COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Personal Property Securities Bill 2009

THURSDAY, 6 AUGUST 2009

SYDNEY

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 6 August 2009

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Marshall

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin, Fisher, Marshall and Trood

Terms of reference for the inquiry:

To inquire into and report on: Personal Property Securities Bill 2009

WITNESSES

Committee met at 9.03 am

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate's Legal and Constitutional Affairs Legislation Committee and our inquiry into the Personal Property Securities Bill 2009. This inquiry was referred to the committee by the Senate on 25 June 2009 for report by 7 August 2009. The bill seeks to reform the personal property securities system. It is a significant micro-economic reform and a key aspect of the government's deregulation agenda. The reform would involve the creation of a single piece of Commonwealth legislation underpinned by a referral of legislative power from the states to regulate PPS interests. The change would be supported by the creation of a single national electronic register of PPS interests. We did have an exposure draft of this bill, which we conducted an inquiry into and reported in March of this year. We have received 18 submissions for this current inquiry and all of those submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer that all evidence be given in public, but if you want to give evidence in camera you need to request that and the committee will consider it. If a witness objects to answering a question, the witness should state the ground on which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera.

I should note for the benefit of senators and others present that we will be hearing from the Attorney-General's Department twice in the course of this hearing. This first session is to allow the officers to provide a public overview of the bill and what has changed since the committee's previous consideration and to answer initial questions. After hearing other evidence, there will be another session tomorrow morning in case there is any follow-up from the evidence that we have heard today.

I need to remind senators that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policy or factual questions about how and when policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis of that claim.

[9.07 am]

BOBBIN, Mr Wayne, Principal Legal Officer, Personal Property Securities Branch, Attorney-General's Department

GLENN, Mr Richard, Assistant Secretary, Personal Property Securities Branch, Attorney-General's Department

PATCH, Mr Robert, Principal Legal Officer, Personal Property Securities Branch, Attorney-General's Department

CHAIR—I welcome the officers from the Attorney-General's Department. Thank you for your corporation during this long process. We have your submission, which we have numbered 1. We have also authorised for publication today a number of additional pieces of information provided by your department—that is, the document responding to the issues raised by Professor Duggan, your response to the PPS privacy impact assessment, updated figures for expenditure on PPS reform and a document responding to the issues raised by Allens Arthur Robinson in their submission to the committee. They are the four documents that we have approved for publication. Do you need to make any amendments or alterations to anything that you have provided to us?

Mr Glenn—No amendments to the documents we have already provided, thank you, Chair, but we just note that we will have a second document responding to the Allens Arthur Robinson and other law firms' submission fairly shortly—by tomorrow, I think.

CHAIR—Thank you, we will take note of that. Do you have an opening statement or an introduction for us?

Mr Glenn—Just a brief one, thank you, Chair. It is a pleasure to be back before the committee. A lot has happened since the committee last reported. The government response has been tabled in which the government accepted almost all of the recommendations that had been made by the committee, in whole or in part. Key amongst those recommendations was that an independent privacy impact assessment be conducted into the bill and the proposed PPS Register and that has been done. We engaged a firm, the principal of which is Malcolm Crompton, a former federal Privacy Commissioner, to conduct that privacy impact assessment. And we are pleased that we have been able to also provide you with the Attorney-General's response to the privacy impact assessment just in the last couple of days.

You will have seen that the bill has been significantly revised. There has been a change to the structure of the bill to make it, we think, easier to navigate and to put the operative provisions closer to the front so that people can get to the information they are really after more easily. I think that shows through on the mark-up that we have provided of the bill comparing this version to the last. There is a lot of red ink on that. A lot of that is the result of shifting of text from one place to another to make it structurally easier to deal with. There have been other changes to the bill to adopt more language from New Zealand and Canadian PPS acts, we can talk a bit more about that if the committee is interested, and there have been changes to address the privacy issues raised both by the committee and through the privacy impact assessment process.

The committee's earlier report also spoke about the time frame for PPS reform and recommended that the start date for the new PPS system be put back until May 2011. The government's response to that was that it would consult with states and territories about that, acknowledging that as a COAG project it was a decision that could not be made wholly by the Australian government. COAG at its 2 July meeting agreed to change the time frame for PPS reform and agreed to push it back until May 2011. In doing so they did not change the interim milestones for the process, so COAG was very keen to see the PPS legislation passed by the end of 2009 and for the core function of the PPS register to be built by May 2010. The reasoning there was to provide certainty for the business world to be able to see the state of the law as passed by parliament and to be able to see and test against the register as built by the Attorney-General's Department so that they have a 12-month period to get used to the new system.

Once the new bill was made public, we have been able to have New South Wales as the first referring jurisdiction. It passed in June for the first referral legislation which refers power to the Commonwealth parliament to pass the PPS Bill and then on 24 June the bill itself was introduced into federal parliament. Chair, you have touched on the documents that we have provided to you. I was going to run through those but I will leave those now.

I should also mention though that Senator Barnett asked a couple of extra questions of us about state and territory expenditure on PPS reform and about the likely timing for other states to refer power to the Commonwealth to pass the PPS Bill. We have gone to the states to try to find answers to those questions. What we have had back from the states is that clearly all the states have spent money on PPS reform through the policy development process. They are not able to separately identify the costs of that because it is being dealt with by officers who are dealing with a range of policy matters. States have also identified that there will be transitional costs for PPS reform once the data migration exercise happens and they need to archive their old registers and those sorts of activities. Those costs have not yet crystallised and will not do so until closer to the go live date for PPS reform, so we have not been able to obtain estimates for that. I should note that PPS reform is part of the seamless national partnership agreement that COAG has agreed which has provided $550 million over five years to the states and territories for a suite of microeconomic reforms, this amongst them.

On the dates for passage of the referral legislation by the other states, the states have all been able to confirm that they are working towards the COAG deadline of passing the referral legislation by the end of 2009, but they have not been able to give us more specific dates primarily because they have been unable to give us dates that can be made public. They are still subject to their own internal governmental processes and their own parliamentary processes.

Senator BARNETT—The deadline was 2009.

Mr Glenn—Yes.

Senator BARNETT—So by the end of this year?

