a lot of trouble, but beyond that it all becomes a blur.

Coming back to the submissions of the firm—I am now referring to 1A(i), the availability and accuracy of data for copyright infringement—I have no survey figures for copyright infringement. The BSAA commissioned Pricewaterhouse, and I believe a submission is coming to you or has come to you to prepare an economic analysis. The BSAA estimates that software piracy in Australia represents 32 per cent of the business and that the cost of copyright software, or the loss to the owners, is roughly $250 million a year. These sorts of figures are extremely conservative in my opinion. I believe the figure is much higher.

When you look at piracy issues, you are looking at two levels. You are looking at the level where people enter the marketplace and deliberately distribute in large quantities pirated computer software that is manufactured either within Australia or overseas—namely, Southern China. Then you have the home user and the corporations. Many leading Australian corporations cannot match the number of sites where their software is loaded with the number of licences they have. On the corporate side, there has been a strong policy for over a decade to encourage large corporations to get their act together in terms of the number of licensed software sites they have, and some celebrated raids with major Australian corporations have been well publicised.

The problem that flows from international piracy is, in my opinion, like the drug trade problem: it is a huge international problem to which there is no simple solution. It then comes down to what Australia is prepared to do with border controls. In my opinion, it comes down to what the Australian government is prepared to do with enforcing the present criminal law that relates to copyright law and what further laws it would be prepared to enact to deal with the problem.

In the United Kingdom—and I am just going from memory here—it was only four or five years ago that the first person was gaoled for copyright infringement. The courts were reluctant to gaol somebody. I am not here with a hanging mentality and I am not suggesting that you throw everyone into gaol, but in terms of criminal law sanctions and the economic issues we are talking about, I believe that law enforcement agencies and the law should have strong sanctions to deal with the international and domestic pirate situation. They are dealing with people who are deliberately putting into the Australian market a large amount of pirated material and making a lot of money out of it.

From the figures available, Australia has a smaller percentage of pirated software than our neighbours. There are figures often quoted for countries like Thailand, where pirated software reached 99 per cent of all software. The People's Republic of China is well known as being a major problem domestically and internationally. The reason why the People's Republic of China is a problem for Australia is that a lot of the pirated software is manufactured in the People's Republic of China and exported to Australia. But there have certainly been some large pirate schemes within Australia—even here in Melbourne, where the pirated material, including the manuals, the holograms and everything else, is manufactured within Australia. So we are far from clean when it comes to being involved in the organisation of these activities.

Mr KERR—Is that manufacturing, with packaging and holograms, documented at any stage?

Mr Stephens—Yes, there was a major case involving Microsoft. I stand corrected: the hologram for the Microsoft product may have actually been manufactured in Shenzhen, but everything else was manufactured here. They trace it back to Melbourne because of the hologram. They did a raid on the factory in the People's Republic of China and then worked their way back to Australia. But everything else was done here. I am sure that the Microsoft legal department would be able to enlighten you on all the details.

In the Hong Kong, the SAR customs and excise department, the agency responsible for the criminal enforcement of intellectual property laws, has in recent times launched Operation Thunderbolt and Operation Terminator to clear up counterfeit CD retail outlets and retail piracy. The Hong Kong trade department has general regulations on the import and export which require both importers and exporters of CD manufacturing equipment to obtain prescribed licences for the Hong Kong equipment, and they have to have a prescribed licence to use it. If they do not, the offender will be liable on a summary conviction fine of half a million Hong Kong dollars and/or imprisonment for two years and, upon indictment, $HK2 million and imprisonment for up to seven years. What I am doing here is just drawing an example of what Hong Kong is doing in an attempt to stop the pirates having the ability to manufacture pirated software.

I refer to (iii), the geographical spread of copyright infringement in Australia. In my experience—and I have dealt with all pirates in all the states and territories—it is very widespread in Australia. Unfortunately, Melbourne has been described as the 'Copyright Council of Australia' in the *Herald Sun* of 27 July 1997, but I have certainly seen no strong evidence to suggest that it is not as nearly widespread in other areas of Australia, including rural areas.

