



COMMONWEALTH OF AUSTRALIA

SENATE

Official Committee Hansard

LEGAL AND CONSTITUTIONAL LEGISLATION
COMMITTEE

Reference: Copyright Amendment Bill (No. 2) 1997

FRIDAY, 27 FEBRUARY 1998

CANBERRA

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SENATE

FRIDAY, 27 FEBRUARY 1998

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Members: Senator Abetz (*Chair*), Senator McKiernan (*Deputy Chair*), Senators Bolkus, Coonan, Murray and O'Chee

Participating members: Senators Bartlett, Brown, Bob Collins, Colston, Cooney, Ferris, Gibbs, Harradine, Lundy, Mackay, Margetts, McGauran, Murphy and Neal

Senators in attendance: Senators Abetz, Bartlett, Cooney, McKiernan, Murphy and O'Chee

Matter referred by the Senate for inquiry into and report on:
Copyright Amendment Bill (No. 2) 1997

WITNESSES

CANDI, Mr Emmanuel, Executive Director, Australian Record Industry Association Ltd, Level 8, 263 Clarence Street, Sydney, New South Wales, 2000 172

FABINYI, Mr Jeremy Rohan, Chief Executive Officer, Australian Music Publishers Association Ltd, 6-12 Atchison Street, St Leonards, New South Wales, 2065 . . . 172

ROTHNIE, Mr Warwick, Partner, Mallesons Stephen Jaques, Level 28, North Tower, 525 Collins Street, Melbourne, Victoria 172

CRESWELL, Mr Christopher Colin, Assistant Secretary, Intellectual Property Branch, Attorney-General's Department, Robert Garran Offices, Barton, ACT, 2600 . . 185

FOX, Mr Stephen William, Senior Government Lawyer, Intellectual Property Branch, Attorney-General's Department, Robert Garran Offices, Barton, ACT, 2600 . . 185

Committee met at 9.02 a.m.

CHAIR—I declare open this meeting of the Senate Legal and Constitutional Legislation Committee. This is the committee's fifth public hearing on the Copyright Amendment Bill (No. 2) 1997. It should be noted that these proceedings and submissions given as evidence are protected by parliamentary privilege. It should also be noted that the committee prefers all evidence to be given in public. However, should a witness at any stage wish to give evidence or a part of their evidence or answers to specific questions in private, he or she may apply to do so and the committee will consider that request.

Before calling the committee to order and asking representatives of ARIA and AMPAL to address us, on the public record I wish to correct what appeared in this morning's *Australian*, as I understand it anyway, in the second paragraph of an article titled 'Bolkus queries role of A-G in Hindmarsh case'. The second paragraph says:

A Senate hearing yesterday revealed Mr Williams and former solicitor-general Gavan Griffith—that should have been Dr Gavan Griffith QC,—

decided against releasing a letter confirming Justice Callinan provided legal opinion to the Howard Government about the Hindmarsh Island bridge law.

As I understand it, that was not the evidence at all. The evidence was that it was agreed that oral advice would be given to Mr Stephen Kenny as to the Commonwealth's attitude in the matter and not written advice. As I understand it, that letter was sent to the committee by Justice Callinan and that is where it remained until yesterday.

Senator MURPHY—Mr Chairman, has that matter any relevance to this particular hearing?

CHAIR—No, but it is the same committee, the Senate Legal and Constitutional Legislation Committee, which dealt with the estimates yesterday of which that alleges to be a report. I just want to clear up the record. The *Hansard*, I am sure, when it becomes available, will—

Senator MURPHY—That is an interesting position, given your criticism of me with regard to asking questions about the matters dealt with at this time.

Senator McKIERNAN—I actually object to the manner in which you have raised that. You did not even give me the courtesy of letting me know what was happening so I can check the matter. You say it is to clear up the facts. It is not clearing anything up; I suggest that it has further muddied the waters around this matter. There are ways and means and conventions by which we can address difficulties like this and what you have just done now is not the way to do it.

CHAIR—The *Hansard* record will speak for itself quite clearly.

Senator McKIERNAN—Mr Chairman, there was no need to do what you did.

CHAIR—It is unfortunately part and parcel of a substantial degree of misinformation that has been circulated.

Senator MURPHY—You say that matters ought to be corrected. You should wait for the *Hansard* record and seek to correct the *Hansard* record when the Senate sits next week. That is what you should do.

CHAIR—No, no, there is no need to correct the *Hansard* record. The *Hansard* record is not available as yet.

Senator MURPHY—You say that it is wrong.

CHAIR—It is wrong. That is right.

Senator MURPHY—If what is reported in the paper is wrong, then you get that opportunity to correct it next week when the Senate sits.

CHAIR—Not when people are seeking to make misinformation and mischief out of a misrepresentation of what occurred at a committee that I chaired yesterday.

[9.04 a.m.]

CANDI, Mr Emmanuel, Executive Director, Australian Record Industry Association Ltd, Level 8, 263 Clarence Street, Sydney, New South Wales, 2000

FABINYI, Mr Jeremy Rohan, Chief Executive Officer, Australian Music Publishers Association Ltd, 6-12 Atchison Street, St Leonards, New South Wales, 2065

ROTHNIE, Mr Warwick, Partner, Mallesons Stephen Jaques, Level 28, North Tower, 525 Collins Street, Melbourne, Victoria

CHAIR—I now call the committee to order and welcome Mr Warwick Rothnie, Mr Emmanuel Candi and Mr Jeremy Fabinyi, representing ARIA and AMPAL and—

Mr Fabinyi—Just that.

CHAIR—Just ARIA and AMPAL?

Mr Fabinyi—Mr Candi represents ARIA and I represent AMPAL.

CHAIR—Yes, and what about Mr Warwick Rothnie in the middle?

Mr Fabinyi—He represents us both.

CHAIR—That is why he is sitting in the middle. Good. The committee has before it a supplementary submission numbered 153A, and I understand that you have no objection to that submission being made public. Good. The reason that I have just asked that again on the public record is that we did get it on yellow paper, which suggests that it is confidential and it was headed up ‘Mallesons Stephen Jaques confidential communication’.

Mr Candi—Yes.

CHAIR—But that is for the public record.

Mr Candi—Yes.

CHAIR—Thank you. That is No. 153A. That is now part of the proceedings. I invite you to make some opening remarks after which we will enter into some time for questions.

Mr Candi—Mr Chairman and members of the committee, this is a pretty complex matter. Now that we are getting into the technicalities of the bill, I will ask Mr Rothnie to provide the first part of the opening address and, given that we were able to see the Attorney-General’s paper late last night, and it was quite late, we have a few remarks that we will make about that—they are certainly not exhaustive—if time permits.

CHAIR—Good.

Mr Candi—That being said, I will hand it over to Warwick to provide the opinion.

Mr Rothnie—In summary, what the opinion that we have given to ARIA and AMPAL is saying is that we think this bill potentially places Australia in breach of the TRIPs—trade related aspects of intellectual property agreement—part of the World Trade Organisation for two very broad reasons. The first reason is that it will potentially allow importation of pirated copyright goods, not just what are being called legitimate copies. The second reason is that it takes away from the effective enforcement procedures.

I will go through each of those aspects in a bit more detail. Before I do so, as is outlined in our advice to ARIA and AMPAL, I should say that it is quite clear that TRIPs does not lay down any particular rules about parallel imports. That is clear from article 6 of the agreement. The problems that we see arise from later provisions in relation to enforcement, and that is article 41 and article 51 in particular.

Article 41 requires members of TRIPs or the World Trade Organisation to provide effective enforcement procedures for intellectual copyrights, of which copyright is one, and article 51 requires members to prevent the importation of pirated copyright goods. 'Pirated copyright goods' for these purposes is defined in a footnote in the treaty, which is set out in our advice. In very broad terms, it means goods that have been made without the consent of the copyright owner and which, if made in Australia, would have been an infringement of copyright here.

The bill in its present terms rules out importation and sale in Australia of pirated copyright goods in probably three situations. The first situation is in those countries where there is no copyright law. The second situation is in those countries where the recordings can be made through mechanical licences. The third situation quite possibly, and I will say this is more qualified than in the first two situations, is situations where unauthorised compilation type records—the sort of 'best of' type recordings—are being made. These three types of goods are not legitimate copies in any sense. They are not made with the consent of any copyright owner and, quite clearly, fall within the definition of pirated copyright goods for the purposes of TRIPs.

If the committee wishes, I can go through the detail of the legislative provisions, but I suspect that that might be something more appropriate for questions. I just say in passing, because it was something that did come up at one of the earlier sessions and I was asked to provide some comments on it, that I do not think paragraph 10(1)(h), which inserts a new paragraph into the definition of 'infringing copy' has any relevance to this particular issue. Once again, the reasons for that are set out in our advice.

That is dealing with allowing importation of pirated copyright goods as opposed to legitimate copies. The other concern that we have with the bill focuses very much on section 130A, which is seen as providing substantial procedural assistance, I think is the term used for it. We do not think that this will work in practice. It certainly will not provide the sort of practical relief that is available at the moment for a number of reasons. The first reason is that, as the Attorney-General's Department acknowledges in its submission, in any event the copyright owner must prove all of the elements required for sections 37 or 38, 102 or 103 before the need for any attempt to prove the defence arises.

The second reason is that trying to prove the sort of double negative of something not being a non-infringing copy would be virtually impossible in practice. Based on the way that they have dealt with similar things in other legislation, the courts are likely to approach that on the basis that very slight evidence indeed would be required to shift that onus.