Mr Glenn—Yes. All the states say that they are on track to pass it. And New South Wales has passed already. Perhaps, Chair, as a way to proceed we have the document that describes the changes that have been made to the bill. Either we could take you through the document or if there are specific questions you have about it, you may want to ask them.

CHAIR—How do people want to proceed, do you just want to go straight to questions?

Senator BARNETT—Yes.

CHAIR—I think it might be better if we just go straight to questions; otherwise it will just duplicate matters.

Senator BARNETT—Firstly, thank you very much for being here and thank you for the private briefing last week, which was greatly appreciated. There has been an enormous amount of work that you have undertaken since the Senate committee report, and I think that should be acknowledged and noted; thank you for that effort. Also, the government's response to the Senate committee report is noted. One of those recommendations related to an independent review—IIA, I think it is—by a former Privacy Commissioner, Malcolm Crompton. I want to come to those in a minute, but before doing so can I just get on the record your answer to my questions regarding the expenses and the time.

Mr Glenn—Yes, certainly.

Senator BARNETT—I have a copy here. This is to 30 June 2009. In the 2007-08 year, the department's total expenditure on the PPS reform was $7.239 million, and for 2008-09 the total cost was $11.248 million. They are the figures that I have in front of me; I am just asking you to confirm that.

Mr Glenn—That is right, I think. You are correct, Senator.

Senator BARNETT—The consultancy costs are listed for 2007-08—$7.858 million—and then further figures are set out in that answer there. That is for 2007-08.

Mr Glenn—Yes.

Senator BARNETT—But it appears not to refer to the 2008-09 year. Can you clarify that?

Mr Glenn—Yes. There is a 2008-09 page, Senator; perhaps you do not have that one.

Senator BARNETT—I do not have that.

Mr Glenn—I can table that now for you.

Senator BARNETT—No, sorry; it is on the back of this. So I have one for 2008-09. What I am asking is: is it correct that they are figures separate from and additional to the department's costs?

Mr Glenn—No, they are costs to the department. These are the costs of contracts that have been entered into to engage consultants and others to assist us on PPS reform. The total will add up to more than the

expenditure because some of these contracts will go over future years. For example, the first contract there for Acumen Oakton in 2007-08 goes through until May of 2010. So these are the commitments that have been made as opposed to the expenditure.

Senator BARNETT—All right. Let us just confirm this, then. The department's costs of $7.239 million for 2007-08 include the costs for consultancies in that financial year?

Mr Glenn—Yes, that is correct.

Senator BARNETT—And then likewise for 2008-09?

Mr Glenn—That is correct.

Senator BARNETT—Do you have a budget for 2009-10 and the out years? I am happy for you to take that on notice.

Mr Glenn—If I could.

Senator BARNETT—Could you provide that on notice for the out years 2009-10, 2010-11, 2011-12 and whatever out years you have.

Mr Glenn—Certainly.

Senator BARNETT—That clears that one up; thanks a lot for that. Can we just confirm the legal status of the bill. You have just referred to the fact that all the states and territories have agreed to cooperate and introduce the model bill—

Mr Glenn—That is correct.

Senator BARNETT—before the end of this year, and in exactly the same terms as the New South Wales bill, which is in exactly the same terms as the bill that is currently before us. Is that accurate?

Mr Glenn—That is correct.

Senator BARNETT—So what we as a committee need to understand is that, if we suggest any amendments whatsoever, one of two things will occur: the states will need to amend their own legislation or we will need to pass consequential legislation to amend the primary bill. Is that your understanding?

Mr Glenn—That is correct. Mr Patch will elaborate, but there is a point to make: that typically in these situations, because of the referral, the amendments are made in a consequential amendments bill so as not to cause unnecessary difficulty amongst the states and territories and get that legislation out of sync. There is an example of that happening in the Corporations Act, where there was a consequential amendments bill that was debated and passed cognately with the main bill and commenced, essentially, the second after the Corporations Act commenced; it amended the substantive bill.

Senator BARNETT—So that is your preference? Is that your advice and recommendation to the committee—that the amendments that you are flagging with us today and that are set out in answers to, for example, the privacy impact assessment report, and other consequential amendments that we may come forward with, would be put in a separate but cognate bill and that it would all be debated simultaneously and one bill introduced after the other? Is that your advice and recommendation to this committee?

Mr Glenn—Certainly in a separate consequential amendments bill; the question of whether they would be cognate is a question for government, of course, but clearly the sequence would need to be the passage of the substantive bill followed by the passage of the consequential amendments bill.

Senator BARNETT—I put it to you that we are in a high-risk situation if we pass a bill which we do not fully support, knowing full well that we wish to have it amended and wish to amend it, and they are not dealt with simultaneously or contemporaneously, so that is an issue that we have to consider seriously as a committee on the way forward.

Mr Glenn—I think the position would be that the amendments would be able to be negotiated and put forward in a consequential amendments bill in a way that generates no risk for the Senate.

Senator BARNETT—There are always risks for the Senate, when we are talking about the Senate, the numbers and what people and parties believe to be in the best interests of the public.

CHAIR—I could not have worded it better myself, Senator Barnett!

Senator BARNETT—There are always risks, aren't there.

Mr Glenn—This is an exercise that can be coordinated in a way that provides comfort.

Senator BARNETT—The question is: will we be accused of—and I think it has already been alleged by some witnesses that we are—rushing the process, in that we should have got the bill right in the first place? The bill before us obviously needs to be amended at least to some degree in accordance with the views of some witnesses.

Senator MARSHALL—But these witnesses cannot comment on that.

Senator BARNETT—You cannot comment on that, no, but we have evidence before us that we are pushing too fast and too far, too soon, and that we need to take that into account.

Mr Patch—The observation I would make is that there are some stakeholders who are calling for an earlier resolution of the content of the bill so that they can begin to plan and implement their business plans for the introduction of the legislation, that deferral of the passage of the legislation compresses or makes their work in implementing the legislation more difficult, and that the amendments—

Senator BARNETT—All right—

CHAIR—Mr Patch, can I just say here that we certainly had evidence through the draft exposure that we were given that people wanted the time line pushed out to 2011. The government has conceded to that. Can you just take us through, then, what you think in terms of the passage of the legislation? We are unsure when it will be listed for debate in the Senate, but one would assume that that will be September—

Mr Glenn—I do not know.

