



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

**HOUSE OF
REPRESENTATIVES**

STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS

Reference: Enforcement of copyright

TUESDAY, 5 OCTOBER 1999

BRISBANE

CONDITIONS OF DISTRIBUTION

This is an uncorrected proof of evidence taken before the committee.
It is made available under the condition that it is recognised as such.

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

[PROOF COPY]

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to: **<http://search.aph.gov.au>**

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
Tuesday, 5 October 1999

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

Members in attendance: Mr Andrews, Ms Bishop, Mr Cadman, Mr Kerr and Ms Livermore

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

NELSON, Mrs Fay Theresa, Director, Aboriginal and Torres Strait Islander Arts Board, Australia Council	341
ANDERSON, Mr Ian, Director, Business Development—Asia Pacific, Mattel Pty Ltd	348
McDONALD, Mr Michael David, Solicitor representing Mattel Pty Ltd, Hasbro Australia Ltd and Australian Toy Association Ltd	348
LEIBOFF, Ms Jacklyn Marett, Member, Management Committee, Arts Law Centre of Queensland Inc.	360
RAMSDEN, Mr John Clifton, Executive Director, Anti Counterfeiting Action Group	368
STANDEN, Mr Scott, Director, Anti Counterfeiting Action Group	368
TAYLOR, Mr Kenneth James, Managing Director/Investigator, Trade Mark Investigation Services	368
SUGDEN, Mr Paul Thomas, Lecturer in Law, University of Queensland	384

Committee met at 9.36 a.m.

NELSON, Mrs Fay Theresa, Director, Aboriginal and Torres Strait Islander Arts Board, Australia Council

CHAIR—I declare open this public hearing of the Standing Committee on Legal and Constitutional Affairs and its inquiry into the enforcement of copyright in Australia. I welcome Mrs Fay Nelson. Do you have anything to say about the capacity in which you appear?

Mrs Nelson—I am here to present the Australia Council paper.

CHAIR—I should advise you that, although you are not required to give evidence under oath, these are legal proceedings of the parliament and are treated as proceedings of the House. We are in receipt of your submission by way of letter to the committee. Are there any brief opening comments you would like to make?

Mrs Nelson—No, I would like to go to the concerns and recommendations.

CHAIR—Certainly. Perhaps you can take us through those, starting with the suggestion that there is a need for greater protection of indigenous heritage, particularly in relation to communal rights and secret and sacred material.

Mrs Nelson—Yes. I would also like to say that I am here as an indigenous Australian, and my views about our own intellectual property and copyright will sometimes come through in what I am saying. I was raised as a traditional Aboriginal person and was taught how to do things properly. Please bear with me about that.

The concerns that we have are growing in number and have continued to do so ever since the marketing of Aboriginal art began back in 1975. Over a period of years, there has been strong evidence of appropriation of traditional imagery and design. Copyright users do not always respect the legally established rights of indigenous artists, and I think there is a lot of ignorance on behalf of the copyright users in that they do not understand Aboriginal cultures and protocols. The fact that paintings are often left unsigned is almost an open go for copyright users.

Internet and online communication seem to be accelerating the unlicensed and inappropriate use of indigenous cultural materials, as service providers use Aboriginal and Torres Strait Islander art and design to identify themselves and attract customers in the global market. The ability to enforce copyright under copyright law is paramount, especially for holders of rights with very little means. Indigenous artists and communities are prime examples. Compliance with the requirement to make payments to collecting societies has not been uniform in Australia. There has also been widespread discussion in the arts community about public and private art organisations, including galleries and museums, not making the contributions artists feel that they should be making.

On behalf of the Aboriginal and Torres Strait Islander Arts Board, I will outline the following recommendations to the committee. There is a need for greater protection of

indigenous heritage, particularly in relation to communal rights and secret and sacred material. Indigenous people need to be informed about how existing cultural heritage laws might benefit their needs regarding the use and control of their indigenous cultural heritage material.

Support should be given to a national certification mark—the label of authenticity for Aboriginal and Torres Strait Islander art and cultural products. The label and a series of derivative marks which allow for local, regional and state differences should be registered under the Trade Marks Act. The Copyright Act should have stronger deterrents and penalty provisions, and there should be further community and industry awareness of the same. The next four dot points are also in the NIAAA paper. We consulted with the National Indigenous Arts Advocacy Association and totally support what they are saying in these next four dot points. I am open for questions.

CHAIR—You seem to be suggesting in part that there is a lack of understanding or appreciation of copyright law amongst some, perhaps many, indigenous artists. Is that your impression?

Mrs Nelson—That is true, yes. A lot of our people are not aware of the need to protect their symbols, designs and secret and sacred objects and materials, et cetera. I guess it is part of the board's role to assist them.

CHAIR—Can you tell us what the Australia Council has done in that regard?

Mrs Nelson—We inform our clients through letters when they apply to us about the importance of copyright and how they should, instead of using other people's designs, look for and develop their own. If they have lost one through part of it being taken away, they can perhaps retrace their heritage, symbols, designs and particular cultures. We also inform non-indigenous people who are working with our people that they must adhere to understanding copyright law and intellectual property law as far as Aboriginal people are concerned. We have a two-pronged focus to be able to make people understand that breaching copyright and taking away somebody's dreaming are going to cause them a great deal of spiritual and psychological grief in the future. That is part of the advocacy that the Australia Council, through the Aboriginal and Torres Strait Islander Arts Board, conducts when we go to various communities, both traditional and non-traditional.

CHAIR—When you go to these communities, do you conduct information sessions or educational sessions or speak to individual artists?

Mrs Nelson—We do conduct sessions about the business of applying to us. The aside to that is the talk about learning from them about their particular copyright, sacred sites, et cetera. This applies right across Australia. We also tell them what we see is happening and discuss the actual events that are occurring.

Mr CADMAN—I have a problem with some of the concepts, and I would like you to help me through them. There seems to be a communal right—a clan right, a family right—of the matters relating to that group of people, but then they allow an artist to express that. It

seems to mean that they do not choose any old person; they choose a special person to give expression to their family outlook.

Mrs Nelson—Yes.

Mr CADMAN—If they do that, they choose that person because of that person's talent and skill. I want you to explain to me where I have it wrong, if I have it wrong. That person then brings something individual, a particular skill, to the expression of some of the family values, standards and spirituality. So who owns what?

Mrs Nelson—Who owns what?

Mr CADMAN—Does that person own some of his talent up there, or does the community own that person and the expression?

Mrs Nelson—When we are born, we are born to a certain dreaming. That dreaming is painted on us when we are born; it is taught to us through song, dance, et cetera as we are growing. We go through various age grading ceremonies that assist us in understanding who our ancestral beings were, the land that they made for us, the plants, the animals. They gave us our totems; they taught us how to live in this country. That is a shared thing, with all of your group. We divided the world into half so that everybody and everything fits in one half of the world or the other. That is part of kinship. Those two halves are called moieties. When you are in one half of the world, there are certain things that you paint about that this is your dreaming: this is who you are; this is what you dance about; these are the plants that you can eat; these are the songs that you can sing; this animal, this bird, is one of your major totems. You have to paint and dance to ensure that that bird or that plant continues its life, because while ever that happens you are very strong. You are part of this group of people who continue this tradition and, as you grow through these age grading ceremonies, either male or female—and they are separate ceremonies—you have an understanding of your role and your responsibility to the community. As you grow, you inherit the right to paint certain designs, to sing certain songs.

Mr CADMAN—Does everybody inherit that right?

Mrs Nelson—Everybody inherits that right, as long as you go through the ceremonies. You go through and you are taught what you can do. With the coming of education and employment, a lot of that is being lost, but there are a lot of people who say, 'I have not painted this, I have not been through this ceremony, because I have not got the right to do so.' Today, many people—if they have been through ceremony—are able to paint whatever it is that their fathers or their grandfathers painted.

Mr CADMAN—So there are no individual rights for copyright. There is only a community right.

Mrs Nelson—There is a community right.

Mr CADMAN—But there are no individual rights.

Mrs Nelson—I would say that nowadays only urban contemporary artists who are having to develop their own styles will have individual rights, but for a traditional person who comes out of, say, Yirrkala, if they are Riratjingu, that Riratjingu mob still own the copyright on everything that they do. An individual cannot take a painting of a sacred story, part of a song cycle, and use that for their own benefit, like establishing a company and marketing totally on their own. They would be breaching Aboriginal copyright and intellectual property law.

Mr CADMAN—Has anybody done that?

Mrs Nelson—I think some people have gone close to it, but I do not think people have gone all the way. They have sought the support of their group before they have gone into producing placemats, coasters and other items.

Mr CADMAN—They have become commercial.

Mrs Nelson—They have become fairly commercial, yes.

Mr CADMAN—That is from within the community.

Mrs Nelson—Yes. I was negotiating with people back in 1984-85 to produce the very first range of placemats and coasters out of Yirrkala. The whole community was involved in the discussion about whether or not the artist could actually use the designs.

Mr CADMAN—So the individual rights are set aside. How then is it possible for somebody not part of that community to know what is their tradition or what is sacred if that is not written down in some place and more or less registered that ‘these are our structures, these are our figures, these are our designs and they are copyrighted to our community’?

Mrs Nelson—That is the difficulty.

Mr CADMAN—The knowledge is fine, but that does allow for frivolous claims also—‘If it is in my head I can claim anything as mine’. It must be something that is generally understood as being yours. How do we deal with that?

Mrs Nelson—It is a very difficult question to answer. If you are a Gumatj, you have a certain dreaming design, the ancestral beings. You know that this is everything that you belong to. In our law, it is belonging to something. I think that our people are naive in the way of marketing and business. They do not understand that they must register the designs, the dreaming stories, of their particular group. It is something that I have seen greatly bastardised by commercialism in the past.

Mr CADMAN—Some of it could be deliberate; some of it could be without good knowledge.

Mrs Nelson—It is like that, and this is where I think the government can assist Aboriginal and Torres Strait Islander people to have information about how they would go about registering their own particular dreaming designs, stories even. I am fearful that a lot

of the myths that we have that tell about how we came to be here on this earth, how we were given life on this earth, can be taken by some non-indigenous person, put into books and then a copyright is claimed over those stories. I think that is dreadful. Our language is in much the same classification. Aboriginal and Torres Strait Islander people are going to have to become very much proactive in the area of learning about what it is that we have and what makes us strong and then having to go to government process to be able to protect what it is that we have and what makes us strong.

Going back to your other question regarding the rights of an individual in an Aboriginal community, the communal life of a group of people is all about everybody knowing their place within that group, knowing how they relate to everybody else and everybody enacting a role that says, 'We can do this and we must do this together.' Punishments are meted out to people who are unable to follow due process, and that is still very prevalent in some areas of Australia, even today. Part of my traditional families still carry out a lot of those punishments.

Ms LIVERMORE—I think NIAAA told us last week that there is a deficiency in the law in that, while indigenous communities would recognise copyright as existing simultaneously with a whole group of people, at the moment the Copyright Act only recognises the individuals. The Bulun Bulun carpet case identified the right that exists from the community towards the indigenous artist as being a common law fiduciary obligation. You are saying that you would like to see a provision built into the Copyright Act that could recognise copyright existing with a group rather than one person.

Mrs Nelson—I think that is absolutely essential. It is a necessity in many Aboriginal communities. You also have to recognise the rights of individual people as well. As I said to you previously, there are indigenous contemporary artists who have developed their own style—names like Trevor Nicholls and Judy Watson. Their work does not have Aboriginal symbols and designs within them, but they are clearly recognisable for the work that they do. They are individual people who have developed an artistic design of their own.

Mr CADMAN—They would be covered, though?

Mrs Nelson—They would be covered under this, yes.

Ms JULIE BISHOP—I have a couple of questions about a couple of the concepts. I have some difficulty in applying traditional copyright law, as we know it, to some of the concepts that you speak about, and I am wondering whether we can bridge the gap. Firstly, with the notion of original work, which the Copyright Act protects, and when numerous people are involved—you mentioned the stories, designs; things being taught and handed down through generations—can you call it an original work in terms of the way the Copyright Act looks at an original work? We are talking here of something that has evolved or has been handed down and many people have been involved in its creation.

Mrs Nelson—Do you mean calling it an original work when it has been repeated from generation within generations over and over again?

Ms JULIE BISHOP—Yes. The traditional copyright laws do not recognise copyright in an idea, a concept. Also, if there are changes to a design or an idea it can sometimes be outside the copyright jurisdiction. How do those applications work?

Mrs Nelson—I think we are going to have a lot of discussion about how the two laws can come together. I do not have the answer to your question, because it is not possible to answer that question without a lot of consultation with our people. As far as we are concerned, that is an original work of that artist at that time, and that artist has the right to reproduce that work because he is part of that family grouping, and no-one has questioned his right to do so and therefore he is able to produce it. We recognise that as ownership of that piece.

Ms JULIE BISHOP—Which will continue to be passed down through generations, along the lines you have mentioned?

Mrs Nelson—Yes.

Ms JULIE BISHOP—In terms of trying to bring together the notion of the two laws, are you aware of examples from overseas of how indigenous art has been protected? I realise the circumstances will always be different country from country and indigenous group from indigenous group, but is there any model that you have seen from overseas that would cover it?