The third reason that we argue that the bill will not provide for effective enforcement procedures is that in practical terms in most situations it will be virtually impossible to get Customs seizure or interlocutory injunctions. It is very likely that there will be quite a lot of delays in any litigation that might attempt to be taken out of that. This arises for a number of reasons. The first reason is that Customs seizure is not an end in itself. At the moment in practice it can turn out to be that, but Customs seizure is really only there to enable copyright owners to block the release of goods into the market while they take action in court to get interlocutory injunctions restraining further release. The legislation currently, as required under

TRIPs, requires copyright owners to do that within 10 days of seizure, which is possibly extendable to another 10 days with the agreement of Customs. That court action has to be initiated and must persuade a court to grant an injunction. As part of that court action, the copyright owner will have to give an undertaking to the court that it will pay any damages that the court sees fit to compensate the importer if the copyright owner ultimately loses the case. That means that only a foolhardy copyright owner would commence any action of those sorts without having first satisfied themselves and got their case in order on section 44D type issues. The exposure to costs and damages is very real. It can certainly run into tens of thousands of dollars; it could run into hundreds of thousands of dollars, and it could be much, much more depending on the quantity of goods that comes in and how long business affairs are disrupted.

The second reason that the enforcement procedures will not be effective is that the copyright owner, who in the end will have to present evidence about these things, will find that it will take a long time and be quite expensive to get evidence about the nature of foreign laws and ownership rights and the circumstances in which things are made. That sort of expert evidence will take a long time and be very expensive to get together.

The third reason is a very practical one that involves the way seizure works at the moment. In all my dealings with Customs I have certainly found that they have been extremely cooperative and they do everything they can to enforce the law, although they do not have fantastic resources to do so. In practice, they are usually only able to seize incoming pirated goods in two situations. One is where you can actually give them information about the ship, plane or whatever that is coming in, where it is coming from and, often, the name of the importer. As you can imagine, quite often it is very difficult to get that sort of detailed information. The other way that we have been able to deal with this in practice is to identify the authorised importers and then say to Customs, 'If somebody is found importing stuff in this category and they are not on this list, we want to know about it. We will come and have a look at it and take things from there.' If this legislation is passed in its current form, that will not work at all because things will be coming in from any number of places; there will be the possibility for quite legitimate things coming in and you will not be able to identify the authorised importer any more.

I am not sure that there is going to be much value in going through these points in any great detail, but I am happy to expand on anything. I hand back to you.

Mr Candi—I want to emphasise a couple of the points made, particularly on the impractical aspects of the legislation. I have no doubts in saying that we think that this act is completely deficient. The Attorney-General's Department has tried its best to meet the requirements that it was given, but it lacks practical experience. I will take you through what we are saying.

Contrary to what is perhaps implied and maybe even stated in the Attorney-General's paper, and looking at the procedure by which we will be trying to prove piracy cases should this become law, the burden of proof will become a lot more burdensome on the copyright holder. The Attorney-General's Department noted a few of the things that we have to prove, but it forgot to add that we will now have to prove where the suspected offending disc was made and what the law of that country is. Let me go back a step.

At present, the law of this country is very simple: there is an aspect of law that relates to things that are imported into this country without the permission of the copyright holder in this country that is known to people in Australia and to the Federal Court of Australia, because fortunately it happens to know what the law of Australia is. If this bill is passed by the Senate,

that will no longer be the case. It remains as a starting position and then, once the importer has traversed the little hurdle that he is given, we would have to find out where the disc was made and the laws of the country where it was made.

Not uncommonly, as Mr Speck outlined in Sydney, pirate trade very often proceeds on the following basis: the discs are made in country X, they are shipped to country Y and the packaging, the jewel cases and the plastic boxes come from another country. This is so that the origin of the discs is ultimately very hard to work out. The places that counterfeit stuff comes from include ex-Iron Curtain countries, China and many Asian countries. Therefore, it is very difficult to prove to an Australian court of law what the law of, say, China is. Certainly none of us would be able to provide affidavits to that effect. We know that the Federal Court would require an expert witness, probably someone brought from the country concerned.

Singapore is often referred to as a stellar example of the coalition's policy. The other day I was speaking to my counterparts in Singapore and they tell me that piracy is out of control in Singapore. One of the reasons for that is simply that China is not that far away. The comment from my counterpart was, 'We cannot get anyone from China who can tell a Singapore court what the actual law of China is to the satisfaction of the court.' Therefore, they fall down each time.

We are very disappointed that the legislation has even got this far. We are very disappointed that all the practical aspects of maintaining a successful anti-piracy regime—and Australia has one of the best because of its present law, the amount of money that we spend and the resources that we put into it—have in effect been pushed aside. I must say that, if the Senate was ultimately to pass this, it would have to be passed on the basis that it can see that piracy will get worse and, in most instances, we will be without a practical remedy to stop it. We will not be in a position to get injunctions. I say this as an ex-litigation lawyer who has run plenty of these cases and who has worked as general counsel in many piracy cases year in and year out.

Unless we can get an injunction to freeze the stocks, the practical damage in the marketplace is going to happen. Without an injunction, we will need time to find out the country the things were made in, the law of the country, plus all the elements that go to proving title. Let me explain a couple of them to you. What studio was the recording made in? Who was the engineer? Who was the producer? Who were the musicians? What was the corporate personality of the company that owned the studio or the recordings or the contracts with the artist at that time, and every chain or title in that recorder's career as it has gone through the years.

In many cases, what the pirates actually do focus on are recording artists who have changed record companies five or six times over 20 or 30 years, because the paper trail becomes more complex by a factor of five or six. We have to prove the licence agreements back to Australia, the presence of the copyright in Australia, and on we go. Without the ability to get an injunction, plus all the extra things that this act is going to require, we will be looking at at least a year before we get all those things together. A quick run will be about six months. Jeremy might like to offer a time line opinion on that as well.

The point is this: unless the stocks are frozen, and we are going through that rigmarole, the sales will take place and the damage will be done. Very typically, the corporation that is usually pushing this stuff is a \$2 company, and it will be bare three or four years down the track, when we finish the Federal Court case and we get awarded damages. And more typically

under this regime, of course, the real promoter or the real operator behind what will be imports in here will be out of the jurisdiction. So whether he has assets or not is irrelevant. He will be out of the jurisdiction and unattainable by us or the law of this land.

So I think that when these things start to be understood you can see why—as a quick traversing of the argument—Mr Dwyer originally, I think, for the ACTU or the PSA, said, ‘Just reverse the onus of proof.’ Of course, this has become the mantra, or one of the sayings, behind what the government is going to do in this act. But then we find that further qualifications upon qualifications arise. Then last night we read in the Attorney-General’s paper that the government did not say that it was going to reverse the onus of proof, and it is not going to do that. It is going to try to shift a part of it. Then we come back to the fundamental point. The onus of proof has not been reversed. It cannot be reversed in a practical sense. The bill is deficient on one of the fundamental policy decisions behind the open imports policy, which is: we will fix the piracy problem by making it virtually impossible for people to really want to import unless they know everything that is going on. The average importer under this proposed bill will not need to know what is going on at all. I will tell you as an experienced litigation lawyer how they will traverse it. It is very simple. They will just get a statutory declaration or a letter from the person they bought it from out of this jurisdiction—in Bulgaria, America or wherever—saying, ‘I got it from a legitimate source.’

CHAIR—But would they not have to nominate a legitimate source?

Mr Candi—He can say, ‘I bought this from XYZ wholesale company,’ and say he got it from a legitimate source. That does not get you very far. People who counterfeit records have no problems with writing a bogus letter. In fact, they have no problems in lining up dozens of bogus licence agreements to give themselves the appearance of someone who had a licence in the first place. In addition to that—and it was with some trepidation that we did put that on the public record, because it is a bit of a blueprint on how to do us over—I can nominate, but I will not nominate on the public record, any number of lawyers around town who advised people the last time there was a big loophole in the act to be very robust. In fact, I will tell you exactly what they will tell a would-be infringer under this: ‘Don’t provide anything. If the copyright owner writes to you and says, “Tell us where you got them from,” don’t provide anything, because by the time you get through the practical interim steps of Federal Court or Supreme Court proceedings and the guy has forced you, you will be so many months down the track that the stocks will have been sold anyway.’ For those of us with practical experience in the law, the interlocutory steps or the stalling procedures that are adopted in litigation in the Federal Court, and knowing that it takes so long to get into the list because everyone is so busy, that is the best way to foil any anti-piracy case.

CHAIR—I thought the Federal Court was pretty strict these days on setting timetables. I would have thought that, to get an injunction, if you had made an inquiry of the other side and they had simply refused to respond and cooperate, that might be of some persuasive effect on the court in determining an injunction.

Mr Candi—That is a good starting point. But where do we go from there? I have been through this with people in the government and elsewhere. What do we then say to the court? What was the country of manufacture? What was the law of manufacture? How are we going to go for an injunction knowing that we have to give a cross-undertaking as to damages, which is a very serious pledge to the court, without any ability to know—and verily believe to be so, as you are required in an affidavit to testify—that we can be certain about what is going on. So what this bill does is take away a longstanding right—and the attorney-generals have correctly pointed out that it is a very longstanding right—a property right, and replace it with

something, on instructions of the government, which is impractical, uncertain and—to create a new word—loopholish.

To take that further, if you are going to allow imports of recordings that were put on the market in a country by the copyright owner, and if you are going to allow imports from countries where there is no copyright law and where the law of the property country does not provide for any copyright, then you have to go back to another country. So you are adding uncertainty upon uncertainty. The other fairly major point is that you are also allowing recordings to come in which, in effect, in the practice of copyright business are unauthorised in the sense that the composer and the publisher did not consent to their being put on the market in the first place at all because they were made under statutory licences.

CHAIR—I will invite you to wind up, because Jeremy wants to say something as well. We have another 15 minutes left.