I refer now to (iv), the cost of infringement and impact on Australian business. As I said, the BSAA has estimated that it costs the copyright owners $250 million a year. It certainly costs the government revenue. But the problem goes further than that, because it does cost the computer companies revenue and jobs and it poses serious economic implications for the Australian economy in the future.

We are also directing this country to hi-tech solutions for economic problems, so I therefore believe—and I go back to the comments that I made in opening—that strong intellectual property laws and the enforcement of our intellectual property regime in Australia are very important. An important plank in Australia's future economic development is to encourage the international community to invest heavily in Australia, especially due to our geographical position in the world, and to promote Australia as a relatively safe and stable country in which one can house intellectual property.

Mr RONALDSON—Is the problem the penalties themselves or is it the apparent reluctance of the judiciary to impose some of those maximum penalties, going back to your first imprisonment two years ago? What is the bigger issue?

Mr Stephens—The bigger issue in Australia in my opinion is that the courts have shown a great reluctance to gaol people in relation to intellectual property matters. I have had only minor association with the criminal side. My firm's main involvement has been with the civil side, and even on the civil side we have brought many applications before the Federal

Court for contempt where people have refused to comply with ANTON PILLER orders and have refused to comply with associated orders to ANTON PILLER orders. I have found that the judges are reluctant to really enforce their own orders. I have gone on record as saying this, so it is no surprise to them. They are reluctant to enforce the law in this area. I have seen no evidence in recent times to suggest that that is changing.

Mr RONALDSON—Are they holding similar views to your client with the keys to the car?

Mr Stephens—No, I do not think that is the issue. Many of the Federal Court judges were practitioners in the area as barristers, and they are people I hold a lot of respect for. In terms of enforcing civil orders, probably in their own minds it comes down to issues of what they are prepared to do as judges.

Mr RONALDSON—In some respects, that must reflect their views of the crime, and hence my comment to you about the car keys with your client. Isn't it one and the same?

Mr Stephens—Even if you think of celebrated cases like Derryn Hinch, the courts do not like people disobeying civil orders or civil law, but in Australia they are reluctant—and this is a wide ranging, sweeping and broad based statement—to gaol people for civil matters. I am not suggesting that we then go into a hangman's mentality. If we are to treat this area from top to bottom as being important, we have to be serious about it. Intellectual property laws are very important and they form an important part of the future direction of Australia. If we have laws, we have to enforce them, both at the civil and criminal level.

Mr KERR—Isn't that considered a bit at right angles to the terms of reference we have here? I suppose a fundamental issue which policy makers have to address is whether we actually do believe that. At the moment, there are almost contradictory views that are held, as the debate about parallel importation illustrates. There is a sense that copyright protection gives an unfair economic advantage to its possessors in certain ways.

Mr Stephens—That is very true. That was the comment I was making about the pirates and other people's attitudes. It is almost an unjust enrichment argument from their side.

CHAIR—Yes, but you would not expect that necessarily from judges on today's Federal Court bench, many of whom, as you pointed out, were leading members of the commercial bar.

Mr Stephens—I have a lot of respect for a lot of them. In my opinion, in the state supreme courts and the Federal Court in civil matters, they become traumatised when contempt proceedings are brought. How many contempt applications have we brought in the last eight years? Probably six or seven—quite a few—and it has been extremely difficult to get them to act. That is in my experience. Other practitioners may—

Ms ROXON—I assume you are not suggesting that it is any different from the way judges react with contempt proceedings in any other area of law.

Mr Stephens—No. I made that clear. My comment was that, in my experience, judges in simple matters—

Ms ROXON—Not civil intellectual property matters, just civil matters generally.

Mr Stephens—Civil per se.