CHAIR—and then there may well be amendments from this inquiry, but I do not suspect there will be as many as our recommendations from the draft exposure.

Mr Glenn—I would hope not.

CHAIR—When do you believe regulations will be available for people to look at, and is there a plan to put those out in any draft form?

Mr Glenn—Yes, regulations are being drafted as we speak, and we would hope to have them in draft form for people to look at. We are talking about the end of September or the beginning of October, depending on the drafting resources that we have. We are also going through a process of—

Senator BARNETT—Before or after the bill is passed? This is a very important matter in terms of the regulations and how they look.

Senator MARSHALL—They do not know when the bill is going to be passed.

Mr Glenn—I cannot speak to what the parliamentary timetable is going to be.

Senator BARNETT—But do you have a preference? You do not have a preference as to whether they will be available before the bill is passed? How can you pass a bill without the regulations being in place?

Senator MARSHALL—It is not a matter for the department; it is for the government.

Senator BARNETT—Is that a legal possibility as far as you are concerned—passing the bill beforehand? There is no legal impediment?

Mr Glenn—Regulations cannot be made until the bill is passed.

Senator BARNETT—No, but is there any impediment in not having the regulations simultaneous with the promulgation of the act?

Mr Glenn—There is no legal impediment against it—in a public exposure process. They literally cannot be made until the act has commenced.

Senator BARNETT—How long is your public exposure planned for?

Mr Glenn—For the regulations? I do not think we have an exact date. It is quite a considerable period. The regulations would be made much closer to the start date for the scheme because they go to a whole series of practical issues about the operation of the scheme rather than the substantive law, so there could be an extended consultation period.

Mr Patch—Mr Glenn has indicated that we are looking to have a draft of the regulations available by September-October. The regulations are made by the Governor-General after assent and need not be made until very shortly before the scheme finally commences in May 2011, so it will be possible to have the regulations made as late as January 2011, leaving a period of well over some 14 or maybe 18 months for the stakeholders and senators to comment on them.

Senator BARNETT—I just want to focus on a few other things.

Senator TROOD—Before we leave this consequential amendments issue, may I just ask a question. Mr Glenn, in its submission Clayton Utz refers to consequential amendments to other pieces of legislation. On the second page of its submission there are three points and the third point is 'Amendments to other legislation'. It refers to amendments to the Corporations Act and the Shipping Registration Act, among others, I gather. Can I just clarify: do you expect that the amendments to other pieces of legislation will be required to be substantial, or not?

Mr Glenn—'Substantial' is an interesting word.

Senator TROOD—Okay, let us say 'extensive'.

Mr Glenn—There will be amendments to a range of other pieces of legislation. There is a class of amendments that are of a technical nature, to change language and so forth. There is perhaps a more significant set of amendments to be made to the Corporations Act to remove provisions that deal now with the register of company charges, which would no longer exist once the PPS register exists. That is probably the most extensive set of amendments we would make. Those amendments are subject to a separate process under the intergovernmental agreement that establishes the Corporations Act scheme, which requires a public consultation period for those separate amendments, which is a separate process to the PPS exercise.

Senator TROOD—So those amendments, at least in relation to the Corporations Act, could not be included in the consequential amendments bill that is likely to accompany this bill. Is that right?

Mr Glenn—They could be. There are—

Senator TROOD—If the consultations have taken place?

Mr Glenn—If the consultations have taken place.

Senator TROOD—Is it likely that the consultations will have taken place prior to the bill being prepared?

Mr Glenn—The consultations are being organised at the moment. It is possible that they can go through at the same time. The timing question is difficult for us because I do not know the point at which debate is going to occur. There are different consultation periods that can be employed under the Corporations Act scheme. Three months is the standard but it can be shorter, and I think we are looking to employ a slightly shorter period for this exercise.

Senator TROOD—I will just register my own personal view, since it is not a committee expression of view. It is obviously desirable, if possible, to have all of the consequential amendments, not just in relation to the bill but in relation to other pieces of legislation, dealt with once and comprehensively by the parliament rather than dribbling them through at various times.

Mr Bobbin—To fill out the picture, I will just add that apart from the Corporations Act a lot of the things we are looking at are interactions with other pieces of legislation. There is a lot of legislation about detaining ships, for some reason, so it is just about what happens if the Commonwealth detains a ship and a secured party wants to enforce a security interest during that period. We just need to work through with the relevant agencies to make that sure we do not change the law. There is a lot of that sort of stuff. As Mr Glenn said, the Corporations Act is the main thing.

Senator BARNETT—But this leads to a very important point—that is, has the department prepared a document listing the proposed consequential amendments to the substantive bill and, secondly, the consequential amendments to other bills?

Mr Glenn—No, we have not prepared documents. We have drafting instructions that are with drafters now for the consequential amendments to other bills. We have not prepared a document about any amendments we would make—

Senator BARNETT—We as a committee need to know the department's views as to the range and extent of consequential amendments that you recommend to the substantive bill and, indeed, other consequential amendments, whether it be the Corporations Act or the Shipping Registration Act or other acts. Can you advise us or take that on notice?

Mr Patch—We can say that there are a few acts that have to be amended. Apart from the amendments to the Corporations Act, the thrust of the amendments is to essentially retain the effect of the existing law. So, to give an example, some acts use the expression 'floating charge', which this act does away with. We are looking at amending that act by omitting the term 'floating charge' and we are currently thinking about

inserting the term 'circulating security interest'. So there are a range of acts that create statutory bodies and say, 'The body may grant a floating charge over its assets' and list the things the body may do.

Senator BARNETT—I am aware of that, Mr Patch, but when are we going to know what the advice of the department is with respect to those two questions? Firstly, there are the amendments to the current bill that is before us. No doubt, you have recommendations in your mind to amend that bill. I would like to know what those recommendations are, and I am sure the committee would be interested no know. I will give you an example. In the report by the former Privacy Commissioner, Malcolm Crompton, there are 14 recommendations. As far as I can see, in your response you have accepted 13 of them and you have disagreed with one of them. There will be impacts and consequences to your accepting those recommendations, I presume some of which will require legislative amendment. You can confirm or deny that with us now if you like.