Mr Candi—Can I just make two points? In the Attorney-General's Department, they rely on Singapore and Canada. The opening page says that Canada does not have exclusive rights. But then you get to page 10, and in a footnote you find that it actually does, but there may be some points where it is a bit weak. My understanding of the law of Canada is that their exclusive parallel import laws are nearly as strong as ours, and it would be incorrect to say that they do not have exclusive parallel import laws.

Singapore is a disaster. It was made a free port in the 1980s. It is the only country in the last 10 years, with Malaysia, that has gone to this free port idea for everything, including copyright, and piracy is a disaster. Every year it has got out of control. The current levels are up to 30 per cent, and local activity—that is, what the record companies are doing with local artists—is not even one per cent. You have Summit Technologies, which has put in a submission to this committee. It is a Singapore based company that has had to come to Australia to start new factories because Singapore is an absolute disaster.

Mr Fabinyi—I plan to be uncharacteristically brief, because this is a technical matter. I am not a lawyer. I am flanked by some experts in the matter so I will leave it to them. But I do want to make a couple of points. The first is that in most of the discussion and the written submissions about piracy the discussion is about the piracy of the sound recordings. Of course, a pirated sound recording is usually accompanied by a piracy of the musical work as well. But there are many instances where the rights of the copyright owners in the musical works are being abused and subject to piracy considerations where the rights to the sound recordings may in fact have been legitimately licensed. That is a point that we need to stress. Certainly, any of the statistics being presented are talking about sound recording piracy. My members and the composers and publishers of Australia are concerned about piracy in the musical works.

I will touch briefly on the areas where these things can arise, that is, where the consent of the copyright owner was never given for the recording of the musical work: imports from countries with no copyright law; imports from countries where everyone is aware that the copyright law is ineffective and the mechanisms are not in place to collect the royalties; and imports of works which are out of copyright overseas but which are in copyright in Australia. This has been described by the PSA as unfair competition to domestic suppliers. If you have to pay copyright royalties if the record was made in Australia but you do not have to pay copyright if the record was made in a country outside Australia, that is clearly unfair competition to domestic suppliers.

This bill would also allow the situation where a record that was made for promotional purposes, for example, with no royalties paid could be imported and made available for retail sale. There is no limitation that the work must have been licensed for retail sale. It could have been licensed for any purpose, such as licensed on a free basis for promotional purposes or licensed under a statutory exception. For example, it may have been originally licensed in a country for educational purposes or some other statutory exception, yet this bill would allow that musical work to be imported into the country with no royalties paid.

I will touch briefly on a couple of items in the Attorney-General's submission. Again, I will leave the technical details to others. But I must comment on a couple of points, one being the comment about market conditions in Australia. The whole discussion about market conditions and the notion that piracy is dodgy cassettes where you hear the needle drop on the record as it is being recorded does not reflect the level of piracy these days. Piracy is a very sophisticated business and counterfeit records are just that; they are impossible to tell from the real product.

As to the idea that we do not have market stalls in Australia—it may be that they do not have market stalls in this part of the world. Certainly, where I live in Bondi there are plenty of market stalls. When there was a proliferation of bootleg recordings circulating around, there were a huge number of new outlets for recorded music, such as service stations and Crazy Clints discount stores—a thousand different places where piracy did flourish and would flourish under these conditions.

I will briefly mention the rather wishful and hopeful thinking in the Attorney-General's submission about the technological solutions for the future in terms of being able to track piracy. It mentions that the International Standard Recording Code is already included on most legitimate CDs. Unfortunately, that is not the case. There is a movement towards including it on CDs. You would not say it is included on most at the moment. Of course, the ISRC is about identifying the sound recording, just as the ISWC is about identifying musical work. It is not of itself an anti-piracy measure.

They go on to say that further measures are under development and consideration. They are under development and consideration; they are not effective, they are not applicable and they do not exist at the moment. This bill would come into existence at the moment in an environment where there is no technological solution to the question of piracy. I am happy to answer questions, but I suspect that, proportionately, most of them will be directed in that way.

Senator McKIERNAN—Mr Rothnie, you are categorical in both your submission and your oral presentation this morning that the effect of this legislation will be to bring Australia into breaching the TRIPs convention.

Mr Rothnie—Yes, in two situations definitely: firstly, where recordings are made in countries which have no copyright law; secondly, in situations where recordings are made in countries which have mechanical licences; and quite possibly in a third situation, that is, where somebody takes, say, the last 10 years worth of the Midnight Oil songs or someone else's and takes a couple of the best tracks off each one and burns their own best of Midnight Oil CD. The legislation attempts to deal with that. I think it is very unclear whether it does that successfully, because the legislation focuses on the copies that are actually imported. Leaving that unclear like that is a disaster. It needs to be clarified what the actual intention there is.

Senator McKIERNAN—In developing your submission—and I accept that you are acting on behalf of your clients—did you give any thought to suggested amendments that might

protect Australia and indeed the clients that you are working for? Is there any happy medium? Is there a compromise that we can work towards?

Mr Rothnie—I did not turn my mind to that in any great detail, because that was not really what I was asked to do. What I was asked to do was to address whether this bill is consistent with our obligations under TRIPs.

Senator McKIERNAN—But you say in your submission in particular that the bill will allow somebody to make unauthorised copies of, say, the best of Midnight Oil and import them. You also describe at length how paragraph 10(1)(h) may not address the problem. Can you elaborate further on that?

Mr Rothnie—To read it properly, it is based on the assumption that the first Copyright Amendment Bill will be passed ahead of it. Firstly, paragraph 10(1)(h) relates to the definition ‘infringing copy’. Sections 44D and 112D, which are the ones that provide this new defence, do not actually apply at all to infringing copies; they tell you only what is a non-infringing copy. Secondly, if you put paragraph (h) into a definition of ‘infringing copy’, as is proposed to be amended by the first copyright amendment bill, paragraph (h) operates as something which is excluded from the definition of an infringing copy. That does not address the situation that we are talking about here.

Mr Fabinyi—I was asked a specific question in my hearings about that. That is why I requested him to address that issue in his submission.

CHAIR—In fact, I think I asked the question, did I not?

Mr Fabinyi—Yes.

Senator McKIERNAN—Thank you for that. I turn to the burden of proof. I think the evidence we had this morning puts somewhat of a new light on evidence that we have heard to date. Mr Rothnie, does this change the onus of the burden of proof, or does it put an additional onus on the owner of the copyright to protect his or her rights?

Mr Rothnie—I think ultimately it puts an additional onus on the copyright owner. I should say in passing that, having had a look through the Attorney-General’s submission, it talks about this improving the situation from the copyright owner’s point of view. That would be right potentially, if all of the other changes that the bill makes were not being made. Before a copyright owner embarks on trying to get a customs seizure or interlocutory injunctions, the risk of the costs and damage sanctions against them if they are wrong means that they will have to make sure they have got a pretty good case. That is the first thing. The second thing is that trying to prove that sort of double negative—that it is not a non-infringing copy—is virtually impossible. In other areas of the law, such as the previous trademarks act, courts have accepted very, very slight evidence from the person with the onus to shift that back.

Senator McKIERNAN—You talked about getting an injunction. Who would be responsible for doing that? Would it be the government or one of its agencies, for example, the Customs authorities? Would it be ARIA as an organisation or would it be the independent distributor or copyright holder? Who would have the responsibility for getting that injunction in the event of this bill passing?

Mr Candi—Exactly the same as it is now: the individual copyright owner, which is either the record company concerned, be it, for example, Mushroom, Polygram or Shock, or the individual music publisher, which are the people whom Germany represents who own the copyright in the musical work. The record companies own the copyright in the sound recording. We are the only ones who go chasing injunctions. They are not cheap, either.

To go off on a side point, we have four criminal cases at the moment with the police and the DPP. As Mr Speck told the Sydney hearing, the police will get involved in only a tiny fraction of cases, and there were three or four that were of such immense conspiracy proportions that we got them involved. We are now two years down the track and not one charge has been laid. That is how slow the criminal side is. Also remember that when more details were revealed, not only have they slipped from saying, 'We are not going to reverse the onus of proof,' they have not even touched the criminal aspect of the copyright law. They have not changed anything there. No, the job is ours. We are saying that it is going to be rendered completely impractical.

Senator McKIERNAN—This bill is not going to improve those horrific tales that we were told in Sydney?

Mr Candi—It is going to aggravate it. Mr Speck's view to me is that we will never get the police involved any more and we are saying to you that, from a practical point in civil actions, if I was to put back on my private practice hat—and I am sure Warwick would do the same—you would have to advise the client not to take the risk, that they will have to wait a year or two to prove their case, and by that time the stock is sold.

CHAIR—Mr Rothnie, your instructions would have been to look at the policy that the federal government had in relation to Cds and this draft legislation if there were problems with it. Did you set your mind to the set of amendments that may have assisted in dealing with some of the matters that have been raised, if you like, as side issues as a case for the core issue of copyright? There is the piracy issue that has been suggested and whether or not artists are going to get appropriate remuneration and things of that nature. Could you see a way through where a set of amendments could be made to provide that sort of protection, or wasn't that part of your brief?

Mr Rothnie—I am not sure that I quite understand the question.

CHAIR—Without being too blunt about it, it seems that you are undoubtedly instructed by some clients saying, 'We do not like this legislation. Try to look at everything that is wrong with it and try to pick as many faults with it as possible.' I do not blame ARIA, AMPAL or anybody else for doing that. I have been in similar circumstances in private practice myself. But I am asking you, if you were to adopt another view which is that you will accept the basic policy of the federal government, could you make the legislation workable to overcome some of the issues that have been raised?