Ms ROXON—Given these comments, do you have a view that there would be a significant impact in shifting the focus or changing the laws to the extent that the criminal aspects of stealing—if you want to put it that way—people's intellectual property, if they are changed, made more explicit or extended in some way, that would actually have an impact for your clients because people would understand that the activity is criminal in your view, not just a civil breach of someone else's property rights? Is that what you are recommending to the committee, that there needs to be a focus?

Mr Stephens—Yes, I will answer your question succinctly. I am not talking about the mum and dad at home and going in and busting every kid who has a PC. That would make a joke of the whole system. I am talking about dealing with the people who are involved in computer piracy at the big end of town, the big operators. I draw a parallel with drug users and drug dealers. I am not suggesting that the two industries are interrelated, but in terms of cause and effect, here you have to be serious. There was an article in the computer pages of last Tuesday's *Age* under the IT section, which said that, if the Federal Police are approached, they say, 'Take civil action. We are underresourced; we don't have the resources to deal with intellectual property problems.' So even if you are looking at the laws the way they presently stand and the criminal sanctions that are provided under the Copyright Act, you have to have the ability even to enforce what is there and take it seriously.

Mr RONALDSON—If it is theft, it is theft. To take your drug analogy, 'for your own use' is normally determined by the quantity of the drug that you have got.

Mr Stephens—That is correct.

Mr RONALDSON—Once you get over a certain amount, you can no longer plead that it is for your own use. It is deemed by the law to be a trafficable quantity. It just seems to me to be a bit difficult. If, as you say, it walks like a duck and it quacks like a duck, it is a duck. If it is theft, it is theft. How do you then introduce a two-layer system which you say does not mean your mums and dads at home—

Mr Stephens—I am not suggesting that; the law applies to everybody. I am talking about the implementation of the law. You will say that, if you are going to bust everyone who is possibly guilty of intellectual property theft, there are not enough resources here. That is like people with tapes, CDs and everything else. Politically, it would be just non-achievable. What I am talking about here are the piracy issues that matter to the economy, to our trading partners and to the large corporations that have invested and are going to invest here. How do you deal with it?

What I am suggesting is that the criminal law should play a greater role in dealing with the piracy issue at the higher level. Our trading nations, under a lot of political pressure,

mainly from the United States, do take strong handed internal actions to deal with the piracy problem. They only ever touch the surface. In the People's Republic of China, you have raids on factories and everything. You are only touching the surface, but something is being seen to be done. In Hong Kong, something is being seen to be done, but all of the members, I have no doubt, have been to Hong Kong and China. You are only touching the surface.

In Australia, if we are looking at the criminal law, I cannot think of any action where anything has been seen to be done. We do have a problem in terms of—and it comes up regularly—the adequacy of Australia's intellectual property laws and the enforcement of them. Part of the problem appears to be—and I am not an expert in this area—that the Federal Police, who are the appropriate body to enforce these laws, are totally underresourced to deal with these issues. In terms of resources and what to do, which I believe is part of your reference, that is one issue that I would urge you to look at. In the future, perhaps you will have a special division of the Federal Police to deal exclusively with—

Mr KERR—These are all matters of choice. For example, the AFP did have allocated resources to deal with this previously, and it is on its menu. But these are choices and if you give greater priority to other areas, as the current government has done, these drop off the bottom of the menu. That comes back to what you were saying. Is there not, to some extent, a bit of a Janus approach officially? We say that we are committed to copyright as an important element of building an intelligent and growing sector of our economy based on trade and services, intellectual property, and the like, but we do not provide the regime to actually carry that through. People read that both domestically and internationally.

Mr Stephens—Based on where we are at—and I do not have the figures of the funding of the Federal Police—and on the evidence that I have, it is a problem. It is one that, in my opinion, not should be addressed but must be addressed.

Ms ROXON—Does that mean though that—leave aside the issue of resources—if you had a perfect world and unlimited resources to be able to put into this particular problem, is it your view as a practitioner that the current laws are adequate, if there are actually the resources to properly pursue and enforce them?