Mrs Nelson—No. In discussions very recently with some American Indians, they were looking to us to try to find some answers as far as protection of some of their things are concerned. They have done a lot of work in restoration of skeletal remains and we can learn from them in that, but there are a lot of people who are looking to Aboriginal people to get some answers and assistance in terms of protection of traditional cultural property and knowledge.

CHAIR—I understand that in the US there is an Indian Arts Act, if I have the title right, which is an act of the federal government which, to summarise it briefly, prohibits and carries penalties for the effective passing off of art or artefacts as Indian when in fact they are not. Are you aware of that?

Mrs Nelson—I am not totally aware of it, I have heard of it. But the people I spoke to said that it still does not give them very much protection.

CHAIR—If, for the sake of discussion, Aboriginal customary law was incorporated—for the purposes of these issues—into Australian civil law, what would be the effect? I mean, if someone were wishing to use some Aboriginal design, indigenous design, what process would they have to go through?

Mrs Nelson—I think consultation with the traditional owners of the design, if they know that in the first instance. We have a lot of people who ring us and ask us if they can use certain Aboriginal designs. We ask them whether they know the people who produced the design. Sometimes they do and sometimes they will say that they saw it on a Qantas flight on their way overseas. In that case, we cannot give them a great deal of assistance, but when

people do know who has produced the design then there is an element of consultation with those people who must take on board the advice of the traditional owners of that.

Aboriginal art styles across the country are relatively clear to me, but I guess that they are not all that clear to other people. There are certain styles that come out of central, eastern and western Arnhem Land. The Kimberleys has its own style and of course the Papunya dot painters have their own style. Cape York has a distinguished style as does the Torres Strait. For a lot of people, it is relatively easy to pick up on some of those. It is when you have other Aboriginal people and non-indigenous people simply taking X-rays of kangaroos, wallabies, possums, et cetera and creating their own designs that the difficulties start.

When people sign their work, it is easy to track them down, and nowadays more people are signing that type of work. Traditional people will never sign their work, I would say, but perhaps signatures on traditional paintings might be of assistance in the future.

Mr CADMAN—But that would imply, in traditional terms, ownership, would it not?

Mrs Nelson—I think you would have to work around that. If people sign their work, they could perhaps sign that they are of a particular group and that would be okay. That would be proper legal recognition of that person and that they belonged to a particular group. When we began marketing Papunya Tula art back in the early 1970s, the work came to us on pieces of chipboard and sometimes on art board. It had a label on the back that the craft adviser filled out. A lot of the early bark paintings were also like that. I think that kind of authenticity has to be reapplied. Perhaps signatures can also be of assistance nowadays to identify some of our people's works.

CHAIR—Thank you for your submission and for coming along and discussing it with us this morning.

[10.06 a.m.]

ANDERSON, Mr Ian, Director, Business Development—Asia Pacific, Mattel Pty Ltd

McDONALD, Mr Michael David, Solicitor representing Mattel Pty Ltd, Hasbro Australia Ltd and Australian Toy Association Ltd

CHAIR—Welcome. 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. We are in receipt of your supplementary submission. The most efficient way to deal with it may be for you to take us through the recommendations in it.

Mr McDonald—We have benefited from the opportunity to present evidence to the committee in its sittings in Melbourne. A number of questions were asked of us at that time, and they have helped us focus more specifically on some of the issues that may be of benefit to the committee, so we thank you for that opportunity.

The recommendations are quite broad. The first issue which seems to us to be a fundamental point is that the attitude in Australia that seems to be permeating through the community is that copyright is not really a serious issue. Whether it be in the marketplace where cheaper products are purchased—from \$2 shops or at that end of the market—or within the judiciary, there generally is a feeling that copyright is not a major matter, particularly in relation to, say, trademarks, patents and other civil issues.

In the submission we have mentioned a couple of examples. There is an interesting case which we were involved in with the Federal Court yesterday here in Brisbane where Mattel took action against an importer who had breached the copyright of a toy product. I have a copy of the product which was brought into the country; I will hand it around for you to look at. I do not have a copy of the Mattel product, but there is a coloured copy there for you to look at. The Mattel product, the Hot Wheels product, has been on the market for many years—I think the trademark was registered in 1968. It is the second largest selling brand within the Mattel range. Mattel is the largest toy company in the world, so it has a very significant reputation—everyone in the toy industry is aware of it. In this particular instance we became aware of the imported product, the pirated product, coming into the country. As you can see from those samples, the artwork has effectively been scanned. If you study them carefully you can see the difference in the vehicles, but the packaging itself, even down to the wording on the helmets of the fireman, was actually scanned in, such is the likeness.

This exemplifies the problem that we see in copyright infringement in Australia. When our clients became aware of this, letters of demand were forwarded to both the retailing chain in Queensland, which had 56 outlets selling the product, and the wholesalers. A response was not received to that. A second letter of demand was sent, and again no response was received. Proceedings were instituted; no response was received. The day before the hearing—when it first went to court about six weeks ago—we finally received a

call. The attitude of the people selling was, 'What's the big deal?' It was quite extraordinary. It does exemplify the problem that not only people in the toy industry but owners of intellectual property face in Australia, where there is this attitudinal problem: 'What's the big deal?'

I think that is also not helped by the attitude of the judiciary. One of the recommendations we are making here is that there be damages guidelines—'sentencing' guidelines, for want of a better word. Perhaps the parliament needs to direct the judiciary, to make a statement in effect that the community really believes copyright warrants better protection and more harsh penalties for breaches. I referred to one case on page 6 of the submission. That was a very typical example—which I think was actually in the Federal Court here in Brisbane again—of where an architect's plans were breached by the builder who built a home. So there was a three-dimensional reproduction of the artistic work, being the plans of the owner. The court awarded \$250 by way of damages—hardly worth your while going to court. Then when the court found that the conduct of the defendant was so bad, it awarded punitive damages and doubled them from \$250 to \$500.

The cost of proceedings in the Federal Court, as you would be aware, would have been probably 20 or 30 times the awarded damages. It is the view of Mattel, Hasbro and the Toy Association that cases like that—of which there are hundreds—send a bad message to the community. If someone is only going to have an award of \$500 for such a blatant three-dimensional breach of someone's intellectual property, what is the point? This is a common theme.

CHAIR—I note that is a 1988 case. Has there been—to put it in your words, if I could—any improvement in the attitude over the past decade to penalties?

Mr McDonald—Not really. I am currently involved in proceedings in the Supreme Court of Victoria. As it happens, in this instance I am acting for the person who breached the copyright. But, again, the damages are just so minuscule that it should not even be in the Supreme Court. The damages awards for a breach of an architect's plans in a domestic dwelling will very rarely surpass \$500. That is the precedent that is being followed throughout Australia.

Whilst that is not relevant to the products of the toy industry per se, I just use it as an example which I think exemplifies the attitude of the courts. The Mattel case which I referred to was settled in the Federal Court yesterday. The damages and costs would have come to probably just under 50 per cent of what it cost us to take the action. But the attitude taken by Mattel—being the largest toy company in the world, with so much money invested in their intellectual property, trademarks and copyright—is that they must take action, even if they cannot recover the cost of the action itself. But this seems to be the problem all the time.

Indeed, the attitude of the court during the mediation yesterday was, 'Copyright breach is not a big deal.' That view that it is not a major issue seems to be pervading the judiciary and the courts. We believe that, unless there is a direction given from parliament, that attitude is going to be nigh impossible to change. Whilst it may be an unusual comparison, the attitude to drink driving 20 years ago was much different to what it is today. People

accepted then that it was not a big deal to be under the influence behind the wheel of a car, but certainly today—because of the programs by the various state governments around Australia, through both community education programs and much harsher penalties for anyone who infringes that legislation—that attitude has been turned around.

One other matter that becomes apparent in any copyright infringement case is the problem of proof. During your hearings in Sydney I listened to the submission from the Business Software Association of Australia, I think, who referred to the problem that having to establish copyright in a complex case could require up to 20 affidavits—for instance, if it were a movie copyright issue. Those types of costs become so great that they prohibit people from taking action.

We feel that registration would be very useful as a relatively low cost means of improving the efficiency of the administration of copyright. In Australia copyright is not registered. There was provision for it in, I think, the 1912 act, but for some reason that has since lapsed. It is our view that it will not conflict with our international treaty obligations to have a voluntary system, not a mandatory one. We feel it could be price effective if there was a small registration fee of \$30 to \$50. Registration would then be self-funding for AIPO and would serve as a means of enabling an easier and perhaps cheaper way of proving copyright in litigation.

CHAIR—So you are proposing that there be a voluntary system of registration and that the act be amended so that it recognised that voluntary registration for the purposes of proving ownership.

Mr McDonald—That is right. Once registered, you could have a certificate of certification that could be used in evidence in court to prove the copyright. When damages are so low, you have to be so careful to efficiently run a case, because in a case such as this we had no hope of getting damages. Given the current attitude of the judiciary, we had no hope of recovering our costs, so you have to try and be as efficient as you can in running an action. When you have problems of proof, you have to call on affidavit material from the artists—they could be in the United States, they could be in Europe—to prove the existence of the copyright in the first place. That registration system would alleviate the need to go into those costly aspects of the proceedings. I think that would be of benefit to the community if it could reduce the cost of litigation.

Ms JULIE BISHOP—Would there have to be a form of proof of ownership for the purposes of registration?

Mr McDonald—Yes, there would. That could come in the form of not an affidavit but proof of ownership, proof of the work. I suppose you would have to actually lodge the work itself, perhaps in electronic form. I would see that as an easier means if you did that once rather than having to do it ten times if you are in court. For instance, with the Barbie doll product we would be in court maybe once or twice a year where products infringe, and every time we have to prove the existence of the copyright. If someone puts you to the test, even though you know it is certainly there, significant time and money must be expended to ensure that you satisfy the court that copyright exists.

Ms JULIE BISHOP—Once you had a register, infringers would be deemed to have infringed with notice.

Mr McDonald—That is right. It is more a means of reducing costs, because once registered you would not have to be put to the test every time in proceedings to establish that fact. Often it is a means used by defendants, a clever tactic to force you into settling so that you do not have to bring witnesses from overseas to prove the existence. You are hardly going to do that when damages awards are so low. Effectively, it works as a method of discouraging people from taking proceedings.

Ms JULIE BISHOP—I guess one other problem that is not quite within this realm is that you have mentioned that damages awards are so low and then you do not recover your costs anyway. If the Federal Court system and Supreme Court system had different cost scales whereby one recovered all of one's costs, it might be worth while and damages would not be so much the issue. It is when you do not recover your solicitor/client costs that it makes the problem that much greater.

Mr McDonald—It does. I think it is an issue of both. I do not think it is just a costs issue, I think it is a damages issue as well. An award of costs against a respondent works as a form of damages; it is a deterrent against them doing it in the future.

Ms JULIE BISHOP—It is just that the copyright owner is out of pocket.

Mr McDonald—In this instance Mattel acted over this product. It was a very blatant breach. We gave them every opportunity to remove it from the shelves and they did not take any of the opportunities. I think Mattel will probably be out of pocket about \$11,000 or \$12,000 over that. They are a major corporation and it is a policy position that they will take action, but a small copyright owner in Australia really has no hope with the current system. They just could not afford to take action in the Federal Court and win. It is rather ironic that you cannot afford to win.

Ms JULIE BISHOP—How are damages then generally assessed? Do the economics of the situation come into it in terms of how many they have sold? In the case of a \$500 or very low award of damages, it is suggesting that the damage has not been that great in economic terms.

Mr McDonald—That is correct. There are a number of issues relevant to damages: the number of products sold, the amount of profit that has been generated by the sale of those and the loss of profit that has been occasioned to the plaintiff in the proceedings. I have referred later in the paper to punitive damages where the court, if they are satisfied that the conduct of a party is flagrantly bad, can award additional damages. That in fact was the issue in the Ownit Homes case, that the attitude of the court was that the person infringing the copyright had behaved so badly that punitive damages were deserving in that instance, but that still only brought it to \$500 and the situation has not changed.

Ms JULIE BISHOP—Your point on proof is that it is the copyright owner who must prove all of those elements?

Mr McDonald—Indeed, every time.

CHAIR—As an alternative to registration, what of a system where there is deemed to be proof of ownership and if you put that to the test then costs follow? What I am saying is that another system might be for you to simply lodge an affidavit with the court attesting to ownership. If the defendant then wishes to challenge that and puts you to the proof and your ownership is proven, then all the costs ought to flow from their election.

Mr McDonald—That would be another method. But there is the problem that we were just discussing a moment ago about what costs will be awarded. Will it be party-party? Will it be solicitor/client? Very rarely do you get an award under the current system of solicitor/client costs which you will be out of pocket for. So, unless there were a change in policy or in direction to the Federal Court, the costs would not be as big a deterrent as perhaps they ought to be.

CHAIR—Suggestions have been made to us for a scheme of statutory damages. Do have any comments about that?

Mr McDonald—I have not considered that. Would it be that you would set levels?

CHAIR—Yes.

Mr McDonald—My only concern with statutory damages is determining in advance what will be applicable to a particular breach, and anticipating that in advance. The breaches in copyright law are just so broad that I would find it difficult to establish what an appropriate statutory limit ought to be, because they vary so much from case to case. Unfortunately, I do not quite understand the method that you are perhaps talking about.

CHAIR—As I understand it—and I am not sure whether this is in force or it has just been suggested—in the United States there is a system of statutory damages that has either been proposed or is in operation.