Mr Glenn—Mr Bobbin will correct me if I am wrong, but we have already picked up all of the legislative amendments that need to be made as a result of the privacy impact assessment. In fact, we picked up most of those as a result of the process rather than in the report itself.

Senator BARNETT—As a result of the previous Senate hearing process.

Mr Glenn—And of the privacy impact assessment process—the consultations that went along with that.

Senator BARNETT—You are saying no further consequential amendments are required as a result of your response to that report?

Mr Glenn—That is correct.

CHAIR—The response we are seeing here before us today has been picked up in the bill we are also looking at; is that correct?

Mr Glenn—That is correct. I suspect that the privacy impact assessment report does not—apart from one recommendation which the Attorney does not propose to accept—actually recommend any changes to the substantive law. It talks about process and other activities. That is because, through the process of doing the privacy impact assessment itself, and as a result of the committee's earlier report, we had already made those changes in the bill.

Senator BARNETT—Will it require changes or regulation of some sort?

Mr Glenn—No, Senator.

Mr Bobbin—Maybe around the margins. There is one recommendation that comes to mind around the registrar's ability to remove a registration. I think the response is that there will be a protocol developed, and some of that might be in regulations. We need to check that.

Senator BARNETT—Let's go back to the original question. Do you have any recommended amendments to the substantive bill for this committee?

Mr Patch—Certainly there are a number of matters that we would be asking the government to consider. In the papers that we have given to you, in response to Professor Duggan and in response to the submission by the four law firms, we suggest there are a number of matters there to which consideration could be given.

CHAIR—It will be for our committee to report on, I expect.

Senator BARNETT—Sorry, Chair, I would like Mr Patch to respond. You have not finished the answer to my question. Can you please be more specific and answer fully the question? You have mentioned Professor Duggan and the four law firms. Can you identify the changes that are required to the bill resulting from those two submissions and any other submissions?

Mr Patch—I cannot identify change; that is a policy matter.

CHAIR—Mr Patch, are you also waiting on the outcome of this inquiry before you do so?

Mr Patch—Yes.

CHAIR—And then you will provide advice to the government about further amendments; is that correct?

Mr Patch—That is correct. Certainly the best that we could do right now would be to say that there are some matters which bear looking into—and we hope that is a sufficient hint to the committee! We cannot foreshadow what the government might say in response to anything that we recommend to them. Indeed, I do not think we can foreshadow to the committee what we might be saying to the government. All we can say, really, is that some things merit consideration.

Senator BARNETT—But, Mr Patch, you have responded to Professor Duggan—I have not read your response because we only got it yesterday, I think, on the email—and you have also responded, I think, to the four law firms. I presume that is in this document as well; is that correct?

Mr Patch—The document you have on the four law firms responds to their comments in part 2.1 of their submission. Another document is in the course of being prepared: the response to the comments in part 2.2 of their submission. We hope to have that document with the committee today or tomorrow.

Senator BARNETT—On balance, are you saying that there is a likelihood that, based on those responses, consequential amendments will emanate?

Mr Patch—I would be very surprised if there were no consequential amendments.

Senator BARNETT—It is helpful from our point of view to know that.

Mr Patch—Certainly there will be a consequential amendments bill. My expectation—and this is not intended to foreshadow what the government might decide—is that I would be surprised if there were not a schedule to the consequential amendments bill proposing amendments to the main bill, independently of anything that this committee might recommend. We will be recommending to the government that some amendments be made to the bill—only a small number of amendments. There is no list at the moment.

Senator BARNETT—That is what I am asking, Mr Patch and Mr Glenn: whether you can give us an indication as to the key areas of concern that you have, to improve the bill. That is why we are having a hearing. We are trying to help improve the bill. So please help us.

Mr Patch—That is a slightly different question.

Senator BARNETT—You are the experts.

Mr Patch—I can mention just a couple of the things that people have raised. For example, a comment was made that proposed section 12(4), about accounts, about the capacity of an ADI to take a security interest in the account with it, should be amended to expressly put in a reference to an ADI account. We think that is something that is certainly worth looking at.

Senator BARNETT—Right. Can you nominate the other sections?

Mr Patch—An alternative approach would be to allow us to give that list when we come back tomorrow. If we take this on notice, maybe tomorrow we could briefly run through the things which we think warrant consideration.

Senator BARNETT—I think, frankly, in the light of the fact that we only have a limited time today because we have other witnesses and so on, that would be most welcome, and I would urge you to use your best endeavours to have that to the committee tomorrow morning. I think it would be most useful as far as the committee is concerned.

CHAIR—Senator Barnett, thank you. Mr Glenn, I take it, though, that the proposed areas that you believe warrant further consideration are outlined in your response to Professor Duggan and the law firms. I have had a chance to read those.

Mr Glenn—Yes.

CHAIR—And you do actually, in your response, go through and make comments that you believe this is or is not an area that should be looked at.

Mr Patch—Yes. In some of those comments you will see that it says, 'This is an area that warrants consideration,' or 'that consideration should be given to'.

CHAIR—Yes. So it is there.

Mr Patch—Those are the ones that I would encourage Senator Barnett to look at in the context of the questions that he has just been asking.

Mr Glenn—We put those comments in, Chair, to assist the committee. Obviously we cannot foreshadow what the government's view might be about any of those matters.

CHAIR—I understand that.

Senator BARNETT—Through you, Chair, to conclude this section, I would ask the department to use its best endeavours to provide further and better particulars on those areas where it has indicated that the committee should be considering these matters further. Please, try and help the committee to the best extent that you can, and I am happy for you to take it on notice and advise us further tomorrow morning.

Mr Glenn—Thank you, Senator.

CHAIR—They are outlined in this document pretty well, I think.

Senator TROOD—I would like to begin by acknowledging the tremendous amount of work that you have done on this bill and in particular your willingness and the government's willingness to restructure the bill, which I thought was a very necessary requirement after the previous hearings we went to. It is not always that Senate committees are listened to by governments or indeed by departments, but I am very grateful for the work you put in to try and reconstruct this bill. It is an important piece of legislation and I think that the bill is vastly improved by the work you have put into it and the restructuring that has taken place. I think we will all benefit from it, those of us who are in the parliament and of course those who are going to be using this bill on a day-to-day basis. So please accept my personal congratulations for the work you have done on that. It is clear that there are some things that need further attention, and I understand that you are going to take those on notice in a serious way.