Mr Rothnie—There are two parts to that. You are quite right; it was commissioned by ARIA and AMPAL. They asked for the proposed legislation to be looked at to see if it is consistent with the treaty. I think that the advice that I would be giving would be the same for somebody who was saying, 'We want to import stuff now,' and I have had calls from people saying, 'Can you come and talk to us about what we can do under this?'—sorting those sorts of problems out. I do not think that they should properly be described as peripheral issues. The ones that are coming up here would potentially have quite a very substantial impact on the industry. It is not necessarily going to be something that might happen once or twice in a blue moon. I suspect the likelihood is that, as Emmanuel and Jeremy have already talked about in the context of the performance bootlegging, once the loophole is there, people will flood in to fill it very quickly.

CHAIR—A suggestion has been made to us that an agreement between record companies and music publishers has been made under which, in relation to the records sold in North America, the publishers have agreed to accept only 75 per cent of the statutory royalty the

composers are entitled to with the record companies getting the other 25 per cent. Is anybody able to confirm or deny that?

Mr Candy—Are you talking about the composition clauses for production in America?

CHAIR—Yes.

Mr Fabinyi—In America you have a compulsory licence provision. You also have the possibility for the record company and the publisher/composer to come to an agreement other than that contained within that. Bear in mind that in America the rate is on a flat cents per track basis; it is not on a percentage of royalty basis, so it is a very different environment from the way that mechanical royalties are calculated in Australia. But by no means are all recordings subject to control composition clauses—certainly not all of them. However, it does happen as part of the market forces that prevail in America. I point out, of course, that a hit record in America will deliver to the composer probably \$1m in income. A hit record in Australia, of course, would probably provide significantly less than that—a substantial hit.

CHAIR—Is it true that the composer's royalty rate for North American records is based on a CD having only 10 tracks?

Mr Fabinyi—If there is a control composition clause there is the ability to negotiate various terms and conditions. The statutory rate in America has just risen to 7.1c per track or 1.39c per minute—but do not quote me on that—whichever is the greater. Anything that is recorded under the compulsory licence provisions in America is paid at 7.1c per track as from 1 January 1998.

CHAIR—Is it based on CDs having only 10 tracks?

Mr Fabinyi—The compulsory licence is not based on any number of tracks; it is the number of tracks versus the number of minutes with one being greater than the other, unless the recording is subject to the control composition clause, in which case the normal control composition clause would be limited to 75 per cent of 10 tracks.

CHAIR—So if the CD had 15 tracks, for example, where would the royalties for those other five tracks end up? With the company?

Mr Fabinyi—The control composition clause usually operates on the basis that the composer is the performer. In the event that the performer is not the composer, then the performer is not in a position to enter into the control composition clause with respect to those compositions. In other words, if a composer is a performer and enters into a record contract in the United States which says that they will be subject to the reduced royalties that relate to control composition clauses, that will only relate to the musical works which they themselves composed. If they wish to use another musical work from another composer, the record company has the ability to negotiate with that composer for a reduced rate, but it is normal industry practice when an outside composer's work is used for them to be paid the full statutory rate.

CHAIR—Can I quickly take you to the *Hansard* of 3 February 1998 at page 38 where I was asking Mr Candi a few questions. I asked:

CHAIR—What proportions of that are remitted overseas in royalties? Can you tell us that?

Mr Candi—No. Not off the top of my head.

CHAIR—Are you able to get that information for us?

Are you able to get that information for us and how far has that progressed?

Mr Candi—That obviates the other questions that the committee members asked. In the letter that I sent this up with, I said that we were working on that other information.

CHAIR—All right.

Mr Candi—I am trying to have everything I can get together for you ready by the end of next week.

CHAIR—Excellent, and that includes the separate agreement between ARIA and ANCOS?

Mr Candi—We will answer all those questions.

CHAIR—Can I just take you to one aspect where Mr Candi in the one sentence told me that the AAA agreement was a draft document?

Mr Candi—Yes.

CHAIR—Twice you told me that the draft document in our office is a draft document. AMRA really let the cat out of the bag, did they not? They said it was a bit more than just a draft document; it was at the relevant boards of the various organisations ready for signature.

Mr Candi—No, that is incorrect.

CHAIR—That is incorrect. So the AMRA representative was incorrect in saying that it had been finalised by the working parties and ready for board presentation?

Mr Fabinyi—I will just explain the way that our board operates. Broadly speaking, in such circumstances, as chief executive officer, I would be involved in a negotiation, which would develop a draft document to a point where it would be taken to the board. If I take any of my contracts to the board for signature, I take it to the board for consideration. Hopefully, they will agree with what I have done. Certainly any negotiations that we entered into, in so far as the AAA agreement was concerned, were subject to the approval of the board. The approval of our board was never given in that regard. What AMRA have done, one cannot comment on.

CHAIR—That also goes without saying. What you are saying, therefore, is that it was at the stage at which you, as chief executive officer, were going to present it to the board.

Mr Fabinyi—There was agreement in principle. That is why we keep saying it. There was an agreement in principle. It was an honest attempt to try to find a way to expedite the import of the records. I must also raise the point that it was never intended that this was going to be exclusively an agreement that would exclude non-AMRA members.

CHAIR—I did not ask about that today. All I am trying to find out is—and you have talked around it: as chief executive officer, was the AAA agreement finished to such a stage that you as chief executive officer were taking it to the board? Had it reached that stage?

Mr Fabinyi—It was to be taken to the board for the board's consideration.

CHAIR—Yes, by you.

Mr Fabinyi—Well, yes, by me.

CHAIR—You would not take something to the board unless you were relatively satisfied with it.

Mr Fabinyi—On the contrary.

CHAIR—If you thought it was a terrible agreement, you would not present it to the board.

Mr Fabinyi—On the contrary, I thought it was a terrible agreement. I think Emmanuel can confirm that.

Mr Candi—I would like to answer the question that you asked me, Mr Chairman, if I could.

CHAIR—I am sorry, I asked—

Mr Candi—No, you asked me originally. Could I answer the question?

CHAIR—If you want to have a go at it as well, by all means.

Mr Candi—You asked me the question. I am happy to answer it. Firstly, AMRA cannot—like any organisation that is not ARIA—tell anybody whether the ARIA board, or me as the chief executive, were ready to treat something as a final draft or put it to the ARIA board. Whether AMRA considered it as just about there from their point of view is their opinion. They are, of course, perfectly right in expressing their opinion. In this case, this agreement has been in the throes for about two years. It has been worked on by my general manager and some people from AMRA, with a fair amount of phone calls from a government department, saying, ‘How’s it going? It’s a good idea. Get on with it.’ The next step would have had to come from me. I have not even read the agreement or looked at the progress of it for over about eight or nine months. When you started reading it to me, I thought you were being a bit unfair, because I did not have a copy in front of me.

The next step would have been that it would have had to be presented to me. I would probably not have looked at it until after all this rigmarole was over, because I am too busy. If I had been satisfied from both my general manager and the lawyers who were drafting it that it was there or just about there, we would have taken it back to the board. I can tell you now—and I am very happy to tell you—that at least two, if not three, of the major distributors have always had the opinion that they would never sign on to it, because they considered their individual arrangements with each individual retailer sufficient. They were not interested in the agreement. I did not expect that to change, ever. My general manager and AMRA were very committed to the idea of having another way and a standard way for recoveries to do this business, just as it had worked in England for so many years. That is the answer, Mr Chairman.

CHAIR—You are saying to us that you had not looked at it for eight or nine months.

Mr Candi—Exactly.

CHAIR—You told us on 3 February that ‘that agreement was originally conceived by me’.

Mr Candi—Two years ago—

CHAIR—And—

Mr Candi—Two years ago—when AMRA came to us and said, ‘We need a standard way of looking at this. There’s one in the UK. Let’s get that over here.’ That is the Bar Dempsey PS and BPI agreement.

CHAIR—It seems very strange that—

Mr Candi—Why does it seem very strange? Chief executives—

CHAIR—If I can finish the question, you might find out what I want to know. It seems very strange to me that, if you were the person who conceived the idea, we have the AMPAL chief executive ready to take it to the board and AMRA ready to take it to its board, yet you claim you had not looked at the document for eight or nine months. You were not even really considering taking it to your board.

Mr Candi—Exactly.

CHAIR—Can you understand that on the face of it that is really—

Mr Candi—No, I cannot understand it.

CHAIR—All right.

Mr Candi—I will tell you why. You should know—as all members of the committee should know—that in organisations things are delegated and finally work their way up to the chief executive. My timetable—

CHAIR—Did you delegate it to somebody in AMRA?

Mr Candi—I delegated it to my general manager in ARIA, as I said to you a couple of minutes ago.

CHAIR—All right.

Mr Candi—In many corporations, whether they are large or small—and we are certainly a small one—they eventually work their way up to the chief executive.

CHAIR—Thank you.

Mr Candi—I have not finished yet. My timetable of doing things is dictated by my workload, not by that of Jeremy's and not by that of AMRA's and not by that of the Department of Industry, Science and Technology.

CHAIR—I understand that.

Senator MURPHY—And not by the opinions of committee chairs.

CHAIR—I just understand that when commercial agreements between three or four different companies are about to be finessed and signed and presented to boards, usually they have a timetable set in place, so that one has not signed it and left it for eight or nine months for somebody to get around to signing it. Usually there is an agreed timetable to progress it, finesse it and present it to the various boards within a relatively short time frame.

Mr Candi—You have raised a good point. That it has taken so long to do could be explained by the fact that a number of companies on our side of industry have formed a view that it would never be signed, so why are we wasting our time?

CHAIR—It would have been good if you had told us that on 3 February at our first hearing. Thank you very much.

Mr Candi—With respect, Mr Chairman, you did not really give me the opportunity.

Mr Fabinyi—In light of the fact that we are looking at how this bill is in breach of the TRIPs agreement and the serious implications of that, it is unfortunate that we have to spend time on this agreement, which has been completely revoked. It has no standing whatsoever.