Mr McDonald—Is that something akin to, say, a criminal fine?

CHAIR—Yes.

Mr McDonald—Additional to civil damages or in place of them?

CHAIR—Rather than going through the exercise of determining the damages, there is a level set—as I understand it—so that if there is a certain breach then there is a certain penalty by way of damages that flows automatically without anything further occurring.

Mr McDonald—There are perhaps two issues with that. The first one is that it would have to be, in my view, a substantial minimum to send a notice to the community that the parliament does not endorse those activities of infringement. The difficulty that I would see is how it could accommodate varying circumstances because, as I mentioned before, the damages issued will vary from case to case. If you have a product where 100,000 are sold,

obviously the damages are going to be much higher. I would be concerned that a system such as that would not accommodate such variances in facts.

There is one other issue that was discussed during our earlier submission. I know it is perhaps peripheral to this submission but I thought it was important to mention it. One of the difficulties that we see in the toy industry are toy safety issues, particularly with the increase of piracy. As Mr Anderson will be able to mention in a moment, up to 50 items at any one time in a \$2 shop would not comply with Australian voluntary toy standards.

Mr CADMAN—Did you say Australian voluntary standards?

Mr McDonald—Yes, voluntary standards.

Mr CADMAN—I thought safety standards were not voluntary.

Mr McDonald—Most in Australia are voluntary.

Mr CADMAN—So you shove something out and you hope that nobody thinks they are dangerous—is that what you are saying?

Mr McDonald—That is part of it.

Mr Anderson—There are some mandatory parts of the Australian standard, but they are minor in comparison with the body of the standard.

Mr McDonald—One mandatory standard relates to the size of a toy for children under three so that they are unable to swallow it. But I think that is the only major federal mandatory standard that there is.

Mr Anderson—And one on heavy metals.

Mr McDonald—Yes. Most of the rest are voluntary, which the Toy Association has tried to enforce throughout Australia, but with increases of piracy that is very difficult to do. One of the other problems with piracy and safety—given the interrelationship between the two—is that there is no real means of checking in Australia because we do not have a certification system, unlike the United Kingdom and the European Community where there is. In fact, Mr Cadman, if the toy product there has a CE mark down the bottom, which is its European certification, that mark is a fake. It has not been certified in the United Kingdom. That has been done by the manufacturers to hoodwink and con people into believing that it has met European safety standards.

Ms JULIE BISHOP—Isn't that fraud?

Mr McDonald—I think it is, but no action is taken by authorities against these people. The message that is out there is: so what. If you talk to the consumer affairs departments in any of the states or territories of Australia, the attitude is that there is no real problem with toy safety. Mr Anderson has just had discussions in New South Wales and they do not believe there is an issue, whereas we see it as a real live issue.

What could be done in Australia is a certification system similar to the European Community's whereby a certificate of an accredited agency that tests the toy product could be required before you are entitled to apply the mark to the product. That would serve as a double means of both ensuring safety and assisting with regard to piracy because it would enable Customs to more readily identify products entering the country that either do not comply with safety standards or are not a genuine article. I appreciate that the safety issue is not central to this, but it is a spin-off because of the piracy problem. That example of the CE mark shows how common breaches are in Australia, and the authorities do not do much about it.

Ms JULIE BISHOP—It indicates the lengths to which manufacturers are prepared to go to disguise what their product really is or the standards that their products have really met.

Mr McDonald—That is right.

Mr Anderson—Part of it also is that it is a blatant copy of an original product: they have simply copied in the CE marks or whatever other safety marks there are. That is why a system of registration would overcome that.

CHAIR—Just on importation, would it be feasible to have some system attesting to copyright ownership when products are brought into the country? When documentation is filled out for the normal Customs purposes, I am wondering if there should be some provision on that documentation to indicate that the importer is aware of the ownership of the copyright and that there should be certification that this has been done according to copyright. The consequence, if that were not the case, would be some liability on the part of the person importing the items. Would some system of that be feasible or useful?

Mr Anderson—It would be both feasible and useful. I had a meeting with Mr Cadman in Sydney post the previous meeting and we discussed a system of registration to ensure that only the rightful owner of the copyright could in fact import the goods. That would become another electronic check on the Customs declaration form.

CHAIR—I am not going quite that part. I am saying that, if I am importing toys, on the import documentation I would have to certify that to my reasonable knowledge or whatever the wording might be—I have not thought about that precisely—the copyright on these products is not being infringed. That in itself does not mean anything except that, if it is infringed, it could be the basis of an action against the importer for not taking the steps that the law would therefore regard as reasonable.

Mr McDonald—I think it would be useful when people raise the defence of innocent infringement. Where it is required and it is brought to their notice that they must attest to its legitimacy or whatever, you are placing an onus upon them and taking away from them the opportunity to use the innocent infringement argument.

That was the argument that was used in this one, that it was innocent infringement. Anyone in the toy industry knows that the Hot Wheels logo has been around for so long that it is a pretty hard one for them to sustain, but they do try to run it. A certification system of that kind would certainly assist in those circumstances. We see it as being feasible.

Mr Anderson—One of the problems I have with that is the defence used in evidence against the importer that that is still post the event. If you have a product which is copied or pirated and it proves to be unsafe, the first you will know about it is when someone takes an action against them or someone is injured whereas, if the registration came through as a check on the customs entry, there is a real chance you could stop it at the border.

CHAIR—That would require some considerable resources, though, would it not?

Mr ANDERSON—I do not believe so.

CHAIR—Mr McDonald, we have only a few more minutes left. Are there any other major points you want to make or questions you want to ask?

Mr McDonald—In our submission we referred to sentencing guidelines. I think that is a very important issue in terms of the attitude of the judiciary. I think a very good point was made by the Australian Federal Police in their submission. They referred to a criminal action they had taken against an infringer. In that instance, they were exasperated by the attitude of the court. There was a very minimal fine given to the person who was guilty of the infringement, to the extent that they said, ‘Look, we are hardly ever going to bother doing this again.’ Because, from a priorities point of view and limited resources, they cannot justify in future conducting an action of that kind.

That sends out a terrible message to the community in general. Intellectual property was respected more in the past in Australia than it is today. We are a modern economy built in the service sector. To sustain that, we must implement tougher penalties for those that breach copyright and other intellectual property laws. We were always the country in South-East Asia that was respected. Our damages and penalties would be about a third of those that are now awarded in Singapore. Singapore has a much harsher attitude to those who breach copyright than Australia. I think it is a real shame that it has got to that extent. I have made a number of recommendations, Mr Chairman, which we would be happy to discuss. One is that an education program be run in tandem with changes to sentencing guidelines. We think that is important to change society’s attitudes.

Mr CADMAN—I noticed your suggestion that section 130A be changed. That is a fascinating proposal, because that has the effect, as I read it, of making sure that every copy of any product that comes into Australia is a non-infringing copy.

Mr McDonald—If you have some form of certification on entry, and people certify that it is a non-infringing product which later turns out to be an infringing product, then the ability to obtain punitive damages would be there.

Mr CADMAN—But this gives it the support of the law. I think what Mr Andrews is wanting is a statement that, if that law has changed, the law has been observed. Is that right?

Mr McDonald—That is right, but at the moment section 130A—

Mr CADMAN—Only applies to recordings.

Mr McDonald—To sound recordings and no other product areas.

Mr CADMAN—That is a fascinating way of going about it. There are two factors to be considered: the infringement of copyright and safety factors. It seems to me that the safety factors are a declaration of observing Australian standards, whereas the copyright statement is a statement that we have not contravened copyright. Are both needed? Are both relevant? Does one carry greater weight than another? What is your opinion?

Mr Anderson—I am not sure that they need to be divided. As far as safety is concerned, the relevant marks should be applied to the product. If it is a legitimate product, that is going to happen. If it is an infringement of copyright, very often the copyright goes as far as an infringement of those standard marks. For instance, on that product you have there, it has a CE mark. That product has never been anywhere close to the CE regulation or a confirmation that it is safe. They actually infringe the copyright in the CE mark as well. So they are both in there.

Mr CADMAN—It does not seem to worry them. Nobody seems to check it.

Mr Anderson—There is no mechanism to check it at this stage in Australia.

Mr McDonald—I think you would be horrified if you saw how much product comes into this country that is unchecked in terms of safety. Mr Anderson attended a recent meeting with Consumer Affairs in New South Wales which identified one store which had just under 50 products that did not comply with Australian safety standards, and they did not seem to think it was a problem. It is an attitude thing. It is quite extraordinary.

Mr Anderson—I got back from the UK yesterday, and I was checked on certain things regarding the lion mark and how that is applied. The lion mark is one of quality, and shows that the product has been through a test laboratory in the UK before it gets to the market. If it is relevantly applied, it is seen as quite an infringement, and the UK law takes action against them. The action is mounted, I believe—and this I cannot swear to—through a member of the British Toy and Hobby Association.

Mr CADMAN—What I am trying to tease out is, if there are obligations placed on Australian manufacturers or importers of products to Australia to observe certain safety codes, and that is a matter of Australian law, and people manufacturing within Australia must comply and importers should comply, turning a blind eye to those people who are not complying I think then puts at a disadvantage legitimate importers and legitimate manufacturers. That ought to stop.

Mr Anderson—Indeed. Mattel have certifications of their products in laboratories in Hong Kong and the United States, and there is a significant cost in ensuring that their products are safe enough for the market. Those in the piracy industry do not bother having anything checked. There could be toxicity issues regarding paint, because children may bite and chew toys and paint may chip off. There are all sorts of issues of that kind. Legitimate manufacturers and importers are put to considerable expense to ensure that their products are safe. That places them at a disadvantage against those who do not comply.

Mr CADMAN—Your recommendation 9 contains parallel import proposals.

Mr Anderson—Yes.

Mr CADMAN—You are proposing that the parallel importer, in the case of Mattel, now has to take responsibility, as I understand it, for all imports carrying that brand.

Mr Anderson—Correct.

Mr CADMAN—Whereas Mattel may not be the importer.

Mr Anderson—That is correct. You may recall in our earlier hearings in Melbourne—

CHAIR—That was the matter that you raised in the recent hearings in Melbourne. Has there been any advance in relation to that?

Mr McDonald—No, there has not, Mr Chairman. That issue came about because the Toy Association wrote to the ACCC seeking a statement from them as to who would be responsible for a recall of a defective good if it was parallel imported by someone other than the owner of the intellectual property. They wrote back saying they believed it would still be the responsibility of the owner of the intellectual property, even if they were not the person who imported the product. We are saying that this can hardly be fair. If the person who owns the intellectual property did not import the product and it was faulty in some way, surely that should be the responsibility of the importer, not the owner of the intellectual property. That has not been advanced. We still see that as a major fundamental flaw.

I think it is going to become very significant from March next year. When the restrictions against parallel importation are lifted, the incidence of this occurring could be significant. In the Mattel range, for argument's sake, we are not saying that Mattel does not stand up behind its products. But how many products would there be that we do not import into Australia now?

Mr Anderson—The list grows virtually daily. We have just modified an item to comply with Australian standards to bring in during this month. If it complies with the standards of other countries but not in Australia—and there is a good reason for it not complying here—we make that modification. But we know that someone else will bring in a product against that parallel importer. It will infringe, and it will almost certainly be caught. We will be responsible under the ACCC's definition for the recall of the product and the damage that does to the legitimate product.

Mr CADMAN—You are really saying here that any importer must verify the safety standards. Recommendation 9 really means that each and every importer must verify the safety standards.

Mr McDonald—No, 9 was with respect to the parallel imports.

Mr CADMAN—Yes, that is right, but it is for every importer.

Mr McDonald—In effect, yes.

Mr CADMAN—In effect, you are saying that every importer must verify those and they cannot rely on some pre-existing agency, sole rights or whatever. They must verify the standards for themselves.

CHAIR—You are not really saying that. You are saying that if somebody imports under the parallel importing a product which has been imported officially not by Mattel Australia but by Coles Myer—to take a hypothetical example—and that product is defective in some way then it ought to be the hypothetical Coles Myer rather than Mattel which is liable.

Mr McDonald—Indeed. It is already being signalled by Woolworths and Coles Myer that there are product ranges that they are going to parallel import. In the US, because of the different seasons with toys, there will be a product at the end of the season that has not been sold. They will dump that in Australia at a very cheap price, and a parallel importer will import it. It is very similar to the ads we have been seeing in Australia for Sheridan sheets. I am sorry I have not brought one with me, but Sheridan Australia have been having ads run throughout the print media in Australia over the last two weeks because another company was importing Sheridan sheets into Australia and selling them by mail order. That is the problem. Again, under the ACCC's definition—not that there are probably a lot of problems with sheets—theoretically, if there were a recall, Sheridan would be responsible even though they were not the importer. We feel that is a blatantly unfair position to place a person in.

Ms JULIE BISHOP—Just talking about things on an international scale, Mr McDonald, you suggested that intellectual property rights are perhaps not as highly regarded in Australia as in the past and that the attitude of the courts reinforces that in terms of the paltry awards of damages. Do you think that this is a notion that is regarded elsewhere in the world? Are we seen as a soft touch in that regard?