The only substantive question I wanted to ask you at this stage relates to the observations by Clayton Utz about consultation. On that same page that I referred to, there was a reference to the fact that the new bill has not been subject to the same kind of consultation with stakeholders as was the case with the earlier bill. It may be a function of the time involved. Do you have a response to that observation by Clayton Utz?

Mr Patch—Certainly it is a function of the time. It is also a function of the fact that we took guidance from the committee in terms of what needed to be done. We had spoken at length previously to private sector stakeholders and were reasonably well acquainted with their attitudes on a range of issues. There was not a lot of consultation with Clayton Utz.

Senator TROOD—Or any others?

Mr Patch—We have a consultative group that we discussed the amendments with and the general thrust of the direction the bill was taking. Certainly the proposals were discussed with the members of that consultative group. That, in a sense, was the rationale for the establishment of that group. There was the Australian Finance Conference. We discussed particular issues with particular organisations, peak organisations. Issues that were likely to be of interest to a peak organisation we discussed with them, but not the whole bill.

Senator TROOD—Have you discussed the new bill in any detail, or the proposals that you are intending to put into the new bill, with any of the law firms, whether it is Clayton Utz or the big four or any others?

Mr Patch—A draft of the bill was given to Mr Wappett, who is something of an expert in this area. Certainly it was not the final draft, but it was fairly close to a final draft.

Mr Glenn—Again, that is picking up on membership of the PPS consultative group rather than law firms generally.

Senator TROOD—Claytons was not a member of that consultative group, was it?

Mr Glenn—No. There is not a Claytons person. The membership is drawn from the legal community, primarily from membership of Law Council of Australia committees relevant to PPS reform.

Senator TROOD—Thank you. I do not wish to ask any further questions at this stage. I think there will be others later on.

CHAIR—I read through your response to Professor Duggan. He is still arguing that some of the issues around PPS in Canada are still worth picking up. You make a comment, though, that you believe that the issues in Canada are different to those here because the Canadian test case opens up an argument about ADIs that does not apply to Australia. Do you want to make a comment about that so that we can clarify that on the record? I think that is a substantial area of difference between his line of thinking and some of the aspects of the bill.

Mr Patch—I will need to craft some words rather carefully here.

CHAIR—Do you want to think about it and provide a response tomorrow?

Mr Patch—I have considered whether this is a matter that we might move in camera on, but I will see if I can do it without going to that extent. This is an issue on which the bill does differ from the Canadian bill. The Canadian bill does not say expressly the right of set-off is not a security interest whereas our bill does say that the bill does not apply to a right of set-off. I think the right of set-off is a very fundamental principle of law and I think that the prospect that the legislation in Canada might apply to a set-off has caught them somewhat by surprise and has some far-reaching implications for Canada. But the observation I would make is that in

preparing our bill and in departing from the Canadian legislation we have anticipated those changes not only with respect to the right of set-off but in relation to a number of other matters and that therefore the problems that the Canadians are experiencing with their legislation will not occur in Australia.

I think that it is an illustration of the area where, with the opportunity to reflect on the Canadian legislation and how it might work, we have been able to craft a product that in some respects is superior to the Canadian legislation—

Senator MARSHALL—We would expect no less.

Mr Patch—and it is probably a reason why we should not be seeking to mimic in every respect the Canadian legislation. We simply do not want to have the problems that they have. Canada's act dates back to 1980s. There is a lot of learning in Canada about their legislation but, because it is state based and provincial based legislation, the politics has just prevented them from amending their act to bring it up to date. So they have only really been able to amend it to make it contemporary to address today's financial and economic circumstances where there has been a very pressing need to do so. That is a reason why we think it is necessary to exercise some caution about slavishly copying the Canadian model. I think similar considerations apply to New Zealand. Their act is slightly more relevant, but our economy is different from the New Zealand economy. To the extent that our economy is different to the New Zealand economy our act needs to reflect those differences, and we have sought to achieve that.

CHAIR—Okay. I am going to leave it there because we are going to run out of time today if I am not strict on our time lines. Can I thank the three of you again. I understand you will all be back tomorrow morning.

Mr Glenn—Indeed, yes. Thank you, Chair.

[9.50 am]

PILGRIM, Mr Timothy, Deputy Privacy Commissioner, Office of the Privacy Commissioner

SOLOMON, Mr Andrew, Director, Policy, Office of the Privacy Commissioner

CHAIR—Good morning and welcome, Mr Pilgrim and Mr Solomon, and thank you for your attendance today. Thank you very much for your submission, which for our purposes is submission No. 8. Do you want to make any amendments or changes to that before I ask you to make an opening statement?

Mr Pilgrim—No changes, thank you.

CHAIR—If you want to provide us with an opening statement we would welcome that, and then we will go to questions.

Mr Pilgrim—I welcome the opportunity to appear before the committee today in relation to the Personal Property Securities Bill. The Office of the Privacy Commissioner has been consulted by the Attorney-General's Department on the development of the national personal property securities scheme since May 2006. The office has provided the department with advice and comments on the scheme design and on previous drafts of the bill in relation to minimising the potential privacy risks and enhancing privacy protections associated with the Personal Property Securities Register.

The office made a submission to this committee on the exposure draft bill in December 2008 and appeared before the committee on 23 January 2009. Our submission to the committee at that time noted that the register may include personal information relating to the financial and credit affairs of a large number of individuals and had the potential to raise a number of privacy related issues.

I note that in March this year the committee released its report on the exposure draft of the bill. The office notes that the Australian government's response to your report released in early June accepted most of the committee's privacy related recommendations. The office supports the subsequent amendments to the bill to incorporate the committee's recommendations and welcomes the department's decision in May to engage independent consultants to conduct a privacy impact assessment of the personal property securities scheme. The office participated in a workshop with those consultants undertaking the PIA.