CHAIR—Now that we know that it has been completely revoked—and thank you for that evidence—

Mr Fabinyi—I tendered that evidence on February 4.

CHAIR—Thank you for that, because part of this hearing is about access to those who are on lists and not readily available, and the introduction to the AAA agreement tells us that those involved in the AAA agreement were concerned about better servicing customers through that agreement. Now that that agreement is over and out, the customers, or the consumers, are left where they were before agreement was being finessed.

Mr Fabinyi—The reason it has been revoked is that you put enormous pressure on us to revoke that. That is the reason. It is clear that you do not want that sort of proposal developed.

CHAIR—Come on. Are you not saying that it was I who led to the revoking of that agreement, surely?

Mr Fabinyi—It was Mr Bell.

CHAIR—Yes, I would think that that would be a bit more accurate.

Mr Candi—Mr Chairman, I know you want to get rid of us. We have not finished our response to the Attorney-General's submission. We will have to do so in writing. We may want the opportunity to talk about it.

CHAIR—We would appreciate any further submissions. In all fairness, I have to say to you that I doubt whether you will get another opportunity to actually address us. We would very much look forward to supplementary evidence in relation to the matters raised on 3 February and also in response to the Attorney-General's matters. The matters that Mr Rothnie raised today are matters that we will be raising with the Attorney-General's Department in a few minutes.

Mr Candi—Thank you.

Mr Fabinyi—Thank you.

CHAIR—I now call representatives of the Attorney-General's Department, please.

[10.02 a.m.]

CRESWELL, Mr Christopher Colin, Assistant Secretary, Intellectual Property Branch, Attorney-General's Department, Robert Garran Offices, Barton, ACT, 2600

FOX, Mr Stephen William, Senior Government Lawyer, Intellectual Property Branch, Attorney-General's Department, Robert Garran Offices, Barton, ACT, 2600

CHAIR—The submission of the Attorney-General's Department is numbered 180, and I thank you for that. Do you wish to make an opening statement or do you wish to move straight to questions?

Mr Creswell—We think it would probably be useful to the committee if we did make an opening statement.

CHAIR—All right.

Mr Creswell—Mr Chairman, the committee has heard from a cross-section of the music industry, including the main industry bodies and collecting societies. Our submission deals with two issues: parallel importation and Australia's international obligations and piracy concerns. We understand that the Department of Communications and the Arts will be providing a submission to the committee that will comment on the issues of price comparisons and movements in relevant industry conditions. By now, the committee is no doubt becoming familiar with the Copyright Act because of its consideration of not only this bill but also another bill that is before the Senate. However, it may be helpful for the committee if we again rehearse the basic structure of the legislation in so far as it is relevant to the amending bill.

The essential arrangement of the relevant provisions of the act is that part III deals with works, which are literary, musical, dramatic and artistic works, whereas part IV deals with what is technically called subject matter other than works, which are films, sound recordings, broadcasts and published editions. It is also relevant to mention part XIA, which deals with performers' rights. For present purposes, parts III and IV have a similar opening structure in that they set out the nature of copyright granted and deal with subsistence in ownership and duration before turning to infringement.

The key provisions regarding infringement are sections 36 and 101, which deal with infringement of copyright in, respectively, works and subject matter other than works. The copyright is infringed by doing anything comprised in the copyright without the licence of the copyright owner. Provisions then follow dealing with secondary infringement, as it is called, that is infringement by importation and by, in broad terms, commercially dealing with copies imported by a person unlicensed to do so. These are sections 37 and 38 for works and sections 102 and 103 in relation to copyright and sound recordings. Because they are secondary infringements, they require not only the carrying out of the forbidden act, which would be sufficient for primary infringement, but also the additional element of knowledge. In the current act these provisions are subject to the terms of section 44A, which permits third party importation of books without the copyright owner's permission under certain limited circumstances.

Proposed new section 44D and its counterpart section 112D in the bill carve out from the application of sections 37, 38, 102 and 103 the importation or commercial dealings with non-infringing copies of sound recordings. These provisions also confine the carve-out for sound recordings to those that have been legitimately published. Both proposed new sections 44D and 112D relate back to the definition of non-infringing copy of a sound recording. Under this definition, a copy of a sound recording is only non-infringing if it was made without infringing copyright in a work in the country in which it was made and if it was made, in broad terms, with the consent of the owner of the copyright in the sound recording of which the CD is a copy.

I hope that this outline makes the point that the amendments do not propose the repeal of the importation provisions of the act. Rather, they create an exception to those provisions. Furthermore, under proposed new section 130A, if an importation is legally challenged, it will be up to the importer or the seller of the import effectively to prove that it comes within the exception or they will be likely to be found to have infringed the importation provisions.

The written submission provides the department's views in relation to the consistency of allowing parallel importation of sound recordings with Australia's treaty obligations and international practice. Permitting parallel importation is not inconsistent with or in defiance of Australia's international treaty obligations, nor is there any wide international consensus against parallel importation. The submission also draws attention to factors militating against the bill's amendments enabling or encouraging piracy of sound recordings. Any risk of increased importation of pirated sound recordings is countered by three factors: market conditions in Australia with strong formal distribution and retail networks that are likely to comply with the law, significant deterrence in the legislation in the form of high criminal penalties and a facilitation of civil actions against those dealing in pirated recordings, and global action which is having some success in combating pirate operations.

The penalties under the legislation now before the Senate are substantial. As a further measure, the department is authorised by the government to advise the committee that, when the bill is brought on for debate, the government will propose that the penalties be increased by 10 per cent. The proposed increase is intended to respond to industry concerns that the deterrence message from the reform of the penalty provisions was insufficient and, in particular, to give effect to the government's own intention to send a message of deterrence through an increase. Although maximum pecuniary penalties in the act were increased in 1997 through an amendment of section 4AA of the Crimes Act 1914, the government accepts that a further increase is warranted and will move an amendment accordingly.

CHAIR—What will that then make the penalty?

Mr Fox—It will be 550 penalty units, which will be the equivalent of \$60,500 per infringement for individuals and five times that—I have to do the maths—for corporations. It is about \$300,000.

Mr Creswell—Yes. As spelt out in the written submission, the terms of proposed new section 130A also respond to copyright owners' concerns about establishing infringement in an environment where not all imported recordings will be automatically suspect. The proposed new section places the burden or onus on an importer or seller to establish that the copies are legitimate. In a court action, the defendant must be able to establish to the court's satisfaction that the stock is genuine. Whatever may be said about complete reversals of onus, this is not such a provision, as has probably already been well established this morning.

The secondary infringement provisions, which are said to be working well, if we understand the submissions of industry, remain intact. However, in the context where parallel importation is permitted, the onus will be on defendants to establish the legitimacy of their imported stock.

Senator MURPHY—How would they do that? What would be sufficient for them to do that?

Mr Creswell—I am sorry?

Senator MURPHY—In the eyes of the law, what would be sufficient for them to do that?

CHAIR—What would they need to show to the court?

Senator MURPHY—Would a letter that says that to all intents and purposes the stock appears to be totally legitimate be sufficient? People have pirated copies of stuff. It was submitted to us this morning that they are not going to be too backward in coming forward with regard to providing counterfeit or fraudulent letters. Is that sufficient or what will be sufficient in the eyes of the law and before the courts?

Mr Creswell—Under the terms of the amending provision, it must be presumed—

CHAIR—What section are you referring to?

Mr Creswell—This is the new section 130A. This is what we are before the committee to comment on. It must be presumed that the copy is not a non-infringing copy, unless the defendant proves that the copy is a non-infringing copy.

Senator MURPHY—Yes, but what will suffice as proof?

Mr Creswell—The legislation does not say more. I have to acknowledge modesty about my experience with practice. But what we do know is that we are making it quite clear in the legislation that it will be up to the defendant to establish the civil burden of proof—on the balance of probabilities.

CHAIR—ARIA is saying that, if you are into piracy, the chances are you do not have too many scruples and, therefore, the odd fabricated affidavit or letter would not be too hard to come by. Therefore, if I am importing the pirated product and I am challenged, I can say to a fellow shonkster, 'Can you write me an affidavit that says that these products are kosher?' If that is presented to the courts in Australia, would that be sufficient? I think that is ARIA's argument in a nutshell.

Mr Fox—I might respond with a couple of comments in relation to the question of what the court might or might not require. The court's requirements are that it must have best evidence. You have referred to an affidavit. That is a good start. But there are procedures available to a plaintiff to require that defendant to appear. If they believe that the information provided in that affidavit is inaccurate or insufficient, they may in fact challenge whether or

not it indeed establishes that there has been no infringement. Certainly, in relation to credible actions—

Senator MURPHY—But to do that—

CHAIR—Wait a minute.

Senator MURPHY—No, Mr—

CHAIR—Mr Fox can finish. I think Mr Creswell had about another 30 seconds of his opening statement to read. Then we will get into questions.

Senator MURPHY—With respect, Mr Chairman, it seems that it is okay for you to interrupt at any time. If you want to apply the rule equally—and I would hope that you would—when we want to ask questions about a point that we hear a witness making and we want some verification—

CHAIR—But not when he is halfway through an answer, Senator.

Senator MURPHY—Either you do not do it and we will all not do it, or we will all do it.

CHAIR—Senator Murphy, I hope that I do not interrupt witnesses halfway through an answer.

Senator MURPHY—I can remember many times this morning when you have.

CHAIR—Mr Fox?