Mr McDonald—I have worked in intellectual property now for nearly 20 years, and I really have seen a change in that time. In the United States, we are now at serious risk. The US authorities are really questioning our resolve in terms of intellectual property. I do a lot of work in South-East Asia as well, and there certainly has been a change of attitude from there. They saw us as being much tougher 20 years ago than we are seen to be today. For example, I would rather run a case in Singapore than Australia in copyright, because you have a greater chance of what I would call reasonable damages being awarded to the owner of the intellectual property. I find it extraordinary that in an economy such as ours that relies upon intellectual property as a major asset in its community we are not protecting it.

Mr CADMAN—Relaxation would be related then, I would have thought, to economic policy.

Mr McDonald—Yes and no. The ACCC's attitude is price, price, price. In terms of economic policy, I think that is what has been driving it to allow parallel imports. That is an issue. That legislation is through. We do not like it, but it is there. I do not think the other issues are so much related to economic policy, however. Copyright just does not seem to make sense to me. I do not see that there is any economic rationale behind giving low damages to the owner of intellectual property.

Mr CADMAN—If you put enough pressure on Australian manufacturers, they improve their performance and drop their prices.

Mr McDonald—Yes, but I do not see breach of copyright as a price issue. I understand the point you are making, and I think that is what has driven parallel importation but, with respect, I do not see that connection in terms of copyright. If someone is the legitimate owner of the copyright, I do not see that as an economic argument. In fact, I see it working against our interests. If we are seen not to protect those rights and technology is at risk of being copied, people will be reluctant to introduce technology into Australia.

Ms LIVERMORE—Mr McDonald, at the start you mentioned the attitude of the judiciary and the difficulty of getting appropriately strong sanctions at that end of it. Have you seen evidence of a winding back of resources and priority on copyright enforcement from agencies like the Federal Police and Customs over that period?

Mr McDonald—Most definitely.

Ms LIVERMORE—They just put it to the bottom of the pile.

Mr McDonald—It is at the bottom of the pile. For example, I am pretty sure it was the AFP's submission where they talked about a criminal action they took against an infringer. Their attitude at the end of that was, 'We're not going to do this again,' because of the hundreds of thousands of dollars they had to put into that prosecution to get a paltry award or fine given by the court. They have priorities. They have so many other issues they must be addressing in terms of illegal drug importation and other things that copyright is going to be way down on their agenda, particularly when the courts are more or less telling them, 'Don't waste our time with this again.' Customs are certainly underresourced at the moment to do it. Although there are provisions in the Copyright Act to obtain the assistance of Customs, it is not a big priority for them.

CHAIR—Thank you very much for your supplementary submission and for coming along and discussing it with us this morning.

Mr McDonald—Thank you very much for the opportunity.

Mr Anderson—Thank you.

Proceedings suspended from 10.48 a.m. to 11.08 a.m.

LEIBOFF, Ms Jacklyn Marett, Member, Management Committee, Arts Law Centre of Queensland Inc.

CHAIR—Ms Leiboff, 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. We are in receipt of the submission from you dated 19 May. Do you wish to make some opening comments?

Ms Leiboff—The Arts Law Centre of Queensland Inc. is particularly concerned with the inability of most of the creators of copyright works, which are generally exploited by other bodies, to be able to effectively enforce their rights as creators. As you can see from our submission, we have directed our comments towards the purposes of people we have called ‘sole creators’—that is, people who have not assigned their rights. There are many creators who are in that position, who are unable to enforce their rights because they do not have the backing of large organisations, and whose work is otherwise exploited. Since our submission to this inquiry we have noted the comments of both the Arts Law Centre of Australia and the National Indigenous Arts Advocacy Association. We take on board and support their submissions, as they are able to reinforce our own views of these matters.

CHAIR—In one of your recommendations, you talk about the activities of the Copyright Tribunal and you say the scale is more akin to a small claims jurisdiction so that a body like an enforcement agency expressly charged with its administration may be an effective alternative. Is there a role for some variation of the role of the Copyright Tribunal so that it does have a small claims type of jurisdiction or even mediation type of jurisdiction to deal with the scenarios that you see as the problem areas?

Ms Leiboff—Certainly the Copyright Tribunal could have a role in that respect. However, we perceive its current structure as being a quasi-court, in effect, and being Sydney based as a problem. Part of the reason for the establishment of the Queensland organisation that I am here representing today was the inability of the Australian based Arts Law Centre to effectively represent the interests of a decentralised state like Queensland. We see the same problems with any kind of centralised structure which does not have effective arms out into the places where people create works.

We are aware of some propositions that the federal magistracy could be used in this respect. We would take on board the comments of the Australian Arts Law Centre that the need for specialists in this field is important, and also the comments of NIAAA in that respect, that people who do understand copyright and copyright industries need to be the people dealing with these matters.

The current lack of effective mediation with specialist knowledge in Queensland seems to be one of our stumbling blocks. However, our problem is in being able to say to people you have an inability to enforce. Most of the people we see on a day-to-day basis neither have the means nor the ability to take on an action, and they will not do that because they have no money and because, for the effort and for the effect of the outcome, it will not be viable for them.

CHAIR—Listening to evidence to our hearings, it seems to me that there are at least two levels of problem. There is the problem that you are describing in terms of access to somebody—particularly for the sole artist or the sole creator—which is difficult under the present system. There are also the other problems, which the previous witnesses referred to, relating to proof in relation to copyright. Even if we were to have some more user-friendly, cost efficient means of resolving problems, such as a small claims process or a federal magistracy or whatever, I take it the sole creator would still be faced, under the current legal regime, with all of the same problems in terms of proof?

Ms Leiboff—The question of proof is not an issue for most of our clients because the question of proof is quite clear cut: they are the authors and therefore the first owners in relation to copyright.

CHAIR—Let me get this clear. Are you saying that, if cost was not a problem, in terms of pursuing the matter, proving ownership of the copyright is not a problem you would foresee?

Ms Leiboff—It is quite clear cut, usually, that most of the people we see have enforceable rights which fall by the wayside. The problem with copyright is that, unlike other forms of property that are taken by somebody else, the potential for exploitation is exponentially increased by the ability to copy and reproduce in some way, shape or form. The loss goes far beyond the taking of an object or an item. We all know that most people think the moment they buy a CD they have the right to do whatever they wish with it when, in effect, all they getting is the physical item. For most of the creators we see, the loss is the ability to exploit beyond the most basic level.

At a very basic level, we can advise people to write a letter and perhaps get some recompense that way, but the future licensing and wider exploitation is not something that people we deal with are involved in. As the committee is no doubt aware, the potential income for artists of all types—whether they be performing artists, visual artists, writers and the like—is small. They do not bring in large sums of money. As a consequence, they are not in a position to exploit their rights.

We are a small volunteer organisation. We have one paid administrator. The committee members undertake much of the day-to-day work that we deal with. All we can do for the people who come to us is give basic legal advice. Mostly, they cannot then afford to go on with proper legal advice.

Mr KERR—What, if any, is the technical impediment to using the Queensland small claims system? I assume there is a small claims system and I also assume—I am not sure of the impact of the cross-vesting decision on that—that nothing would displace the capacity of the Commonwealth parliament to vest a state tribunal with a Commonwealth power, because that is constitutionally facilitated. It was the other way around that the High Court found difficulties with regard to. I assume the Queensland small claims tribunal has a cross-vested jurisdiction to hear federalised claims and presumably in copyright. Why can't people pop along to the small claims tribunal and have those matters determined in a no cost jurisdiction, if it is a no cost of jurisdiction?

Ms Leiboff—The situation is not that of no cost. The situation is that mediation services are available as an adjunct to the magistracy here. The nature of the small claims jurisdiction in Queensland is not appropriate, given the nature of the specialisation. It links back to our advice to people in terms of letter writing and the like. That is the limit at which we can deal. We might be dealing with an artist whose painting has been copied or cropped or dealt with in a particular way and, for most of the people we are dealing with, a letter is the most they can afford. We are dealing with people who have incomes of \$10,000 to \$20,000 a year.

Mr KERR—I understand that.

Ms Leiboff—We are not in a position to provide a letter on a solicitor's letterhead. We can only help them draft a letter for themselves. People who are infringing will not pay any attention to what is said unless there is some kind of clout which looks better than most of our creators.

Mr KERR—I just need to tidy this up because the question you have raised is quite different from most of those that come before us, which have been addressing the complexities of enforcement in larger matters. You are saying that the difficulty in Queensland is twofold. Firstly, that the tribunals at that level have no expertise so they have difficulty in understanding the propositions that are being put to them and, secondly, that there is no cost jurisdiction for small claims in Queensland. Is that right?

Ms Leiboff—Certainly with respect to the issues we deal with. Even taking it to that stage it is not an applicable jurisdiction. The question we are dealing with has probably less to do with the question of the small—

Mr KERR—Sorry, I do not understand what you are saying. Often it is the case that people do not think of doing things in a particular way. But, for example, if it is a simple, straightforward matter of somebody putting on greeting cards a photograph that is under copyright, I think that even the dumbest small claims magistrate or commissioner—or whatever the title is—in Queensland is likely to comprehend that that is a matter which results in damages and they are likely to be able to make appropriate orders of restitution or the like, if the jurisdiction is there.

We need to do some further research but, superficially, the cross-vesting of Commonwealth cases to state tribunals would pick up small claims, and I am just wondering why you say it is inappropriate on those sorts of simple and straightforward things where the facts are not particularly complex in the law. I appreciate that copyright law can become immensely complex in larger matters, but in the sorts of things that you are speaking of it would not appear not to be so.

I do not have any understanding of the Queensland jurisdiction, but in many states—the ACT, Tasmania and a number of places—there is no formality of pleadings required and the like, so you can basically write to the tribunal and say, 'This is what I am complaining about, and this is the order I want,' and it is done with minimal formalities. I know there are some states, like New South Wales, where there are still considerable formalities and where

it is more difficult access those processes. I am just wondering what, if any, are the difficulties in Queensland.

Ms Leiboff—We do not take on that work for people, so in many respects I am not able to expressly deal with the day-to-day running of it. However, what happens is that our clients will give up before that first hurdle, because even taking an action beyond a letter is often more than they are financially able to do.

Mr KERR—But if they can do it—

Ms Leiboff—They do not do it themselves. They cannot do it themselves and, beyond basic advice, we do not have the resources to help them do it.

Mr KERR—But if they cannot do it themselves in the present format, why would they have the resources to do it in another system? All I am trying to say is: take the ACT, which has a small claims jurisdiction. It is easy to access. There is a little form that you fill out. You go to the registry and they tell you what to do. I think there is a minor filing fee. I cannot remember how much it is, but it is quite small. Essentially, the jurisdiction lacks any complexity at all. You essentially do it as a lay person. Eventually you get a hearing date. You then have orders made. It is the same in other jurisdictions.

As I say, it is not the case with New South Wales, where the case is still heard before a magistrate and there are some formalities of pleadings, even in the small claims system. But where there are simple state tribunals of the nature of small claims, I am wondering what actually prevents people from using it. Truly, even a person on a very low income would use that in the normal course if they had a problem where somebody had failed to repair a fridge, or in a household dispute or something like that. I am just wondering why we do not use mechanisms that might be superficially available.

Ms Leiboff—There is no reason, of course. But the point is that the step to get to that point is often difficult for the people we see. We are dealing with garage bands and ladies who knit, as well as people whom we would call artists. We are dealing with all levels of people. I take your point; I am not arguing against it, by any stretch, although within that the notion of someone who understands the regime of copyright is important. But it is the underlying process of being able to find a person who has infringed and starting it from that point. It is something which for many of our clients is an issue. By nature our organisation is a referral agency. After free legal advice, we are then referred on to people. We cannot pursue that in our own right. That is not what we do. It is purely volunteer advice. We do not have paid lawyers. We cannot take those things on for ourselves. So it would be the advice given by people, if they are then able to go and see a solicitor.

I know what you are saying. If we could say, 'Here is a form. Go and take this on,' sure enough, we could provide that as well. But, beyond that, the issue is often what you need to show and what you need to be able to find out to point the finger at a person and then take it on. Our volunteers will help people draft letters and help them develop things as much as they can, up to a point. Beyond that—I agree—they are on their own. That is of concern to us. More often than not at that point of being on their own they will just say, 'It is not worth it. It is not worth our while.'

Mr KERR—Probably this is not the place to explore this, but I would be grateful if you would come back to us with some advice as to whether or not the small claims jurisdiction is available and what, if any, are the difficulties in accessing it. I must say that in schemes where no cost or low cost regimes are available and where formal pleadings are not required, yes it true that you have to identify a defendant. But that is not particularly onerous. Normally you have to identify a defendant. But after that, really, you just use plain English to write what you are complaining about—‘I complain that my photograph in which I have copyright has been misused by company X, Rip-off Ltd, in the sale of postcards’—and then you quantify what you want by way of an order, which would be damages, the return of documents or whatever. Then, if the scheme is working well, you get some well-intentioned commissioner of a small claims tribunal who listens to both parties. In most jurisdictions, they are not allowed to have lawyers at all.

Ms Leiboff—Certainly with anything below the damages limit, though, some of the situations that have occurred over time have to be taken on board. I can see that the Bulun Bulun case and the other case have been referred to here. We are not dealing with small claims in those particular circumstances. If it goes beyond the issue of a small claim, many people are not able to afford to take beyond that a matter which is appropriately within the jurisdiction of a court.

Mr KERR—I quite understand that, but I was just trying to separate out what I thought was your first point, which was that there are a lot of little people with very minor claims who cannot get relief.