The office generally supports all of the recommendations in the privacy impact assessment report released recently, including that a three-year review of the personal property security legislation consider the impact of the operation of the register on individual grantors' privacy. The office appreciates that many of its suggestions and the suggestions of others have been adopted or reflected in some way in the current draft of the bill.

Our current submission to the committee discusses several issues that the office believes would improve consistency of the bill's provisions with those of the Privacy Act. Either I or Mr Solomon are happy to answer questions that the committee may have on our current submissions or on privacy issues more generally. Thank you.

CHAIR—Thank you, Mr Pilgrim. Mr Solomon, is there anything you wish to add?

Mr Solomon—No.

CHAIR—I have a couple of questions after reading your submission. You suggest clause 173(2) would need further amendment to clarify the fact that the registrar of the PPS Register could lodge a complaint with the Privacy Commissioner. So do you not believe that the registrar has enough authority to take action under the current legislation?

Mr Pilgrim—It is not so much that the registrar does not have enough power to undertake action. What we are approaching there is the issue that currently under the Privacy Act complaints generally are lodged by the individual who has been affected by a particular breach. The way we have interpreted the application of this particular clause of the bill is that there could be a situation where the registrar could be lodging a complaint about a potential breach against an individual's privacy, in terms of the register, and it could be in circumstances where the individual does not know. In normal circumstances another person can lodge a complaint on behalf of an individual, but that is usually with the direct authorisation of the individual who is being impacted. So this process could be slightly different to current practices within the Privacy Act, and we think that issue needs to be clarified.

CHAIR—So you would amend this legislation, or would you amend the legislation so that people other than the person directly affected could take action?

Mr Pilgrim—We think it would be preferable for the registrar, if they believed that there had been a breach of the personal information held on the register, to advise the individual and then get their authorisation prior to lodging a complaint on their behalf with our office. I think that it would be best dealt with through this legislation.

CHAIR—You make the comment on the second page of your submission that the coverage of the Privacy Act in relation to individuals and entities otherwise exempt from the Privacy Act in relation to the two specified interferences with privacy in the PBS bill will need to be addressed in consequential amendments to your act. Can you just expand on that for us for the record so we understand exactly what you mean there?

Mr Pilgrim—Certainly. Generally speaking, the Privacy Act is structured in such a way that investigations that are undertaken by us are undertaken in terms of investigating either government agencies or private sector organisations. There are very limited situations where we can undertake an investigation against an individual. Through this enactment it would be setting up a situation whereby our office would be likely to be able to undertake further investigations against individuals and we believe that that needs to be reflected quite clearly in the Privacy Act through amendments because it is, if you like, a step away from the natural application of the Privacy Act. Similarly, in terms of some small businesses that are exempt from the Privacy Act, there may need to be an amendment to the Privacy Act to allow us to undertake investigations against them.

CHAIR—But that is a much broader and sweeping change of reforms, isn't it, if we amended the Privacy Act to allow for that provision? It certainly broadens, does it not, the scope and capacity of the Privacy Act if we went down that path?

Mr Pilgrim—If we are looking at it narrowly, at the moment there is a provision—and I have to advise the committee that in my time in the Privacy Office I do not recall it being used—which does allow us to undertake investigations against individuals, but they are limited to certain aspects of the credit reporting provisions and the tax file number provisions so they are very limited and very strict. So if there were an identified need to have us able to undertake an investigation of an individual in terms of a potential breach of the use of the personal properties register, we think that should be reflected in our act in those same sorts of limited ways to remove from doubt our ability to do it.

CHAIR—So you could just amend the Privacy Act to add, and in respect of PPS—

Mr Pilgrim—That is correct.

CHAIR—So that could be another piece of consequential amendments.

Mr Pilgrim—Yes. We would interpret that as being done through the consequential amendments, and it would be a minor amendment for the purposes of our act in terms of individuals.

CHAIR—Your submission also draws our attention to a few remaining issues that you believe would improve the consistency of this bill with those of the Privacy Act. You talk about complaints to the registrar, and we have gone through that. Then you refer to third parties. I found it interesting that currently, you are saying, the misuse by third parties is something that is not entertained by your act, or it is unclear in the PPS Act—is that so?

Mr Pilgrim—If a third party was to get hold of information that had been collected inappropriately in the first place by another person or another party, it is unclear to us whether in the PPS Act the penalties or the regime that would cover the individual who did the initial inappropriate accessing would apply to that third party should they then go on to use that information. We would assume that it would not be a very good situation if a third party could then go on and use information that was inappropriately accessed in the first place, but we are just unclear as to whether or not the intention is that it does apply to those third parties.

CHAIR—So you have suggested that the bill would need to clarify that situation, that it needs to be clear.

Mr Pilgrim—Our view is that we think it needs to be clearer and I am not whether that should be done directly through the bill or possibly through the explanatory memorandum. I am not sure of the best mechanism.

CHAIR—In which case you would table a revised EM if—

Mr Pilgrim—If that is the appropriate mechanism—

Mr Solomon—I think that it is a matter for the department and government to decide what is the best way to respond to that. We are not sure whether that is the intention and, if it is, it should be clearer in either the explanatory memorandum or the bill itself. It would be useful if the government were to advise why that was not the intention.

Senator TROOD—I take it from your comments, gentlemen, that you are generally happy with the direction in which this legislation is moving but for these particular concerns that you have flagged. Is that right?

Mr Pilgrim—Yes, we are generally happy with the way the privacy issues have been dealt with through this whole process and certainly with the protections that have gone into place overall. We think that that is a very good outcome.

Senator TROOD—Have you consulted at all with the Attorney-General's Department about these matters that you have raised specifically in your submission?

Mr Pilgrim—I might ask Mr Solomon who has had more direct dealings with the department on that.

Mr Solomon—A number of these issues have been raised—in fact one of them was raised in a previous submission. The Attorney-General's Department is on notice about these issues. At this stage we have not had a full discussion with them about any response in specific terms to our submission to the committee.

Senator TROOD—So your concerns are on notice, I assume. Is that in relation to all of the matters that are in your submission or just a couple of them?

Mr Solomon—The department is on notice about all of these—

Senator TROOD—But you have not had a reaction from the department about its response?