Mr Fox—The issue in relation to criminal actions has been on questions of proof of substance and ownership, where there have been difficulties because defendants have challenged affidavits produced. On that basis, the court has been unwilling to accept that evidence without those people appearing in person. In this case, yes, there will be obviously some requirement upon plaintiffs to examine the evidence that has been put by defendants in pursuing their defence that these are non-infringing copies. But it is a requirement for the court to be satisfied on the basis of the evidence. There is the onus on them to go through each of the requirements in the definition of a non-infringing copy of a sound recording and establish to the court's satisfaction that each of those has been satisfied. I was interested to hear Mr Rothnie's comments that courts have been prepared to accept limited evidence from defendants in other situations. This is a new situation. I cannot say whether or not a court would be of the same mind in this circumstance.

CHAIR—Mr Creswell, could you finish your opening statement. Then we will continue with questions.

Mr Creswell—As was observed in the evidence of preceding witnesses, a provision applies only to civil actions. In civil actions copyright owners are given the assistance of a number of presumptions so that, under normal circumstances, there should be no greater difficulty than there is now in taking the case to the point where the defendant must make out his defence, and that is to satisfy that presumption. It is no panacea to say that action is being taken against piracy of copyright. Nevertheless, very considerable efforts are being taken against piracy, and the considerable money, effort and time devoted to this action by governments and various copyright industries is not being done on mere hope. There have been major legislative and educational efforts in many jurisdictions as well as effective enforcement action. There are examples in countries such as Thailand and Hong Kong. I have referred briefly there to what is more fully covered in the submission regarding the global action against piracy. That concludes the opening statement.

Senator MURPHY—Can we go back to the issue of what is sufficient proof? You say that the plaintiff can stand that proof up, whatever it might be. If it is an affidavit, they might say that the affidavit is false. Who has to prove that?

Mr Creswell—It is my understanding that the establishment of a statutory presumption is a fairly well recognised device. It sends a certain message to the courts so far as legislation is concerned. Traditionally, it has entrusted the courts, without being more prescriptive than that, with the job of determining in the circumstances of each case what will or will not be sufficient to overturn that presumption.

CHAIR—So the Evidence Act and the Federal Court rules about accepting evidence would all come into play under this particular regime?

Senator MURPHY—Mr Chairman, are you interrupting the answer being given by Mr Creswell?

CHAIR—No, I am not.

Senator MURPHY—You're not? Perhaps Mr Creswell might continue his answer then.

CHAIR—I thought he had stopped.

Mr Creswell—Mr Chairman, we have not actually exhaustively gone through those provisions, but I did not feel that it was deficient in not having done so. We are satisfied that the erecting of a statutory presumption sends a familiar and well understood signal to the courts, and they then take it from there without expecting further prescription as to how in the particular circumstances of a case this statutory presumption will be overturned.

Senator MURPHY—That does not answer the question with regard to a person who, in the first instance, says, 'Look, we believe these are pirated CDs, music' or whatever the case might be. On the basis of what you have just said, the court says, 'Yes. Okay. We'll accept that,' and they seek proof to the contrary. The proof comes forward in the form of affidavit and maybe other documentation. That is presented to the court. The court either has to accept that, does it not, or reject it?

Mr Creswell—Yes, if that is the only material before it. However, as Mr Fox in an earlier answer indicated, it is open to the court under the normal general procedure to request the appearance of the deponent of the affidavit. But this is not limited only to affidavits in relation to this presumption. Although I do not for a moment impugn the integrity of copyright owners who might be bringing actions, no doubt the defendants may raise the question, 'Look, they say that they are the copyright owner, but you prove it.'

Senator MURPHY—That is true. That in itself could be another problem altogether. But I want to deal with the problem of the possibility of fraudulent proof being presented. Who has to prove that it is fraudulent? The court is, to all intents and purposes, presented with a range of documents in support of the right of the person against whom a claim has been made for importing pirated music, CDs, or whatever the case might be. Those are the documents they present in support of their defence. Now, who has to prove that they are incorrect, and what is the process for doing that?

Mr Fox—I think the first issue is that the question jumps over a hurdle, that is, that these documents actually establish the claims that are made that these goods are, in fact, legitimate. But the court must make an assessment of that. For the presumption to be overturned, the defendant must provide proof. So the court must ascertain for itself the credibility of the evidence that is presented to it. It may be assisted in that process by any evidence or questions that may be raised by the plaintiff. But ultimately it is the court's requirement. That is why

the onus is on the defendant to be satisfied, having regard to the credibility of the documentation and the credibility of the defendant as it assesses it in the individual case.

Senator MURPHY—Let us assume that the court even embarks upon that, which is highly unlikely, and it says, ‘Okay, the defendant presents some documentation. It is signed by a person or persons from another country.’ For example, company X in country Y has signed to say, ‘Look, we have sold these goods to this person. They have been produced under the copyright law of this country,’ et cetera. What does the court do? Does it then send someone over there to check all of that out? Or does it ring up and say, ‘Listen, company Y, is this all legitimate?’ What is the process? We have heard evidence this morning of the difficulty that is experienced under existing law with the parallel import restrictions in place. What you are saying to me—at least what I think you are trying to say to me—is that it ain’t as tough as it is.

Mr Fox—If I could take the committee back to the terms of the definition of ‘non-infringing copy’, what has to be shown—not just asserted, but shown—in the evidence presented by the defendant is that these particular sound recordings actually fit within that definition.

Senator MURPHY—You have not told me though—nor does the legislation tell you—what is required to do that. It could be just a plain old affidavit or a letter from company Y in Singapore that says, ‘I hereby verify that these copies were produced legitimately under the law in accordance with the copyright act of this country,’ and so on. That is what you are not telling me.

Mr Creswell—Mr Chairman, if I can attempt to respond to that to dispose of this—as my colleague Mr Fox said, it is a question of the meaning of assertion—I think you are asking us how the court tests mere assertion in an affidavit. As you said, somebody writing, ‘I swear that I was licensed to do that’ is assertion, as opposed to some hard evidence that establishes legitimacy, such as a written licence signed by people who, on the face of it, appear to be the copyright owners licensing the producer of these copies. Where it is mere assertion in an affidavit is not fundamentally different from mere assertion in oral evidence. Every day in the courts we have witnesses on one side swearing that black is black, and then another witness called by the other side goes in and swears that black is, in fact, white. The court then has to make a decision, as a result of its assessment of the credibility of the two witnesses, and you will hear the court saying, ‘I have decided, after listening to all the evidence, that the evidence of witness X was not to be trusted and I do not accept it.’ So, in the absence of anything else, or as a result of its consideration of all the other evidence, including hard documentary material, the court will say, ‘The assertion in the affidavit by Mr X from overseas is not to be trusted and I do not accept it.’

Senator MURPHY—They would have to have some basis for saying that, though. Is that not the normal practice in any court? I do not know too much about the legal system, but I have always assumed that courts have to have some basis upon which they then make judgments. What you say is right; they listen to the evidence of the witnesses before them and then make a judgment. But what we are talking about is the capacity to actually test the evidence that is presented, and to what extent the court will go.

Mr Creswell—Mr Fox, as I recall, said that there has to appear on the face of the assertions a set of assertions which establish the legal facts or the facts adding up to a legitimate licence to make these copies. I do not think that any court would take too much notice of an assertion which said, ‘I was licensed’—and not even identifying by whom—‘to make these copies.’

Senator MURPHY—Because our time is limited, we might have to pursue that at a later date. So there will be no greater difficulty, with the introduction of the new legislation, than is currently the case? We have heard in evidence this morning about the difficulty that occurs under the existing legislation with the restrictions in place to even get convictions. I thought that the evidence also was that there have been no changes to certain other aspects that might even assist that. Mr Creswell, you placed great emphasis on this increase in penalties and the legislative and educational effort in other countries. You might think that that holds water, with your knowledge in a whole range of other areas—I can give you but one, that is, the fishing industry. There are huge penalties for illegal fishing in this country, but that does not stop people from doing it—not one little bit—because the rewards are greater than any penalties that can ever be applied. I could also say to you that, in some countries, they actually have capital punishment for certain crimes, but it does not stop people from committing them. So I would suggest to you that it is not worth tuppence to have huge penalties if you do not have a capacity at some point to actually get them applied. I do not think you have explained very well the capacity to do that under the new legislation proposed by the government.

CHAIR—That is like saying that you cannot stop murder from happening, even with a death penalty, so it is ridiculous to apply any penalties for any offence, and it is not worth while the legislature seeking to apply any penalty for any offence.

Senator COONEY—You could try.

CHAIR—Hanging them might be a better penalty, do you think, Senator Cooney?

Senator McKIERNAN—You cannot stop the clock going around, though, can you? I want to draw your attention to your submission and, ultimately, what you could call your report. I refer to the bottom of page 3, the top sentence:

The PSA recommended ending copyright control over importation.

Which report of the PSA are you referring to that made that recommendation?

Mr Creswell—This is on the top of page 3?

Senator McKIERNAN—That is page 3 of your submission.

Mr Fox—That may have come across slightly differently from your print.

Mr Creswell—I just want to make sure. It is the December 1990 report and the name of the report was 'Inquiry into the prices of sound recording'.

Senator McKIERNAN—Have you got a copy of that report with you? You have given me the direct reference of what, in fact, the PSA did recommend. I do not think that we are quite accurate on this one.

Mr Creswell—We have not got a copy of the PSA report with us but, Mr Chairman, we can offer to take that on notice.

CHAIR—Yes, the secretariat has a copy.

Mr Creswell—Can we take that on notice, Mr Chairman?

Senator McKIERNAN—I would ask you to do so and do it very seriously because you have run very close, I would suggest, to misleading the committee with comments such as that. That is not what the PSA recommended in 1990. It was not. For you to put something like that in a submission from the Attorney-General's Department is quite serious and I would ask you in all seriousness to have a further look at it and perhaps give a bit more care in the future to what you put to a committee such as this. The matter of piracy has received some attention

here this morning. Are you aware of the evidence that was given to the committee in Sydney from Mr Speck.