Ms Leiboff—It was not so much that they were minor claims; it is just that the claims are there but are not able to be pursued. I misunderstood that. It is not so much a question of it being minor; often it is major, but they will give up, even if it is major.

Mr KERR—Again, I do not know what arrangements you have with your solicitors, but I have to say that there is a whole bunch of greedy solicitors in most jurisdictions who, if it is major and clear-cut, are quite happy to enter into contingency fee arrangements now.

Ms Leiboff—With respect, given the nature of the current litigation involved, I do not think that that is exactly the nature of the situation. Copyright lawyers are not going to be able to take these sorts of matters on board, nor will they choose to do so. Even the people we referred to who are associated with the organisation, who will do this for a reduced rate, will not commence litigation, for that particular reason. The outcome for the clients concerned is not a large sum in the end, by the time those financial aspects are taken off.

Mr KERR—I suppose also that the real problem with some of these cases is that the defendant is a man or a woman of straw. A realistic appreciation of what you are trying to do is to stop future abuse, rather than any realistic apprehension that you will recover any damages, because the company or whatever has created the abuse is really not able to sustain an award of damages.

Ms Leiboff—The situation in many instances, as well, may be that the infringement will occur with the knowledge or assumption that the person whose work has been used inappropriately will not pursue it, for all of the reasons that I have mentioned today and that

come through in the submission. In other words, the point is that you are more likely to infringe if you think nobody is going to pursue you, for all of these reasons, financial or otherwise.

I would not expect the small claims issue to be a big issue for most of the people involved. The letter, in effect, may do just what we want. It is the big issues—the Bulun Bulun case; the example used by Australian Arts Law of the Grant Matthews case—which we are not able to help people develop up. We have to rely on them. I can only refer to those instances. They are the kinds of issues we can see as well, and people will say, ‘It’s not worth my while.’

International jurisdictions will say that as well, when there has been an infringement across borders. People are not going to be able to take these things on unless test cases are funded which will help the kinds of people we are dealing with to be able to say, ‘This is inappropriate behaviour; these matters will be dealt with beyond the most basic treatment.’

Mr KERR—Accepting all that, I still think there is another side to it, which is that if little people pursue minor claims it also sends a message. I would like to find out whether there is any inconvenience in the pursuit of those small claims. What can your research, if any, show about that process? Essentially what you are saying is that there is a range of practical barriers to accessing judicial remedies in this area. I quite accept that. If there is a complex issue involving copyright law there can be extensive litigation, et cetera. But, where small claims jurisdictions are available and utilised, they are such a damn nuisance to the people against whom the claim is made that the same point is there. I do not know what the damage limit in Queensland for a small claims matter may be; it may be only \$10,000 or \$20,000. If a rock band does take infringing action against minor transgressions—for example, if someone has made false pressings and is selling them—and if you are not at any particular risk, the nuisance value to the defendant is pretty high and it tends to stop bad behaviour. It is not just the big ticket headline cases that send messages; it is also the fact that people are prepared to pursue their own individual interests reasonably aggressively and not sit back on copyright infringement.

Ms Leiboff—The lack of an ability to enforce the law in relation to copyright infringement, though, does send inappropriate messages, we think, if for no other reason than it is inappropriate to have a system of property rights within our system which cannot be enforced. The assumption is developed that these people will not be able to take these matters on, and that is something that we are particularly concerned about. We are a small funded organisation which runs on a volunteer basis. That indicates the nature of the situation we are dealing with. We are not dealing with a paid organisation which can provide the kind of support needed.

As well as providing volunteer advice sessions, we go and educate the community. We are invited to go and speak to various sectors of the arts community. We try to do it across Queensland, but given the decentralised nature of the state it is difficult. We are based in Brisbane with a couple of volunteers in Cairns. We are dealing with a very large place and there are limits to what an organisation like this can do to advise people who have rights, many of whom may not be aware of the extent to which they can develop their rights further. I gather from the comments you have made that the committee is perhaps also

thinking about educating the creators about their ability to seek these rights. We can maintain education, but the process—

Mr KERR—I do not even know whether the jurisdiction exists. I need that clarified.

Ms LIVERMORE—You may be able to check this when you do your research, Ms Leiboff, but off the top of my head I think people pursuing copyright in Queensland in the small claims tribunal would be blocked because the jurisdiction is based on a consumer tribunal and it is between a consumer—there is a definition—and a trader and only consumers as defined by the act can take a claim in the small claims court.

Ms Leiboff—I have not been involved in it so I would have to look it up.

Ms LIVERMORE—I think that is the barrier.

Mr KERR—In my previous incarnation I was briefly, for six months, contesting the seat of Denison. That was 12 years ago. I was rescued from penury and given a job as a community legal officer in the Hobart Community Legal Centre, and we started being very innovative in the use of the Tasmanian Small Claims Tribunal, which was a no cost jurisdiction. Lots of matters that people had said were too hard were pursued through to judgment in ways that seemed quite innovative and novel at the time.

Ms LIVERMORE—The problem in Queensland is that you have to fit within that definition of a consumer in the act to access the tribunal.

Ms Leiboff—I have some memory of it from a long time ago. I do not deal with this on a day to day basis. Certainly within the structure of the jurisdictions within Queensland, there are defined financial limits as well, which may be a barrier.

Mr KERR—The federal Attorney-General has raised the initiative of a federal magistracy. I am not certain—I should be, but I am not—as to whether he proposes to give it a copyright jurisdiction. Were he to do so, that may well be another process. I do not know the fee scales and the access arrangements that they are proposing for that, but to the extent that that is in discussion—or even further advanced than that—it may be a point we need to reflect on.

Ms Leiboff—It was certainly an issue that we raised at the beginning, and certainly something which is viable. The point I made again was that we are dealing with Queensland. If it is based in Sydney, the situation will become untenable unless the federal magistracy has a circuit which will ensure that someone with specialisation is able to hear those matters.

CHAIR—Taking on board what Mr Kerr says, it may well overcome one or two of the problems you identified. One is access to justice, which is the nub of what you are complaining about, and the second is the lack of expertise on the part of the tribunal. Presumably a federal magistracy will include, as part of its jurisdiction, a number of commercial areas, and therefore the magistrates would be expected to have some better understanding of copyright law than magistrates in states who are dealing with traffic offences and the like.

Ms Leiboff—Certainly that is something interesting that could come out of the development of the federal magistracy. If it does tend to take on generic roles, such as family law or trade practices, then that might be something which would mean copyright gets squeezed out. The need for something within Queensland as well is significant. People need to be able to access it within this jurisdiction, and not have to use Sydney as the foundation.

CHAIR—Thank you for your submission and for coming along to discuss it with us this morning.

[11.39 a.m.]

RAMSDEN, Mr John Clifton, Executive Director, Anti Counterfeiting Action Group

STANDEN, Mr Scott, Director, Anti Counterfeiting Action Group

TAYLOR, Mr Kenneth James, Managing Director/Investigator, Trade Mark Investigation Services

CHAIR—Welcome. Do you have anything to say about the capacity in which you appear?

Mr Taylor—I am the Managing Director of Mainpack Pty Ltd, a Queensland registered company trading as Trade Mark Investigation Services. I investigate Australia-wide for the Anti Counterfeiting Action Group.

Mr Standen—I appear as an executive committee member of the Anti Counterfeiting Action Group.

CHAIR—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 the parliament. We are in receipt of your submission to the inquiry. Do you wish to make some opening comments?

Mr Taylor—Yes, by way of clarifying where we are, I have an opening statement on behalf of TMIS and other clients, and John Ramsden has a short opening statement in respect of the ACAG. We also have a prepared and edited video that runs for about eight minutes and sets out some of that.

Prior to founding Trade Mark Investigation Services in 1991, I was a member of the Australian Federal Police and later, between 1976 and 1989, a member of the Royal Hong Kong Police. Trade Mark Investigation Services was founded to investigate complaints of counterfeiting in the clothing industry in markets around Australia. At that time, there were about 90 markets nationwide. To date the business operates a network of licensed investigators throughout Australia, New Zealand and South-East Asia. Our clients include Acme Merchandising, the Anti Counterfeiting Action Group, Microsoft, SOCOG and various other Australian and overseas companies. We have identified 1,050 markets today around Australia. It might be handy at this stage if I hand up copies of the opening statement and some attached documents.

CHAIR—Yes. For assistance time wise, Mr Taylor, if there is a statement we can read and you just want to highlight some points from it, that might be useful.

Mr Taylor—Perhaps in that case I will let Mr Ramsden make his opening and we will play the video after.

CHAIR—I am not trying to cut you off. I am just saying we can read it.

Mr Taylor—No, that is fine. I will just highlight a couple of points and then hand over to Mr Ramsden.

CHAIR—If you want to highlight a couple of points, please do so.

Mr Taylor—I am concerned on behalf of my clients in respect of a number of issues. We are detecting each month approximately 2,000 breaches of copyrights in markets and souvenir and discount shops around Australia. None of those 2,000 breaches is being investigated or prosecuted. There are several types of activities that we are concerned about. One of those is a strategy by counterfeiters known as ‘party plan’, where usually single-parent families in lower socioeconomic areas are targeted with private parties selling branded clothing inside homes. One person attends to present the goods, another person delivers the goods, and there is a manufacturing and organisation structure behind that. That has been operating for about six years.

The second activity we are worried about is the bootlegging or migratory counterfeiting at special events such as pop concerts. We have some more information to produce on that, so I will not dwell on that, but we have had the situation with those where we have had to get the immigration department involved because there were no other law enforcement resources available to assist. Those activities are organised, international activities.

We also have local gangs that scalp or bootleg local events around Australia, such as sporting fixtures and entertainment events. Over the past 18 months, there has been a serious increase in counterfeiting due to the economic downturn in Asia. Asian countries such as Indonesia and Thailand have large unemployed skilled populations and plenty of manufacturing facilities but no local market. Those facilities and labour forces have been turned to produce branded goods to be imported to Australia and other countries.

Finally, an area we are concerned about is the increase in crime over the Internet and the increase in counterfeiting through advertisements in trading post type magazines. I will hand over to Mr Ramsden.

Mr Ramsden—Again, to save some time, I have copies of my opening remarks. I will hand them around. I will just make some highlighted points. The Anti Counterfeiting Action Group was formed in 1991 by three companies which had problems with breaches of copyright. The group has since grown to 18 members, all of which are members of the textile, clothing and footwear industry. We have spent close to \$2 million to date fighting breaches of copyright around Australia. As Mr Taylor has indicated, there are now 1,050 markets throughout Australia. In our submission, we indicated that this was worth approximately \$3.5 billion in sales. We have since revised our numbers, and we are now in the position where in excess of \$5 billion worth of sales are being generated by those markets.

With the markets, we are dealing with a very itinerant population. Market stallholders have no need to identify themselves. There is no requirement from market owners to identify stallholders, hence stallholders come and go in a very short period of time. There are no

dedicated police resources at federal or state level which deal with breaches of the Copyright Act. Consequently, there are very few criminal prosecutions for intellectual property offences. To take action through the civil process costs a company in excess of \$15,000 for one action. In the back of Mr Taylor's reports, there are the breaches that have happened in the month of August. In one month, one company had 66 breaches of their trademark. If they were to prosecute that through the civil process, it would cost that company in excess of \$1 million in legal fees alone, regardless of their time and costs involved.

There needs to be a speedy means of dealing with breaches of copyright. Ideally, there should be dedicated federal and state police resources for that. There is no reason why it cannot be both. If there are not dedicated police resources, a cheaper, more efficient and faster civil process needs to be achieved, including changes to the proof of copyright, which is one of the deterrents. The other deterrent is that we are not dealing with large corporations here; we are dealing with individuals. We are talking about backyard operators. We are talking about people who deliberately make identification of themselves difficult for us as well as for consumers. Consumers who are trying to remedy faulty merchandise that they believed was legitimate often cannot find the stallholder again because he is not at the same market or stall that he was at the previous week.

The pending changes to the parallel import laws under the Copyright Act will bring a dramatic increase in the level of counterfeit of copyright in Australia. In New Zealand, where they have recently changed their parallel import laws, we have experienced quite a major increase in counterfeit merchandise. There is an urgent need for police resources to allow a fast, decisive and effective resolution of breaches of copyright. There is also a need for legislation that allows copyright owners to seize the goods at the point of sale. Safeguards would obviously need to be provided in legislation to protect people with that. There is also a need to declare counterfeit goods prohibited imports. By declaring them prohibited imports, Customs would then have the right to seize them without going through the processes that they necessarily go through now. Australia has an obligation under TRIPS to provide an effective enforcement program. We are presently failing this obligation, and urgent action needs to be taken to resolve it. Thank you.

Mr KERR—I have a question about civil enforcement. How far have you pursued the availability of Anton Pillar orders in relation to these markets? I know, for example, when the Rolling Stones came to Sydney, there was a standing Anton Pillar order that enabled seizure of the counterfeit goods being flogged around the stadium where the Rolling Stones were.

The availability of that did not seem to be restricted by the fact that the anticipated breaches could not name the bad guys who were going to do it—because, presumably, these people were mobile and opportunistic. So I am just wondering why, in respect of these markets, for example, you could not go to the Federal Court for orders in the nature of Anton Pillar orders setting out all these matters and then seize the goods and, in a sense, force those defendants who claimed any entitlement in the marks into a litigation process on your terms.