Mr Solomon—No, but some of these are recent issues that have evolved and the department has been very busy—

Senator TROOD—It is not an implied criticism; it is an attempt to find out precisely where we are in relation to this process of dialogue, that has been a constructive part of this whole process from the beginning. The department has not in any event rejected some of these suggestions you have made—

Mr Pilgrim—That is correct. I would couch it in terms that our discussions are ongoing with them and it is a very positive interaction with the department.

Senator TROOD—Good. And just one final thing from me just in relation to this point that you make about clause 157(4), which you say does not align with some aspects of the Privacy Act. Then you say 'in particular' and you mention one aspect of the Privacy Act. Are there other parts of the Privacy Act about which you have a concern, or is that the issue—and this is on the penultimate page of your submission, two-thirds of the way down in the paragraph beginning:

The Office supports the intent of clause 157(4) …

Have you found that part, Mr Solomon?

Mr Solomon—Yes, I have, Senator. The issue here from the office's perspective is that it is a little unclear in the PPS Bill. It appears to say that if a verification statement is not given to a grantor, any grantor, then they can make a complaint to the Privacy Commissioner that that verification statement has not been given. What we were trying to clarify here is that generally the Privacy Act works in relation to individuals whose personal information has been affected or harmed in some way, and we think that it is important that it is clarified that it would be individuals in their personal capacity who could make that complaint but not small businesses or other grantors where the verification is not about their individual personal information. I just think that it is a little bit unclear in the PPS Bill.

Senator TROOD—And you take that view because the Privacy Act is in relation to individuals—is that right? It is about individuals' rights and not small business rights or anything of that nature, so it is a matter of principle in relation to the intent of the act—

Mr Solomon—Yes. We believe this is the intention of the PPS Bill. We just think that the wording of that area could be clarified in the explanatory memorandum to show that that is the intent.

Senator TROOD—So you are concerned that the consequence of not clarifying this may be that it would seem to give a right to an individual, an organisation or an enterprise which under the act is not intended to have a right.

Mr Solomon—Exactly, Senator.

Senator BARNETT—Thanks for being here today. I will just ask a few questions about your submission. I would like to ask your views on the Malcolm Crompton submission too, if I could. I will go to that first. It has made 14 recommendations, and my understanding from reading it is that the department has accepted 13 of them. Firstly, I would like to get your response to the report and your views on it before we go through the recommendations of that report.

Mr Pilgrim—Generally speaking, we welcome the report. I mentioned earlier that we thought it was a good approach and we welcomed the department going through the process of having an independent privacy impact assessment undertaken. Overall we supported the majority of the recommendations made in the PIA—in fact we supported all of them, I should say; sorry—and we have welcomed the response generally from the department, which has taken on board most of them.

Senator BARNETT—So, on the record, you support all of the recommendations of that report.

Mr Pilgrim—That is correct; we do. I am conscious of the fact that there is one recommendation, I believe, that was not accepted.

Senator BARNETT—Recommendation No. 3.

Mr Pilgrim—That is right; that was not accepted by the department, but I believe the department has proposed an alternative approach to dealing with that particular recommendation.

Senator BARNETT—I am interested in your views on that. Recommendation 3 says:

… that secured parties proposing to register a security interest in consumer property where the registration will include an individual grantor's name—

and date of birth et cetera. It is not accepted, the department says, because it would impose additional obligations on small business. Do you have that document in front of you?

Mr Pilgrim—Yes.

Senator BARNETT—Can you speak to the recommendation, the department's response and your views with respect to that recommendation and the response.

Mr Pilgrim—Yes. With regard to that particular recommendation, we did examine that in terms of what the PIA was raising as a particular issue and how the department has intended to respond to it in providing, as I understand it, additional guidance to those entities that may have to deal with that particular information. I will get Mr Solomon to expand on this a bit further in detail, as he is much more familiar with the PIA in detail, but, generally speaking, when we were looking at the issue of the information that will be put on the PPS register we did take into account the need to acknowledge the amount of information that will be business related information and individual information. Overall, I would say that I think there has been an appropriate balance struck between the protection of that information and the ability of the register to achieve the policy aims that have been stated for its establishment. Now I will ask Mr Solomon to comment in detail on it.

Mr Solomon—The PIA recommends that notice be given prior to registration by all security holders or potential security holders who wish to register their interest. It is important to recognise that there will be a notice required after registration: the verification statement to be provided to the grantor. The PIA recommended that there be a separate notice prior to registration to all grantors. The department has responded that this could be a burden on small businesses that do not currently have to provide notices like that under the Privacy Act. In relation to the majority of security holders who would be dealing with security interests, they would be subject to the Privacy Act already and would be required to provide notice about how they deal with individuals' information when they collect it. So most of the situations would already be covered by the Privacy Act.

It would be a very small number of situations where small businesses wishing to register a security interest would not be subject to a notice provision under the Privacy Act. From reading the government's response, the office has formed the view that this is a reasonable alternative to the request of the PIA and that guidance issued by the registrar to those few small businesses that may be seeking to register a security interest of an individual grantor would be appropriate in the circumstances.

Senator BARNETT—So those small businesses affected would have an extra administrative burden in terms of lodging that notice.

Mr Solomon—No. As I read it, the government is proposing that the registrar issue some good-practice guidelines but that would not be a mandatory provision; it would just be something to assist small businesses who are likely to do that to know the best thing to do in the circumstances. It would not be something that would be subject to sanction.

Senator BARNETT—So would they form part of the regulations or would they just be guidelines for small business or words to that effect?

Mr Solomon—I am not sure. You would need to ask the department about that. I would think that that would just be a guidance note from the registrar, not part of the regulations. But that would be a matter for the department.

Mr Pilgrim—I would agree that that is how I would have interpreted it as well.

Senator BARNETT—Let us go back to the 14 recommendations which you have supported. What are the consequential effects of those recommendations now that the department has agreed to them? What has to happen? I do not necessarily want to go through each one of them and I am happy for you to take it on notice. We as a committee would like to know the consequences for this. We are advised by the department, for example, that there is no need for consequential amendments to the substantive bill. Firstly, I would like your confirmation that that is also your understanding. Secondly, what are the consequences to these recommendations being implemented?