Mr Creswell—My colleague Mr Fox has indicated—

Senator McKIERNAN—And do you have a response to that evidence? You have not addressed it in the submission as such. Am I to take it from that that the Attorney-General's Department is accepting the evidence that was given to the committee in Sydney or are you seeking in any way to refute that pretty appalling state of affairs that was so described to us?

Mr Fox—As I recall the evidence from Mr Speck, it was that they had taken action against a number of people and that they were also investigating a number of other operations, that they considered those operations to be highly organised and considerable and that the operations against which they had taken action involved not only parallel imported goods but bootleg recordings.

Senator McKIERNAN—The question is: are you accepting that evidence or are you refuting it?

Mr Fox—I have no reason to refute the evidence that that action had been taken. What I would wonder about is the extent to which that evidence is relevant.

Senator McKIERNAN—You seek to address that in the explanatory memorandum in part under the section that denotes how each proposed option affects existing regulations and the roles of existing regulatory authorities. At the bottom of that page—it is page 4—it states that Customs advises that sufficient controls under the Commonwealth and state legislation already exist to control importation and distribution of objectionable material. We were given evidence in Sydney to say that those controls were dramatically inadequate, and that not only the controls but also the follow-up legislative and legal actions were dramatically inadequate. We have heard evidence here this morning that what is being proposed in this legislation is, in actual fact, going to compound the situation and make it a lot worse. That is the reason for that.

Mr Fox—I think also certainly Mr Candi, and not Mr Speck, indicated an understandable difficulty for Customs in identifying shipments of parallel imported goods, let alone pirated goods. Certainly, the practice as I am aware of it in relation to this is that Customs do require intelligence from the industry in order to undertake any of their activities in regard to seizure of copyright material. As far as that is concerned, that situation will not change. In regard to the question of the customs intervention, I was not aware that there was a significant involvement of Customs in any of the cases to which Mr Speck referred.

Senator McKIERNAN—I will return to piracy, which is addressed in this bill. The parliament has been given an assurance through the explanatory memorandum that accompanies the bill that the Customs service in this country will provide that protection. Are you saying that that is not the case?

Mr Fox—What I am saying is that the situation that exists now—that Customs relies on intelligence from the industry in order to undertake the seizures that they do undertake—will not change.

Senator McKIERNAN—Would it not be much more difficult to identify shipments coming in in the future than it is now because now it is a matter of identifying who is bringing in the importation and whether it has a licence to do it? If that legal importation can be done from any country around the world, would it not be much more difficult to do—to follow it through?

Mr Fox—Because there will be a potentially larger number of importers who could be importing quite legitimately, that is a possibility—that there will be more difficulty in identifying those that may be importing pirated stock as opposed to those who are simply importing without permission as under the law at the moment. In the case of major importers who may be proposing to utilise this legislation such as we have heard—I think the committee heard from Woolworths—our assessment, I suppose our guesstimate, is that Woolworths would not engage in practices which would lay them open to risk. So there may be a narrower range of companies that could be targeted by the industry in order to determine whether or not they should be bringing forward the information.

Senator McKIERNAN—I think that I might agree with you on Woolworths but undoubtedly there probably will be others who are not as reputable as Woolworths who will do it. What I was saying to you was that the opportunity to do that is being opened up by this legislation. You have provided the committee an attachment to your submission, which talks about what has happened with piracy in the region and worldwide. Is piracy on a world scale—on a global scale as I think you have described it in your submission—being curtailed or is it expanding further?

Mr Fox—The information that is provided almost exclusively by the industry suggests that the nature of piracy is changing. I certainly cannot speak for the industry—they have presented their evidence to the committee on this issue. What I see from the literature is that countries such as the former Soviet Union, Russia, Bulgaria, Albania and a number of those in the former Soviet bloc are now countries where there is a problem with piracy of all forms of copyright and trademarked materials. In relation to the question of China, as we have mentioned in our submission there is still a serious problem identified by the industries, but there are actions being taken by the respective governments, in China certainly, which are at least seeking to address the issue. In Thailand, which has previously been regarded as a serious infringer in relation to piracy, they have taken quite serious steps to both amend their legislation and establish an intellectual property court. According to the literature, recently they jailed their first copyright infringer and jail sentences in countries like Singapore, for example, are also being meted out.

Senator McKIERNAN—I appreciate the detail of your answer, but I really was asking about a world trend. Is it getting worse or is it getting better? If we were provided with a task such as this attached to your submission from five years ago to now to perhaps trying to predict in the future, is it getting worse or is it getting better?

Mr Fox—In our estimation, it is getting better and it is getting better because of the TRIPs agreement.

Senator McKIERNAN—How are countries addressing that? You have mentioned some countries, for instance Taiwan and Germany. What are countries doing in effecting the TRIPs agreement and other trade arrangements?

Mr Fox—I can really only speak through examples rather than being able to say at a global level, because I could not assert to that on a global level.

Senator McKIERNAN—That is unfortunate, because you do address it in a global level in your submission.

Mr Creswell—The TRIPs agreement which, of course, has been much talked about does require the introduction of enforcement regimes by members by specified times. This is being taken seriously by many TRIPs countries—I would not say all, but by many of them. I guess those that do not in the long run, if not in the short run, will have to face trade sanctions. It

is instanced by the fact that, for instance, in the Asia-Pacific region next week an intellectual property experts group of APEC is meeting here in Australia and a two-day workshop is being conducted in which intellectual property management and enforcement is a strong theme.

Senator McKIERNAN—Could we see arising out of that each of the countries of APEC moving to deregulate or remove any barriers to parallel importing?

Mr Creswell—I do not think that—

Senator McKIERNAN—Following the Singapore example, which is the shining light held up to us here, will we be able to convince departments and APEC to do that?

Mr Fox—It is not on the agenda of the experts group.

Senator McKIERNAN—I wonder why. Who else apart from Singapore has undertaken this?

Mr Creswell—It is a controversial matter. There is no risk about that. We know that, but the US strongly disapproves of this. However, we do other things that the US strongly disapproves of in the trade arena and I think the US does a few things that Australia strongly disapproves of in the broader trade environment.

Senator McKIERNAN—You mentioned the US. The US recently negotiated a trade agreement with its near neighbours. Has the US dropped its parallel importing provisions?

Mr Creswell—No, but Canada has maintained its regime as far as we know. We have carefully sought advice from officials of the Canadian Justice Department on this.

Senator McKIERNAN—Canada and Singapore?

Mr Creswell—It is harder to establish at least one other country which is a major market. ‘The situation in Japan is unclear’ is the best you can say, but it is certainly not definitely against. For instance, it was one of the voices in the international negotiations that we recently participated in that opposed an importation right.

Senator McKIERNAN—So we are the trendsetters. Australia in association with Singapore and Canada are the trendsetters. We are leading the charge. It is not on the agenda for APEC. Is there any other international forum that it is on the agenda for?

Mr Creswell—I would not say that we are leading the charge. My understanding from the discussions is that certain smaller EU countries oppose a mandatory importation right. There is the controversial discussion of Norway, which I know is not an EU country but has close association with the EU.

CHAIR—Though Sweden does not.

Mr Creswell—Sweden, Finland and Denmark were also very concerned about what they might have to do as a result, or were very strongly opposed to an international standard or an international obligation to have an importation right.

Senator McKIERNAN—I have just one further question of you. At page 10 of your submission is the matter of the onus of proof—whether or not it is reversed. You are saying now that the bill will not reverse the onus of proof. You follow it through by saying:

The Government has not asserted to the Parliament or the public that it will.

Then you draw attention to the notes in the explanatory memorandum which, to quote, makes it plain. Can you direct me to the notes in the explanatory memorandum ‘makes it plain’?

CHAIR—Is it easy for you to find or should we ask another question?

Senator McKIERNAN—Yes.

Mr Fox—I can perhaps come back to that.

Mr Creswell—Can we come back to that?

CHAIR—Yes. Senator Cooney can then ask a question.

Senator COONEY—I just want to put a question and get you to comment. The way you have helped us with the law has been tremendous, so thanks for that. What worries me about this whole issue is that the law only operates on a factual situation, or operates best when that factual situation is in accordance with the law. You have been around with us as, with the energetic chairman, we have gone from state to state and from place to place. The consistent evidence from the industry, artists, songwriters and what have you has been that this is a very bad move. Can you point to anybody who is actually in the industry who supports it? You have got Woolworths and others, but could I ask you if you have time to draw a judgment on the basis of the evidence that has been given throughout this period that in some way shows that the overwhelming support is in favour of change rather than keeping things as they are?

CHAIR—In that list could you include the consumers of Australia?

Senator COONEY—That is exactly what I am worried about. I do not want you to include the consumers of Australia unless they have given evidence. Thanks for making the point. I am afraid that we are not going on evidence; we are going on what we people say the consumers want. We are going on what people say will happen if import controls are different. We are going on what people say happens elsewhere. I do not want secondary evidence; I do not want hearsay evidence; I want to go on the evidence of people who actually know, the people who have given evidence before this committee.

CHAIR—We will be hearing from the Australian Consumers Association.

Senator COONEY—You can put them in, but at this stage that is what I would like you to do. Do you think you could do that?

Mr Creswell—We could submit that subsequently at the table, as it were.

Senator COONEY—I do not want you to go speculating on what might be the situation consumers want or what might happen on the law; I want you to go on the basis of the evidence that has actually been called to this table.

CHAIR—That might be a job that the secretariat can do—just indicate the number of submissions that we have received. Those in favour and those against—

Senator COONEY—You are missing the point which is this: you are not pursuing policy, but you are pursuing a statement and, as people ask a question, you say, ‘This happens and that happens.’ You are sure that, if the piracy provisions are put in and the penalties are imposed, this will have an effect. That is all speculation, isn’t it?