Mr Taylor—The Rolling Stones concert was attended by two Australian Federal Police officers. The counterfeiting was organised by one Sydney based individual who recruited 40

backpackers from local hotels and backpacker hostels. He handed out the shirts in bags to these people and they were to collect \$5 per T-shirt as commission for selling them. It was quite a large, organised event. The lawyers were fairly singularly unsuccessful. The police officers seized quite a few goods that had been planted in the early stages of the evening—there were only two police officers present from the Australian Federal Police—and, after the concert was over and the people started to come out, the backpackers and the other people picked up their goods but, immediately the police started to approach the sellers, the organiser approached the police and accused them of corruption.

The police officers told him to go away while they were trying to arrest one of the counterfeiters, a fellow by the name of Fitzsimmons. Fitzsimmons escaped and the organiser assaulted one of the police officers. The organiser was subsequently arrested for assaulting police or obstructing them or some other similar type of offence. The police officers were out of action and the shirts were sold. In this particular case of the Rolling Stones concert incident—I understand, however, what you are saying in respect of Anton Pillar—Acme Merchandising was not able to take that avenue because it was too expensive. I understand, but I could be corrected on this, that the cost at the time—and that was 1995—would have been in excess of \$80,000.

Mr Ramsden—The ACAG took action at Parklea Market in 1993 using Anton Pillar orders against seven stallholders. The legal fees in that instance were in excess of \$80,000. While we won that case in the Federal Court—we were awarded damages of a similar figure, as well as being awarded costs—we only ever received \$15,000 from the offenders. Three days later, two of the offenders returned to their home country and two of the other offenders moved address a number of times to prevent us collecting the debt. One of the other offenders is still operating in the Sydney markets. While they are not breaching copyright of ACAG clients, they are certainly breaching copyright of other clients.

Mr KERR—Was the \$80,000 for legal fees or to reflect the cost of putting people on the ground to enforce the orders? Presumably, if you have an Anton Pillar order, you need somebody to go out there and conduct the security.

Mr Taylor—At Parklea, there were seven lawyers from Freehill, Hollingdale and Page.

Mr KERR—And it only cost you \$80,000!

Mr Ramsden—With an Anton Pillar order, you have to have one lawyer representing you and one lawyer who represents the offender. So you have 14 lawyers.

Mr Taylor—So there were seven more lawyers from, I believe, Baker and McKenzie. Each of those teams of two had to have one security person with them and the seven stalls were located at different places—Parklea markets has over 1,000 stalls—so it was in effect raiding seven separate locations, although it was one market. We only raided seven out of the 30-odd stalls that were causing a problem.

Mr KERR—We are focusing on the enforcement of copyright law. Plainly, thus far, orders in the nature of Anton Pillar orders have not been particularly effective. I agree with you that we should give greater resources to law enforcement, but the same difficulties that

apply in civil forfeiture measures would apply in respect of law enforcement. You would get police making arrests, people moving on and returning to their country and all those sorts of things. I do think we underresource police and have not given sufficient attention to intellectual law infringements—but that is a different point. Have you any suggestions about how we could improve practical remedies on the civil side? If you were able to go to a court and say, ‘Look, we apprehended; there is this breach, this is the material upon which we apprehended and we want authority to seize this offending material and deal with it in a particular way,’ and that was not attended by the fact that you needed 17 lawyers from expensive law firms, you could actually do it in a way that was more cost effective. You may find that your self-help remedies are as important or as practical in cleaning this up as any increased police pressure.

I guess that at the end of the day we can recommend an increase in resources for the police, but the degree to which they then operationalise that down to street level is always going to be the subject of operational priorities within law enforcement. If you have within your hands a better and more effective means of civil enforcement, that would obviously be something that could be of lasting benefit coming out of this inquiry—if we were able to recommend it. Have you given any thought to the changes that you would wish to see by way of effective enforcement on the civil side?

Mr Taylor—There is a third aspect to existing enforcement that has not, as far as I am aware, been discussed yet. We have the possibility of criminal enforcement, which I guess we are complaining there is not enough of, and we have the civil route, which we are complaining is too expensive so we cannot do enough of it. But a few years ago the Australian Federal Police suggested to us in respect of ‘party plan’ that we actually initiate civil/criminal proceedings under the Trade Marks Act. We attempted that and it was quite an expensive attempt. We attended, we liaised with the federal DPP in Sydney, we sought some advice and we got some guidance. We reached a point where we went to talk to the suspect in the case and were advised that we would have to put the suspect under caution when we went to ask them questions. Suddenly, the DPP was unable to advise us further and we were back with the barrister getting advice in case there was a conflict of interest.

Needless to say, we did get to a point where we interviewed the suspect in the case, but then we were left at the point where there was no possibility to search for or to seize goods. So, for that type of activity to proceed, we had to have basically all of the evidence that we needed to be able to prove the offence but without the access to very important methods of evidence collection. Eventually, that route failed. I believe, and I think John has touched on it as well—as have others—that the most important thing is to be able to seize the goods at the time they are there so that you can actually stop the event at that time. There are lots of different ideas about how we get to that, but I see terrible problems with copyright owners going up to the public and seizing goods. I see real difficulties in respect of breach of peace, assaults and allegations and counter allegations. I do not know the way out of that.

CHAIR—I do not have it here with me, but we have had evidence from other witnesses that the relevant provisions of the legislation in the United Kingdom do allow for civil seizure. The goods then have to be delivered up, as I recall, to a police station or a clerk of courts or some civil authority—I am not sure which—and the evidence was that that had a major impact. Rather than having to get, as for example at the Rolling Stones concert, the

Anton Pillar orders or John Doe orders, it was open to the likes of yourselves to seize goods from anybody with their bag of T-shirts over their arm, deliver them to a certain place and hand the notice to the person from whom those goods were seized as to their rights as to where these were being delivered and their rights pursuant to the legislation to contest the seizure of the goods. Are you aware of those provisions?

Mr Taylor—I was present when I think it was Alistair Little gave evidence in respect of that on behalf of Acme Merchandising. I heard about it during that evidence. It might be an appropriate time to play the video so that you can actually see what we are dealing with.

CHAIR—If you heard the evidence, I would like an answer, because it seems to me that we are all searching for a simple, effective and I suppose fair remedy for copyright owners who are having trouble with enforcement. On all that I have heard so far, and I obviously do not know enough about it, the UK provision at least goes down that track.

Mr Taylor—In my statement this morning I have touched on this. I am concerned about how that happens. It is on the bottom of page 3, the last paragraph. It says:

There is urgent need for legislative change to empower copyright owners to seize goods at the point of sale. Restraints are necessary to protect everyone; however, a Special Constable type arrangement could work. The courts could supervise the administration of such an authorisation. In the absence of such change, Australia is virtually without criminal enforcement of its copyright laws.

I do not know how just an ordinary person, without training—I am speaking as an ex-police officer, I guess—and without understanding of how people react and without the experience to be able not to use too much force or too much bullying, can walk into a situation like that and have it end happily.

Mr KERR—We still preserve self-help remedies, for example, in tenancy law. Landlords can still evict tenants without bailiffs. The older tradition of the law always allowed for self-help remedies. Of course, we have pulled them back to some extent, and you are quite right to alert us to the prospect of civil disturbance if these things are abused. On the other hand, if it is the case that there is massive and knowing transgression, and I suspect this is knowing—people who are selling Versace jackets for \$15 probably really do not think that the Versace mark is lawfully appended to them—

Ms JULIE BISHOP—Unless they think they have got a real bargain.

Mr KERR—If we were to provide, as the chair suggests, a means whereby self-help could be utilised, it would be a matter of your association working out proper procedures to check abuse, because if you worked in an improper and abusive way obviously that would backfire on you. I go through markets in Hobart and various other places and buy things from the stalls, and they do not seem to me to be brimming over with folk who are ready to slash at me with a knife at the merest provocation.

Mr Standen—Can I take that a little bit further. Our group was really formed on a self-help basis because we were not getting help elsewhere. One of the things we have alluded to in our submission is that we do need a simplified, more effective civil remedy where we can seize the goods, which is at the end of the day the most important thing to brand owners.

Our primary interest is preventing the infringements taking place, not necessarily damages or other things. I am not familiar with the UK legislation. I am aware that in Malaysia they have something along similar lines where you can actually obtain a standing Anton Pillar order, if you like. You do not need to get an Anton Pillar order for every occasion but it will be in force for a period of time. I think they still require law enforcement officers when they actually go to seize the products. I certainly think there is scope to explore that option further where in effect the people who are executing those orders are, in a form, an officer of the court and still have obligations to the court and are not to commit a criminal offence in seizing the goods. Certainly that is something that brand owners and intellectual property rights owners would find a much more effective civil mechanism than we presently have.

CHAIR—It can get worse. I was in New York about two months ago and there was a market on Sixth Avenue that ran for about 20 blocks. It moves to a different place around Manhattan every weekend. There were lots of brands there that seemed familiar to me, and the prices seemed to be quite reasonable for what was purportedly being sold. But the finest of the New York police force were patrolling the market—presumably looking after the stallholders.

Mr Ramsden—You will find the same in the Australian markets. You will often see police officers wandering around the markets, oblivious to what is happening in front of their eyes at times.

Mr Standen—As mentioned before, a lot of these stallholders do not necessarily appear to be overly aggressive, but in a lot of cases very large amounts of money are involved. Ken alluded to ‘party plan’ previously. Aggression has been shown at times towards people who have been involved in ‘party plan’. Ken can provide evidence about bootlegging at concerts, where it can get quite aggressive and nasty. It is not a simple matter of walking up to them. There has to be some sort of balance. The type of remedy you have alluded to would certainly be beneficial.

Mr CADMAN—I am the only non-lawyer on this side and I do not understand the mechanisms that would be put in place if you were to act to seize goods. Under the normal process, as I understand it, you would present a notification to a magistrate who would appoint a sheriff or somebody to go and grab the articles on your behalf. That does not appear to be what you are contemplating here. It means that you go along with a couple of your mates and say, ‘This stuff belongs to my client and I am grabbing it now. If you do not like it, go and complain.’

Ms JULIE BISHOP—You have a court order that you produce that gives you the right to do that. But I agree, that is where things start to get ugly in the enforcement of Anton Pillar orders.

Mr Taylor—I have been present at the execution of quite a number of Anton Pillar orders, as a security person-cum- assistant under the court orders. I have been present when those sorts of orders have been obstructive. It tends to be a far more civilised and controlled process because there is an independent lawyer there who explains the person’s rights to them. If the person does not understand, then time is allocated—usually one hour, but it may be two hours or more depending where it is—for the person to get independent legal advice

or to call his own solicitor. Until that time nothing happens. Everyone stands around and waits until that person is satisfied with the order and satisfied that he is going to let it go ahead. If he refuses to let it go ahead, it is a matter of contempt of court and they go back to court.

Mr Standen—Under the Anton Pillar orders you do not have seizure powers. If the person fails to comply with the Anton Pillar order, which is a court order, it is contempt of court and that person is then dealt with under contempt proceedings.

Mr CADMAN—Your point is that you have to have that evidence up front or there is no point to the whole process. Isn't that right?

Mr Taylor—That is the difficulty, because we are talking about something that happens spontaneously. You go to a market on a Saturday or Sunday and you cannot go away to find a magistrate and get an order and prepare everything and come back. The market probably closes at 2 o'clock and the person may not be there the following week. In New South Wales alone there are 18,000 unidentified stallholders anywhere on a Sunday selling goods for cash. Any one of those 18,000 can turn up anywhere else in the state the following week. Some of the markets operate only once a month, some operate weekly, some operate on the third Saturday in a month and some every second month.

Mr Ramsden—There is no guarantee that they will be there the next time the market is on.

Mr KERR—If we were starting all over from scratch—which we can do, at least theoretically, here—could you imagine a scheme like this: you have a civil power of enforcement, a self-help remedy, which would give you a right to seize goods and to provide a notice in an appropriate form that they have been taken, as the chair says, to some place where you can then claim them back. Perhaps you would put in a clause which provides threefold or tenfold damages against you if you make a false seizure.

Mr CADMAN—Or frivolous.

Mr KERR—Yes, frivolous. In other words, you have this power, you notify them, and if—contrary to your claim—the goods are properly licensed and you have put the people to some inconvenience not only do they get the goods back but they also sting you for some money, which is a bit of a restraint on your overenthusiasm. But, in the absence of a claimback, the goods would be forfeited within a certain period of time. Wouldn't that suggestion give you a practical remedy? Otherwise most of these people would be really pissed off if they were to be continually disrupted and have goods seized. Isn't that suggestion going to be much more effective than almost anything else, if you can do that conveniently?

Mr Ramsden—Certainly the seizure of the goods prevents them from selling them: if they have not got the goods, they cannot sell them. Provided that we are confident that the goods are actually counterfeit, do breach the client's copyright and that we have the power, we can seize those goods. If they wish to front up at the local police station or the local magistrates court, where we deliver the goods, and claim something else, the onus of proof

falls back on to them to prove they have the licence or that they own the copyright, which is the reverse of what copyright law is now.

Mr CADMAN—This seems strange to me. Aren't we extending copyright into a whole lot of other areas which relate to design and all sorts of other protections that I would have thought existed till now? I think that it was the rather enthusiastic application by associations connected with the recording industry of the recording copyright provisions that brought about an inquiry by this committee to establish a reasonableness in the process. But, if you are talking about dresses, handbags and shoes, surely copyright is not the most appropriate process?

Mr KERR—Trademarks.