Mr Stephens—No, I was going to come to that.

Ms ROXON—Right, that would be helpful for us.

Mr Stephens—I do not believe they are adequate. We are sort of starting at the back, I suppose, and we are coming through to the front. I do not believe they are adequate but, in terms of the adequacy of intellectual property laws and copyright laws that relate to computer programs in the computer industry, you are dealing there with a huge problem. We have a global market; we have technology that is moving ahead quickly; we have new rights coming through all the time. And the digital reform bill is trying to address some of these issues—it is before parliament at the moment—and it becomes extremely difficult.

In Australia, in terms of the adequacy of the laws, the initial Apple decision in 1983—and that is where Beaumont J. at first instance handed down a decision that computer

software was not covered by copyright law in Australia—led to an immediate meltdown, and the then Attorney-General Gareth Evans instituted some amendments to the Copyright Act. They put into the Copyright Act a definition of computer copyright. This is due to be amended with the digital reform bill. That has led to two High Court cases during the last 15 years to deal with that issue. One is the Autodesk Hardware Lock case, which our firm ran. The second one, which was heard by the High Court in February, and is due to be handed down, is Data Access Corporation and Powerflex Services.

When you are dealing with large corporations and with what is protected, the problem is that it becomes so complex. It is really important when you are looking at legislation to define what is to be protected. If you have a regime in Australia whereby an international corporation can look and say, 'In the worst case scenario, there is a risk that our intellectual property is not protected'—and it may be incredibly important and complex technology that Australia needs—this could be the case because of the legal system now, and because of all these problems.

You cannot just lay the fault here at the steps of parliament, because many countries have taken different approaches. The United States has a general definition of what a computer program is and then allowed the court system to define it. With the situation in Australia, let me go back to the Autodesk Hardware Lock case. This is one mistake I believe we made and the Labor government made. In the late eighties the United Kingdom passed legislation that made it illegal to be involved in developing and distributing a computer program that enabled you to circumvent a software or hardware lock. In the 1990 inquiries into computer law, for which I put in three submissions on behalf of my clients—Autodesk and other computer companies—we recommended, along with people like Microsoft, that this approach be taken here. It has not been, but it has been addressed in the digital reform bill.

This led to Autodesk having to go to the High Court—in fact twice, because of other reasons. It is one of two cases in Australian history where the High Court dealt with the case being reopened again, but that was for other reasons. The company were involved in the expenditure of close to $1 million. In a country as sophisticated as Australia, they believed that they should not have been put in that position, if you can understand where I am coming from, because of the adequacy of the legal system. Even though the case itself is quite complex in many ways and is a world leading case in certain aspects of computer law, if the government of the day had passed this legislation back in 1990 or 1991, then this problem may never have arisen.

I am sure that there were reasons—and it is easy to kick the dog after the event—but I think it is critical for Australia's future that a lot of thought be put into what we are doing in the intellectual property area. It is critical that, to the best of our ability, we do provide protection for intellectual property—I am speaking here specifically about computer software, and that involves transmission rights and all the new rights coming in—so that Australia can say to the people who are potential investors in this country who are critical to our economic survival, firstly, 'We are doing our best to protect your intellectual property with our laws'; and, secondly, 'If the laws are breached'—I am talking on the criminal law side now, not the civil action they take—'we are doing our best to protect your products'—and that is with broader controls and the customs laws, although with the Internet that

becomes irrelevant with a lot of products. 'We are doing our best to have civil laws that can be enforced and a civil regime that is enforceable so that you can feel that at least we are using, to use an expression, world's best practice in relation to your intellectual property and your investment in Australia.' That is my personal view. It is a tall order.

Mr KERR—I appreciate what you are saying and think it is perfectly rational but, from an Australian national point of view, that might be seen to be a plea for looking after the multinationals, which does not carry much currency, I suppose. How can you turn that argument around.