Mr Fox—The whole effect of the bill is that it is, in a sense, speculation because it has not occurred yet.

Senator COONEY—Absolutely.

Mr Fox—But it is a speculation in a sense that the parliament has given you the responsibility of making an assessment about.

Senator COONEY—When you are giving evidence, you are saying, ‘We have been given a brief which is right by government to produce this bill. So we have done it and we will support it as advocates as best we can.’ That is your position.

Mr Creswell—Yes, but I am just reinforcing what Mr Fox has said.

Senator COONEY—If the government changed and another government came in, you would put forward its policies in the same way, advocating those policies as you mentioned it.

Mr Creswell—Yes, but it is not as if the government has gone into this on the basis of a hunch. I think the submission refers—and I just cannot see where it is—

Senator COONEY—I know the submission. I am concerned about evidence. You have been coming around and you have seen the evidence. You have actually sat at the table. If you looked only at that, the preponderance would be one way.

Mr Fox—In fact, we have not attended all of the hearings of the committee. I and a colleague did attend the first two days of the hearing, but we have not since attended the hearings until today.

Senator COONEY—I am sorry. You have not even heard the witnesses.

Mr Fox—We have not heard the witnesses, but have seen the transcript, of course.

Senator COONEY—So you have not seen the demeanour of the people, how confident they have been or anything like that? You have just read words?

Mr Fox—What we have seen are the two days of hearings that we have attended.

Senator COONEY—That is all?

Mr Fox—Yes.

Senator COONEY—Otherwise, you have read a few things? You have read the transcript?

Mr Fox—Yes.

Senator COONEY—You have read the transcript and read the literature, as you say, around the world about it. But you have never had any practical experience yourself in the industry. Have you ever applied for an injunction?

Mr Fox—Senator, I am happy to answer that question if you want an answer, but I am not sure—

Senator COONEY—Have you ever applied for an injunction as a private solicitor, having experienced the costs involved and the problems of getting evidence as a private person? Have you ever done that or have you always done it as a member of the Australian government solicitors?

Mr Fox—The answer is: no, I have never specifically been involved in bringing an injunction.

Senator BARTLETT—I did not have the pleasure of sitting through the committee inquiry into Copyright Bill (No. 1), although I have read the report.

CHAIR—You have just read the words and not seen the demeanour of the witnesses?

Senator BARTLETT—That is true. Could you clarify for me how independent they are and whether this bill is dependent on the Copyright Bill (No. 1) being passed first or being passed unamended?

Mr Creswell—I think it is true to say and to acknowledge in the evidence that was given earlier this morning that we would have to make a change to the No. 2 Bill if the No. 1 Bill was not already enacted.

Senator BARTLETT—Okay.

Mr Creswell—It would not be a big job, but it would be something—

Senator BARTLETT—Copyright Bill (No. 1) is further ahead in the sausage machine of the Senate. You have written Copyright Bill (No. 2) on the basis that, by the time Copyright Bill (No. 1) gets passed, No. 1 will have already been passed. Potentially, if that is amended, that may have ramifications?

Mr Fox—It is possible, but the specific bits that rely upon amendments made in the No. 1 bill are essentially technical. I think they are a reference to a subsection in one case and an amendment in relation to the exclusion in the references in the opening words of sections 37 and 38. They really are very minor.

Senator BARTLETT—One more little pursuit in terms of the piracy issue and the nature of what might have to be proven in a court—earlier this morning, the previous witnesses mentioned that, if there were some proceedings under way, they would need to demonstrate or prove where the disc was manufactured and what was the relevant copyright law of the country where that came from. Would that be a relevant factor in a court case?

Mr Creswell—Subject to the advantages of certain evidentiary provisions now, of course, when a person claiming to be a copyright owner wants to bring an action, that may be a foreign copyright owner. Indeed, they frequently are. They may have to have recourse. There are certain statutory provisions that can make that easier, at least, unless it is put in evidence. Of course, as Australia is a net importer of copyright material, many of the plaintiffs or potential plaintiffs to assert their rights are foreign copyright owners who get the benefit of protection under the act because of our treaty obligations. But they may have to invoke or invite the court, or the court may require them to establish their ownership credentials by recourse to foreign law. My colleague Mr Fox wants to add something.

Mr Fox—I do not wish to say more than that I was surprised to hear the assertion that somehow, where the defendant in a proceedings for copyright infringement by importation, as we see, has the onus of establishing that it is a non-infringing copy, it would be necessary for a plaintiff to establish the law and the making of that particular copy in any particular country other than to establish that it was indeed imported. It seems surprising to me for that to be suggested, but it may have been that the issue was more about establishing the subsistence and ownership in the first place.

CHAIR—It may be in the circumstances where the importer claims to have an expert at law as to what the law is in China and you wanted to dispute that. I suppose you would need your own expert in Chinese law. That would be at the second step and not at the initial stage. Then you would need some legal expert willing to tell pork pies to the Federal Court about the state of the law in China or whatever country we are talking about.

Senator BARTLETT—As I understand it, this bill will allow CDs to be imported from countries—and New Guinea is used as an example—that have no copyright law, or other countries that have inadequate copyright laws.

Mr Creswell—Yes.

Senator BARTLETT—The fact that the legitimacy of something is being contested and that was manufactured somewhere where there was no copyright law would not be relevant, in your view, in terms of any court proceedings regarding piracy?

Mr Fox—What I am suggesting is that our understanding of the effect of section 130A is that the defendant would have that obligation placed upon them in the first instance at least, in establishing where and under what circumstances the copy was made in order to establish that it was a non-infringing copy.

Senator BARTLETT—If it was made in a country where there is no copyright law, does that not matter?

Mr Fox—Those facts would still necessarily have to be established.

Mr Creswell—He would have to prove one of the legs of the definitions of non-infringing copy. That is catered for. If you go to the definition of ‘non-infringing copy’, it has to be made by or with the consent of the owner of the copyright—or related right—in the sound recording in the country in which the sound recording was made. Where they are two different countries, you go back to the country where the master was made. One would assume that, in most cases, a person would not produce a sound recording commercially unless they had the protection of a copyright law, so it would be made in a country where there was a copyright law protecting sound recordings. But if a copy was made, say, in Papua New Guinea, but it was of a recording of which the master was made in the USA, say, you have to go back to see whether the owner of copyright in the US gave consent to the making of that copy in Papua New Guinea.

CHAIR—So people cannot manufacturer CDs oblivious to people’s copyright per se?

Mr Creswell—By going to a country that has no copyright?

CHAIR—Yes.

Mr Creswell—Not for the purposes of parallel importation into Australia.

CHAIR—With Singapore, at the time of making—

Senator MURPHY—Why is that the case?

Mr Creswell—Because it is what the definition of ‘non-infringing copy’ requires.

Senator MURPHY—You would have to concede that there is a lot of proof that goes into all of that.

Mr Creswell—That is where placing the burden on the importer comes in. If you want to import, you will have to—

Senator COONEY—The way you put it is as if I could accuse him of something and he would have to disprove it. That is not what you mean by reversing the onus, I hope.

Mr Creswell—No.

Senator COONEY—There has to be some sort of colour shown.

Mr Creswell—As the preceding evidence this morning has very clearly pointed out, there are a number of steps to be established by the plaintiff before that kicks in.

Senator COONEY—It is an expensive exercise and one that involves—

Mr Creswell—All those preceding steps have to be proved now. I cannot just go into a record shop and say, ‘That copy looks a bit dodgy. You, the shop proprietor, have to prove that it is a legitimate copy.’ It does not work that way now.

Senator COONEY—I would suggest that the litigation that you do would have a lot of money behind it, Mr Creswell; is that right?

CHAIR—I am not sure that that is necessarily a helpful question, given the time constraints.

Senator COONEY—I know, but I am just making the point.

CHAIR—We will allow that on the record as a comment. Did Singapore have parallel import laws at one stage and then revoke them?

Mr Fox—Not so far as we are aware. The Singapore legislation, as understood by the Singaporean government, always intended to permit parallel importation.

CHAIR—Do they have a similar reversal of the onus of proof as we are suggesting in our legislation?

Mr Fox—Not that we are aware of.

CHAIR—What are their penalties in comparison with what we are proposing?

Mr Fox—I could not answer you specifically, Mr Chairman.

CHAIR—Could you take that on notice? If people want to portray Singapore as an example of what happens, we need to compare apples with apples and understand exactly what the onus is, on whom it is and what the penalties are as a disincentive to engage in the conduct complained of.

Senator McKIERNAN—Can we clarify whether Singapore has similar provisions on the reversal of the onus of proof as we are proposing? I think that Mr Fox answered in the affirmative to that, but in your submission you say that the bill does not propose to reverse the onus of proof.

Mr Fox—It is a linguistic issue here, because in some cases people appear to be referring to the reversal of onus of proof as if there is nothing for a plaintiff to do, whereas this bill still requires the plaintiff to establish certain things in order to get his claim on board.

Senator McKIERNAN—For the record, I should thank you for responding to an earlier question by pointing to the notes on the explanatory amendment. You have drawn my attention to item 6, after section 130, No. 12, the sentence beginning with ‘Once the plaintiff has proved the elements’.

CHAIR—On which page?

Senator McKIERNAN—It is page 18. Thank you for that. Had we more time, I might have asked further questions on it.

CHAIR—If you wanted to put some questions on notice, I am sure that they will be happy to answer them. Mr Fox and Mr Creswell, thank you very much. To representatives of ARIA and AMPAL, thank you very much for your appearance. I now adjourn the hearing into the Copyright Bill (No. 1). We shall move straight to taking evidence in relation to the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997.

Committee adjourned at 11.07 a.m.