Mr Standen—In most cases copyright and trademarks go very much hand in hand in all of these cases. Where someone has a trademark, they will also have copyright in that trademark. The two remedies are almost indistinguishable in practice, so when you talk about copyright to a large degree you could almost take out the word 'copyright' and put in 'trademark' and you would have the same conversation.

Mr CADMAN—Should we be aware of that in our findings?

Mr Standen—Absolutely; copyright is one of a basket of intellectual property rights. Invariably, they go hand in hand and they supplement each other. In this case, where someone does have a dress and it may have a label on it, there is quite possibly copyright in the label and it is quite probably trademarked as well as well. They do go hand in hand and it is very difficult to actually distinguish between the two, and the remedies need to be consistent across the gamut of intellectual property legislation.

Mr KERR—Trademarks are immensely valuable. A beautifully handmade Louis Vuitton handbag is worth what it is because of the status that is attributed to that quality of craftsmanship and also because of the elite price that is attached to the Louis Vuitton name. It is the same with all these products.

Ms JULIE BISHOP—And there is the scarcity.

Mr KERR—Yes. So, to the extent that we recognise this and allow people to quite properly exploit their intellectual property in these, there is a huge price premium. The advantage for counterfeiters is obvious if they attach that mark to something that could be almost indistinguishable. I think that is what Mattel was saying: that with many of these products they need scientific investigation to tell whether the 'fraudulent' Barbie is a licensed product or not.

Mr Taylor—That is exactly the same situation now. That situation has actually worsened considerably with the economic situation in Asia to the point where substandard clothing is coming into Australia so cleverly and so accurately labelled—in the copied sign-in labels, the swing—tags and packaging—that it is indistinguishable, and quite often it has to be sent back to the country.

Quite often we will identify it as a counterfeit by a spelling mistake in something on the label. A recent line of Caterpillar clothing came out with two t's in Caterpillar, and it was only close inspection that picked it up. Once it was pointed out to Customs in Sydney, Customs started to seize quite a lot of it and other goods associated with those shipments. Yes, it is a difficult problem because they can go to a lot of trouble and telling the difference in the goods is quite difficult.

Mr KERR—If we were going back to first principles, would you be happy with a regime that put some penalty on you? If we were to allow seizure in a simplified form, would you be happy with a regime that said, 'If this seizure is in fact of goods which are properly in the hands of the seller, you are liable for some additional penalty'? It would be a sort of practical restraint. There have to be some checks and balances in this system. The checks and balances that presently exist are that you have to lumber up with 14 lawyers and a court order, which means that the cost of it is obviously a huge disincentive. Even I could not lumber up with 14 lawyers!

CHAIR—That's a big cheque.

Mr KERR—Yes, a big disincentive. Whilst I am all for the full employment of lawyers, if we were to think of something that would be more convenient for you there would still need to be some sort of check on the system. Perhaps a regime that required exemplary multiple damages in such instances might not be a bad check.

Mr Standen—We are very well aware that there need to be checks and balances and we certainly do not expect or ask for some sort of carte blanche authority to take what we like. Ken referred earlier to how he was very nervous about where the right boundary lies and about the proper checks and balances to put in place. We are aware of that. We do think it is reasonable to put some sorts of checks and balances on those that are trying to exercise some sort of law enforcement right, and an exemplary damages type of arrangement may be appropriate.

Mr Taylor—As long as we do not have to write too many cheques.

Mr KERR—That would then be in your hands.

CHAIR—Mr Taylor, given that time is getting away from us, perhaps we can see the video.

Mr Taylor—The contents of the video basically cover the topics that we have been discussing. We have taken extracts from three separate situations and each one is titled as it appears.

A video was then shown—

Mr Taylor—Watch the action here. He is talking to a New South Wales policeman, complaining about a member of the public.

... ..

It caused the intervention of the immigration department. I think Alistair Little mentioned this in his evidence.

... ..

CHAIR—These were backpackers, were they?

Mr Taylor—They came here specifically to sell at the concert.

... ..

This is a party plan presenter setting up a party plan in a private house. The people present are from Sportsgirl, Billabong, the *Sydney Morning Herald*, Rip Curl and Quiksilver. It was a set-up meeting.

... ..

Mr Standen—I might say, while you are watching that that these party plan operators operate in a very clandestine way through pager numbers, false names, changing names constantly, different people, different parties, different deliveries. We have not been able to obtain any police assistance with this party plan activity.

Mr Ramsden—Or assistance through the Department of Fair Trading, whom we have also lodged a complaint with.

Mr Taylor—I have explained in the eight-page attachment to the opening statement the details of costings and the money.

... ..

These are interviews with stallholders last month in Queen Victoria markets in Melbourne.

... ..

Mr Ramsden—None of these caps have been authorised by any of the marques that you see: Mercedes, Triumph, Ford. You can see that the gentleman has got the computer facilities and everything to do them on the spot there for you.

... ..

This gentleman has had civil action taken against him by a number of copyright owners previously. He just switches from one label to the next. The labels you see on the stall there, Prada, DKNY, Tommy Hilfiger, Gucci, Versace, he has not had civil action and also no undertakings to those, so he does them. His entire stall is full of counterfeit copyright merchandise.

... ..

Mr Taylor—These are Calvin Klein sweaters.

.....

Mr Ramsden—It is quite interesting to listen to the conversation here. That alludes to your comment before, Mr Kerr, about whether they claim it is real or not. They certainly do.

Mr Standen—I want to make the point that, as rights owners, we are very interested in exercising any remedies available to us exercising self-help. We ask for effective, efficient remedies. But, as you have seen, it is a large scale fraud on the public. We believe much stronger law enforcement needs to be involved. It is not just infringement of a private right, although it is a theft; it is also a fraud against the public.

Mr CADMAN—What about the point that the price is so ridiculously different that nobody but the most gullible and naive member of the public would ever dream they were getting a real product.

Mr Taylor—The problem now with technology is that it has changed so much. When we first started to do this work and when the ACAG formed, the biggest single problem was counterfeit T-shirts. They were normally plain coloured T-shirts printed in one colour, black or white, with the brand name on it and sometimes the logo. That has changed quite considerably now. We now have clothing sold by party plans, we have sewn-in labels and iron-on transfers, we have computers that can scan a genuine label and, with the bush of a button, print it back out, if you have the right paper, almost identically. That is far beyond what the public would be able to tell.

In the garment industry the public has traditionally been able to rely on the sewn-in label. Mum went into the shop, picked up the shirt and said, ‘Yes, that’s Bonds. It’s a good brand.’ If it is \$10 instead of \$20, she might think she is getting a bargain when that might not be the case. The quality of the counterfeit products coming in from Asia, from Thailand and from Indonesia at present is second to none. It is better quality counterfeit than I have seen in the 10 years that I have been involved in this industry.

Mr CADMAN—So you are saying that they can get for half price a product which is equivalent to the original?

Mr Taylor—No.

Ms JULIE BISHOP—With a designer label, but not the real one.

Mr Taylor—That is right.

Mr Ramsden—They are normally made with inferior fabric; a lighter fabric. In the case of footwear, it is made with inferior products. Whilst it has the name on it, whilst it is exceptionally well made, and whilst mum and dad are probably not aware of any difference, there is a substantial difference in the quality of the product. Brand companies such as Billabong, Rip Curl and Levi are quality products. That is why they have their reputation. Counterfeit merchandise does not have the same quality, it does not have the same wearability, and that damages the reputation of those companies.

Mr Taylor—It is also important to consider the cost make-up of any product. It does not matter whether it is toys, CDs, clothing or whatever. If a company like Billabong or Sportsgirl is making it, they are paying proper wages. The workers are paying taxes.

Mr CADMAN—What about SOCOG? Are they paying proper wages? I am sorry, I did not mean to interrupt.

Mr Taylor—There is a large component of taxation and contribution to society generally, and also to the licensees or the owners of the copyright, because most of the copyright products are licensed back to the company which develops it.

Mr CADMAN—There is an investment in research and in advertising.

Mr Taylor—That is right.

Mr CADMAN—I acknowledge that.

Mr Taylor—And the pirate has none of that. We have been involved with the SOCOG program since April 1997. I think SOCOG are fortunate in a number of circumstances because they have a very specific product. They have very special protections. There is even a dedicated piece of legislation. They are also taking advantage of new security technology in their labelling. But I do not think at the end of the day it is going to entirely protect them from the migratory or the ambush type marketing that we see at events, like the Pearl Jam concert. I think there is still going to be an element of that in 12 months time when the event is actually on.

At the present moment, their program is being run very much along the same lines as the ACAG program has for the past few years. We identify stallholders. Every weekend we go to the markets and we serve notices. The notices are in several different languages—Chinese, Vietnamese, Korean and English. We serve the notices, and we tell the people what they are doing. We ask them to stop doing it. We give them time to stop doing it. I have been handed a sample of those notices with Vietnamese on the back that may interest the committee.

SOCOG has a similar notice, and I have just been handed one of them. There has been quite an education process with those two particular groups, with SOCOG and with the ACAG. But there reaches a point where there are certain people who are hardened. They are there, and they are not going to go away. The only way to make them go away is to prosecute them. Because markets operate without regulation, identifying them can be a very time consuming and a very costly exercise. You have to identify who they are and where they are, and then you suddenly find that they have moved somewhere else as soon as you initiate proceedings.

Ms JULIE BISHOP—The message I am certainly getting is that we are not talking about the one or two backyard manufacturers who put together some T-shirts and whip out to the Rolling Stones concerts.

Mr Taylor—No, we are not.

Ms JULIE BISHOP—You are talking about organised systematic dealing reaching endemic proportions.

Mr Taylor—In all of the concerts that I have attended, like Rolling Stones, Bon Jovi, Paul McCartney, the Bee Gees, I have seen no individual produce a product and take a product to a concert to sell by himself. It is always a group. It is always the same groups of people, and it is always organised.

Mr Ramsden—I was present at an arrest in Adelaide of a gentleman at a Rolling Stones concert. We tracked him through Sydney into Melbourne and finally arrested him in Adelaide. Part of his belongings was an around the world airline ticket which followed every single Rolling Stones concert around the world. In some cases he was on the same flight as the band, in and out of the countries. It is very, very organised.

Ms JULIE BISHOP—What happened to him? This is Harrison. You arrested him?

Mr Ramsden—That is correct. He was arrested and charged. I think he spent four days in gaol in Adelaide until his mum could wire his fine by American Express. He paid the fine and was released. He was escorted to the airport and put on a plane back to—

Ms JULIE BISHOP—The next concert.

Mr Ramsden—No, back to mum. He had the airline ticket taken and he went back home to England.

Mr Taylor—Harrison is a case in point. He was warned in Sydney in March 1993 at a Paul McCartney concert. He was warned at a Metallica concert, at a Madonna concert in 1993, again at a Madonna concert in Sydney in 1993 and at a Rolling Stones concert in Sydney before he got picked up at the Stones concert in Adelaide. This was a fellow who travelled out from the UK for every one of those concerts and followed the tour. It is an organised enterprise. There was a car load of counterfeits under surveillance. When Harrison was picked up, we thought we would go back with the police and get it. When we got back, the car full of counterfeits was gone.

Ms JULIE BISHOP—Did he bring the counterfeit items with him?

Mr Taylor—He brought it with him.

Ms JULIE BISHOP—So he brought it in.

Mr Taylor—Yes.

Mr Standen—It is the massive broad based organised nature of counterfeiting that we generally face that makes the present remedies unusable.

CHAIR—What do Customs do? Presumably he came through Customs with a suitcase or suitcases full of T-shirts.

Mr Taylor—In that case it was bandannas. You can fit probably 2,000 bandannas in a suitcase. It is only a strip of cloth.

CHAIR—Presumably he had nothing to declare, and he was not checked and he walked through. What if he were randomly checked?

Mr Standen—If he were randomly checked, if people had various copyright trademark notices in place, they may have picked it up and seized the product.

CHAIR—But they would not do anything just because you had 2,000 bandannas in your suitcase.

Mr Taylor—No.

CHAIR—That doesn't make them suspicious?

Mr Standen—One of our points was that counterfeit product, product that has copyright infringed, ought to be a prohibited import. At the moment it has to be for trade, and there are plenty of occasions where someone can say they have 3,000 relatives or something. There is not a definite line as to where—

CHAIR—Is there a problem with that, though? I will not ask people to put up their hands, but how many people have been overseas who have not purchased a T-shirt on a street corner in London or Washington or somewhere and brought it back? I agree with you about cracking down, but if you say that the sole basis for prohibiting an import is that it is counterfeit, probably every tourist that comes back into Australia who has bought a T-shirt from somewhere is going to be in breach of that law. You might say to me, 'That is fine.' I am just asking.

Mr Standen—There is more to it than that. Customs have their brochures, which are educational campaigns which explain what you can bring in and what you cannot bring in. No doubt customs officers would exercise some discretion. They already do if you bring in excess alcohol over the limit. They still allow you to go through. There is always going to be some discretion.

Ms JULIE BISHOP—So you say that counterfeit goods should be added to that list.

Mr Taylor—Yes, add it to the list. Part of the problem is that there is an attitude out there that it is okay to do all these things and bring it back in. It is not the one or two things we are worried about; it is the people who bring back suitcases and then sell products at the markets to pay for their holidays.

CHAIR—Maybe that is where the line can be drawn. If there are 200 T-shirts in a suitcase, you can hardly claim you have lots of nieces and nephews.