Mr Stephens—This just as much affects a small business person with VECCI. The same principle applies to anybody whose business revolves around and relates to intellectual property. The reason why I am pitching it at the big end of town is that both governments in the last decade—Labor and the Liberal and National Party governments—have placed a lot of emphasis in our future direction on hi-tech industry and hi-tech investment. In my submissions I am not supporting large business; I am looking at the economic imperative, and then that will filter down for the benefit of everyone.

The VECCI members are never going to be in a position to mount a High Court challenge. Access to the law for the VECCI members is extremely difficult, so they have to live with whatever the regime is, but the large corporations can have an impact on the direction of the law and they are in a position to do so with political lobbying and through the United States. The United States uses trade law, as you all well know, as a major weapon for the protection of intellectual property. Under section 301 of the US trade law, the President of the United States has the power to impose economic sanctions on any country that does not have intellectual property laws that protect US trade. That has been used with China; we have been threatened with the use of that. It is a trade law issue, coming back to the big picture, so we cannot ignore it.

Mr KERR—No; I understand what you are saying.

Mr Stephens—But, to come back to the shape of the laws, having laws which are possibly more certain, to the best of parliament's ability in view of the speed at which technology moves, affects everyone in business, in my opinion. I did say at the outset this is an incredibly complex area.

Mr KERR—I am simply being a devil's advocate here—

Mr Stephens—That is fine.

Mr KERR—putting a view that I have sought to oppose for a very long time. I think it is this, if I can put it this way: that whilst the United States has an economic interest under 301 in protecting its burgeoning intellectual property market, essentially Australia has been a net importer of technology, and for the foreseeable future is likely to remain so, and that our economic interests may be best served by giving minimum service to those international obligations to the extent that we have to concede ground to the United States to do so; but, essentially, our interests are to reduce the cost transfers that are otherwise going externally and to allow as cheaply into Australia product which is necessary for our economic

advancement and for us to develop a base here. That is not an argument that is publicly advanced, but I think it lies as a sort of an unexpressed premise that essentially our terms of trade and our natural advantages do not lie so strongly in this area as in other areas and that we are a net loser in terms of toughening these regimes.

Mr Stephens—I will answer that point by point. Firstly, Australia does represent a growing market for the high-tech industry and the development of computer products and services. It is a growth industry, if you look at the real figures. Also, the success or failure of Australian inventions and of Australian software companies and software is interdependent on the ability for us to trade with intellectual property, mainly with the United States. There is a net gain to Australia, then, for Australians to be successful, for Australian businesses to be successful and for Australian software to become part of the global market. For us to achieve that we have to be a member of the international community in relation to intellectual property laws, and we have to accept that the only way we can succeed and grow is to have strong intellectual property laws.

You have to accept that, as a net importer, we are dealing with other people's intellectual property and you have to look at the economic gain that that has given Australia across the board. If the United States embargoed all high technology transfer to Australia, our economy would suffer tremendously because we rely so heavily on that technology. I am not an apologist for large US corporations, but that is the way it is—we are part of a global economy. I believe that for us to leverage our position and to head as a country in the direction that we should be going, we have to accept that that is the international regime. Also, it works both ways. If an Australian software product had dominance in the United States, we would expect the Australian copyright owners to be able to enforce their rights in the United States through the treaty obligations by utilising copyright law as the international vehicle by which computer software is protected. So it works both ways.

CHAIR—I am going to have to call the discussion to a close at this stage. I note you have not made a written submission.

Mr Stephens—I am happy to put in a written submission.

CHAIR—We would be very interested in a written submission. Apart from what you have covered in terms of our first term of reference, we would also be very interested, in relation to the second and subsequent ones, to hear in more specific terms what you think we should do in relation to this because, ultimately, the question we have to answer is: what is to be done?

Mr Stephens—Yes. Thank you for your time.

CHAIR—My pleasure. Thank you for coming along. I thank everyone for their attendance. I thank Hansard. I declare this meeting of the committee closed.

Resolved (on motion by **Mr Kerr**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.31 p.m.