Mr Taylor—At the present moment, Immigration have some statistics along the lines of 280,000 passports in Australia issued each year. Some 200,000 use them to go to Bali once and never use them again. But just about every person who goes to Bali brings back a

suitcase of counterfeit goods. As to the most popular brands in Bali, in our last survey of the 90 top counterfeit brands, the top 10 brands were Australian brands, such as surf labels, because of the type of place it is. They bring those items back. We are seeing caps, bandannas, shorts, T-shirts, watches and wallets seized almost every day in shipments coming in through customs. The tourist has brought back a suitcase to Australia, sold the goods at markets and then thought, 'That was okay. I still have the business card from the shop in Bali.' So they order more goods or they go back to buy more goods to bring back. It is a serious problem. We lightheartedly ran the possibility of checking a flight from Bali one day with Customs, who said we would not dare look.

Mr KERR—I suppose you make a distinction between commercial amounts of goods.

Ms JULIE BISHOP—Trafficable amounts.

Mr KERR—I think the chairman is right. There is a diminuous principle here. Australians are notorious for their free and easy approach to life, but we have to live within certain parameters to a large extent. I think you are right: there is a difference between a tourist going to Bali and buying a couple of pairs of jeans for themselves and a scarf for their friends and that of putting 200 pairs of jeans in a suitcase.

Mr Standen—There at least needs to be some guideline or some presumption as to what a commercial quantity is. At the moment there is not, and it is variable.

Mr Ramsden—A suitcase full of T-shirts can quite happily pay for your Bali holiday. The question is: is that a trafficable amount? It certainly is when it pays for your Bali holiday.

Mr Taylor—Again, it comes back into the community untaxed, and it earns untaxed income. It takes away taxed income from companies that are manufacturing genuine product. Because, if people buy these sorts of products, they do not need to buy the genuine one.

Ms JULIE BISHOP—Let alone the issues in terms of the labour force that manufactured them. The sorts of expectations that we have in Australia as to the standards to which our manufacturers will adhere, of course, can be easily avoided.

Mr Ramsden—That is right.

CHAIR—I must draw this discussion to its conclusion, otherwise we will be well over time. I thank you for your submissions to the inquiry and also for the discussion today. It has been most useful.

Mr Taylor—On behalf of our group, we would like to thank the committee for giving us the opportunity to bring our problem to you.

Mr Ramsden—If there is anything else, feel free to contact us at any time to discuss it further.

CHAIR—Thank you.

[12.42 p.m.]

SUGDEN, Mr Paul Thomas, Lecturer in Law, University of Queensland

CHAIR—I welcome Mr Sugden. 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 the parliament. We are in receipt of your submission, and I invite you to make some opening comments.

Mr Sugden—I have six points. First: unifying the remedies across the intellectual property areas. My research basically shows that there is a great bias towards remedies for copyright. Copyright has phenomenally more remedies than the other areas—such as trademarks, patents and trade practices—with two particular areas being conversion damages and additional damages. Those two seem to be missing from the other areas. With trademarks this seems to be an illogical step, because a lot of the reasons why they are granted under copyright would be the same under trademark law or trade practices. That was the first one: to really unify the remedies across the jurisdictional areas.

Second: abolishing the requirement for election by a plaintiff between a count of profits or damages and, by abolishing that, allowing a plaintiff to claim both a count of profits and damages. The reason for that is that there does not seem to be any philosophical reason why the two could not be claimed. There is the case of *Milpurrurru*—I have forgotten the other party—where they did not award a count of profits but awarded all forms of damages. There were comments in the case that supported arguments that there should be an abolition of the distinction.

Third: maintain the innocent infringer defence. But I agree with the other submissions that I have been reading about the difficulty of proving knowledge. From a practical point of view, from my experiences with the Australian film and video surveillance group, the way that that has been solved was that they basically would go around all of the video outlets and lecture and instruct them. They really spent quite a bit of time and effort doing that, to get a case going. So maybe the issue we have to really look at is a way of loosening up on the issue of knowledge.

Fourth: criminal sanctions should be maintained. I am very pro the criminal sanctions. I am probably a bit on my own in the remedies areas of lawyers on this, because in a remedies conference recently they were very pro the idea that civil remedies were deterrents to people doing things. I disagree with that on the grounds that, really, in a commercial world, if there is a profit to be made and they can make a quick buck by circumventing things, there is often a philosophy to do it. Whereas increasing the possibility that they will go to jail and lose their liberty to be out there doing things is going to have a stronger deterrent effect than just a commercial solution. So I am very pro that.

In cases like *Columbia Pictures v. Luckins* a criminal remedy may have had more of an effect on the defendant than a civil one, because as soon as he got the civil award he went and bankrupted himself, and so thwarted the civil award. So the great problem with civil

awards is that the next step can be to defeat the award by bankruptcy proceedings. Unless the defendant has something to lose by being bankrupted, then they are more willing to do that than to pay the fine. So it is the quid pro quo; it is a sort of balancing trick on that issue. I am very pro the criminal actions.

Also, I am very encouraged that the criminal sanctions have been increased and used in the digital agenda bill for the purposes of Internet issues, because I think that will really cause people to suddenly focus. I know from research that it has in America, where they use criminal penalties, particularly in the trade practices arena. The directors of a company can go to jail, even if the company commits the offence. So you do not get the issue here that often you have to bring another action if the company gets wound up. You do have to prove that it was under section 592 of the corporations code—a completely separate issue which means another action to try to get it personally against them. In America there is a stronger angle on the criminal sanctions, which does focus directors' attention on that issue.

CHAIR—In your studies have you looked at the comparison between Australian legislation and, say, UK legislation?

Mr Sugden—Yes.

CHAIR—One of the things I am interested in—and maybe you can help me with this—is what we were discussing earlier this morning and in previous submissions, that is, the UK provisions in relation to seizure and forfeiture. Are you able to elucidate them for us?

Mr Sugden—Seizing and forfeiture in Britain is, as I understand it, very similar to here, but stronger. I think this is because of the influence of Europe and their approaches to these sorts of matters. France is a lot stronger on those issues than even Britain is, particularly in the area of fashion. They have particular fashion laws. So they can enforce those and, with the influence of France, they are stronger. Did you want practical—

CHAIR—To take up the discussion this morning, this related to the example of counterfeit items of clothing being sold at markets, rock concerts or the like. As I understand the UK provisions, there is a provision where a person can be effectively authorised by the court to go out, serve a notice on somebody alleged to be dealing in those counterfeit items, seize the items and deliver them up to the court. The notice has the effect of saying, 'If you want to challenge this, this is the process by which you can go through it.'

Mr Sugden—But that is already very similar to the rights that Customs has—Customs officers have the power to seize. Really, it has been extended a bit further than Customs officers and it allows someone virtually to do an instant Anton Pillar order: you just turn up and seize it.

CHAIR—You do not need a dozen QCs with you.

Mr Sugden—It saves a lot of time and money.

CHAIR—Yes.

Mr Sugden—So that does work and that is appropriate, and I have seen that operate.

CHAIR—Would that be an appropriate way to develop the law here?

Mr Sugden—I think that would be a fabulous way. That is excellent for the market situation, which we do not have here unless you have already set it up beforehand and you know that it is going to occur or that it regularly occurs, so that you can then pounce by having, as you said, the order from the court with the QCs involved beforehand.

What I would like to see though is that it be tailored into a criminal action as well against the people who did it. Yes, it works instantly in a civil action but how do you deter them from doing it? Yes, they lose the goods but it does not necessarily put them out of business immediately, which we had here with a sarong design person—the case of Stephen Hein in 1990. The person was even importing them from the person that was making them for the legitimate owner in India. He had 4,000 or 5,000 sarongs; literally five or six weeks later he had another set of sarongs.

We had gone through the process of getting the order against him, seizing them without his notice, processing him through the court and there was a problem in that there was no real deterrence. Yes, he paid about \$12,000 plus costs as damages for the whole event but it did not really deter him. So there must have been a profit margin at 50c a sarong, which is what he attested to as his profit margin, that meant that there was something more for him to make.

CHAIR—How do you tailor a criminal action into that?

Mr Sugden—You have to actually tailor in the thing that it is accepted as evidence by a criminal court that the document that you used to seize would also be proof of ownership of the other party. That is the basis which you can then use to bring the criminal proceeding.

CHAIR—Surely that would have to be a rebuttable presumption in the court?

Mr Sugden—Yes, I am not completely on one side to say that we should go out and lynch everybody. The joy of Australia is that you do not lynch people, whereas other countries may.

CHAIR—So you are saying that, if a notice were served upon an individual and the goods were seized, that notice could then form the basis of proof against the individual in some criminal action as well and would be open to challenge in that action?

Mr Sugden—Yes, so it is up to them to then bring the defence in the criminal proceeding as well in the civil proceeding. But you do not force the party to then go through the onerous requirements of instituting the criminal proceeding; you have the evidence. It is a bit like the certificate in a trademark case and a patent case. It is accepted that you had that as your ownership—a bit like a title deed—to start the thing, rather than then going into the issues of having to prove that it all existed.

CHAIR—Does the UK legislation go that far?

Mr Sugden—No, that is why I suggested that we went further.

CHAIR—So it stops at the civil?

Mr Sugden—Yes, it stops at the civil. They have not really used the criminal. They abolished a lot of their criminal remedies earlier with the 1988 act because they were not in use, whereas every time we have looked at our criminal remedies we have managed to keep them going for different purposes, and I think the technology age is going to give a good reason to have them.

Mr CADMAN—We have looked at the big end of town during the discussion but what about the little end of town?

Mr Sugden—The little end of town is probably where I have a lot more experience in advising. The little end of town seems to find it the hardest to bring an action. I do pro bono advice work for artists and I find that most of them cannot bring a single action.

A classic case was that one artist in Brisbane did a design which, as it turns out, has been used for the carpet in the Cairns international airport and she could not afford to bring an action against the people who did that. To bring the action would probably cost her about \$12,000 and then if she were fighting against big firms and big companies they could tie her up. She is an artist with \$16,000 income per year, and she is really stuck. How do we balance that to give artists their rights? I thought that was ideally the concept behind the original idea.

Mr CADMAN—Did she get any remuneration at all?

Mr Sugden—None whatsoever.

Mr CADMAN—So they just knocked it off and reproduced it?

Mr Sugden—Yes.

Ms JULIE BISHOP—According to your submission, she had initial discussions with them. She presumably provided them with her designs, the people said, ‘No, we’re not using them,’ and then, lo and behold, they turn up on the carpets.

Mr Sugden—And they had the gall to actually invite her to the opening! So she arrived at the opening, walked in and found that she was walking on what was basically her carpet; it had the design that she had given but that they had refused.

What added to the complications was that she had licensed it, for the purposes of fabric design, to another company and the other company did not want to get involved and she literally got stuck between two sides who would not say anything. By the time she came to me it was a year after the event, so there were real difficulties if she wanted instant remedies.

Ms JULIE BISHOP—And the government consumer protection and fair trading agencies were not interested?

Mr Sugden—No.

Mr CADMAN—I know of a similar experience to yours: somebody thinks of a program that has titles, ideas and activities and a government department does what you have described. What remedies are there?

Mr Sugden—If the government department takes it completely and uses all of that, your remedy is really against the government department.

Mr CADMAN—How does a little person get on in those circumstances?

Mr Sugden—It is very difficult, although I have one example where someone did succeed. He succeeded against the education department with a group of software. One of my students who designed a software package managed to succeed against the education department by showing that he owned it, that they copied it and that they did not have permission. But he was one of the lucky ones with the knowledge and the ability just to run it himself, rather than rely on a third party to run it. Basically he would get bits and pieces of advice from me, and he succeeded. In the end I think the settlement was around \$70,000, which he was paid for the number of copies that had been infringed. It was for a database or something. I did not really understand what the computer did; I am not as computer literate as I probably should be.

Mr CADMAN—In your experience is that a common process—‘No, we are not interested in this. Take it away,’ and then it turns up at a later stage?

Mr Sugden—Yes, very much so, and then it is, ‘Sue us or fight us.’

Mr CADMAN—Is that the normal technique?

Mr Sugden—Yes, often with artists. The other one is that they think they have bought it. You have fights with people who have commissioned something and who think they have bought it, but they have not looked at the law. The general education of the public is that if you commission something you own it, whereas that does not follow under the Copyright Act. So you find that they think they own it when in fact they do not. Again, you get into all the problems that then the artist is forced to prove all these issues up front.

And I have seen the other trick that can be played in practice, which is that, if the artist is forced to put up security against costs, they get stuck again. Most of them cannot put up a security to support an action. I have seen actions that have been twisted the other way around so that the artist would have to be giving security, and they have not got the security to do that.

It is a matter of the crossover issues between the rules of evidence and the substantive law. Substantive law says they have lots of rights but then the rules of evidence and the rules in the courts of the tactical issues that you can do mean that they can defeat right more

through might than through right. It always depends on whom you take on. I know, from having advised clients, that you would pick someone that was not really going to be the biggest fight, rather than someone who was going to fight and so you would have the chance of losing. So it is a really dicey issue, but that is where I think this is quite good because you get a chance to review everything.

CHAIR—Thank you for your submission and also for coming along and discussing this.

Mr Sugden—Thank you, it was a pleasure.

Committee adjourned at 1.00 p.m.