Mr Pilgrim—I will ask Mr Solomon to answer that. If we think there is anything we need to cover other than that, we might take that on notice.

Mr Solomon—From my understanding, most of the recommendations would not require consequential amendments, because a number of the issues have already been picked up in the bill that is before you. I note that the department said that in their evidence before you this morning. That is something that accords with how we view privacy impact assessments being undertaken. They work very well when there is an iterative process that is going on and changes are made to the design along the way as the privacy impact assessment is undertaken. That is what has occurred in this case as far as we can see. It is very useful if that occurs and you do not have to wait till the end to get a report and then decide what to do. The purpose of that privacy impact assessment is to assist and inform agencies and organisations as they are designing and putting in place issues around a particular project. That is what has happened here. As the department mentioned this morning, we understand that there may be some need for regulations, in relation to the registrar's ability to remove information, to come forward at a later stage.

Senator BARNETT—So you think some of the recommendations are going to be picked up in the regulations.

Mr Solomon—That one in particular, I think, will be picked up in the regulations.

Senator BARNETT—Which one specifically?

Mr Solomon—Where the registrar is able to remove—

Senator BARNETT—Recommendation No. 3?

Mr Solomon—No. This is recommendation 12, where the PIA recommended that the government consider what to do in emergency situations in relation to individuals' personal information that may appear on the register. The government has responded that the registrar would be best placed to deal with those requests to remove the details. Our understanding from the evidence given this morning by the department and in general is that there would be matters about the criteria for that and so forth put forward in the regulations.

Senator BARNETT—I want to pick you up on something, Mr Solomon. In your initial response to my question you said that most of the recommendations would not require legislative amendment. I want to be quite specific. Can I tie you down and ask you: will any recommendation require legislative amendment, in your view?

Mr Pilgrim—I think we will take that on notice and get back to the committee, if that is all right with the committee.

Senator BARNETT—That is okay. No problem at all. We need to be clear on these things.

Mr Pilgrim—Yes. I can appreciate that.

Senator BARNETT—I think that will help. If there is a legislative amendment, when you respond perhaps you could indicate where that amendment would be best placed and the form of amendment that you would envisage as being appropriate.

Mr Pilgrim—Yes, we will do that.

Senator BARNETT—Thank you very much. Do you have any other views on amendments that the government intends to make in the proposed consequential amendments bill?

Mr Pilgrim—We raised earlier on, in the discussions with the committee, some issues relating to potential consequential amendments to the Privacy Act in particular. That is covered in our submission, on page 7.

Senator BARNETT—Is there anything apart from that?

Mr Pilgrim—No. I think everything else that we thought was an issue has been covered in our submission.

Senator BARNETT—Would you want to be consulted in the drafting of the regulations? You would be part of that process, would you not?

Mr Pilgrim—We would expect to be and we would welcome it.

Senator BARNETT—Can you consider any other amendments to other acts, apart from your own act, that may be relevant?

Mr Pilgrim—At this stage I cannot think of any, but we are happy to consider that and get back to the committee with an answer when we provide the other information.

Senator BARNETT—Thank you very much. Do you liaise with other state and territory privacy commissions? Are they cognisant of what is happening around this issue, the PPS reforms?

Mr Pilgrim—We do meet regularly with our colleagues in the states and territories. I believe—and, again, I can confirm this—the issue has come up at one of those meetings. I am not sure exactly how formally it has been raised, but there has been some discussion with some of the state and territory commissions about this issue. I cannot recall any major issues being raised by them, through us, on the proposals at this stage.

Senator BARNETT—I will put it another way. Are they across it? Are they briefed on it? Do you know, from the best of your knowledge, whether they are up to speed on the reforms and aware of the consequences for their own states and territories? We are advised that prior to Christmas they will all be introducing their own substantive primary bills to implement the objectives of the bill.

Mr Pilgrim—I will take that on notice and just confirm the level of awareness with our colleagues. I would be surprised if they were not aware.

Senator BARNETT—Thank you.

CHAIR—Mr Pilgrim and Mr Solomon, I do not think we have any other questions for you today, so thanks very much for your submission and for your time. We appreciate the time you have provided to the committee. Thank you very much.

Mr Pilgrim—Thank you.

Proceedings suspended from 10.19 am to 10.47 am

[10.48 am]

GILBERT, Mr Ian Bruce, Director, Retail Policy, Australian Bankers Association

CHAIR—Welcome. Thank you very much for your submission. It has been lodged and numbered 14 for our purposes. Before I invite you to make an opening statement, do you want to make any amendments to your submission?

Mr Gilbert—I will perhaps cover this in my opening statement. There is a technical error in one aspect of the submission. I will address that in my opening statement, if that pleases the committee.

CHAIR—That will be fine. I invite you to start.

Mr Gilbert—Thank you for the opportunity to come again to this committee to speak about this important reform measure. Last time I appeared before the committee I indicated the ABA's support for this reform. That has not changed. We are fully supportive of the proposals for reform of the law of personal property securities in Australia.

As I mentioned earlier, on page 2 of the submission, in the second paragraph in which I made reference to clause 14(2)(c), the example in that particular element aspect of the submission is wrong in its reference to a vehicle, because a vehicle of course would be required to be registered by way of a serial number in the earlier security charge, if it existed at that time. Whilst the principle that I have made there still stands, the example is wrong. However if, for example, the asset was not a vehicle which was a serial-numbered good but something that was not required to be registered by reference to a serial number, the same principle applies in that example. Our members support the view that this subclause should be removed from the bill. Thank you.

Thirdly, by way of opening comments, Madam Chair, there are a number of submissions on the committee's website and they are quite instructive. One that has caught our attention and one which I have sought specific input from member banks on, is the four legal firms' submission, which appeared constructive and helpful. There are a number of aspects of that submission with which our members agree—not all of the points made but some of them. We would like to suggest that those matters are dealt with expeditiously by the Attorney-General's Department in consultation with the firms and banks and other relevant stakeholders.

The ABA's concern is to ensure that the timetable that this reform is currently on stays on that timetable. We were very appreciative of the committee's recommendation that the commencement date be extended to May 2011. That gives our members the opportunity to settle in and develop in a realistic time frame the sorts of changes that they need to make and which they and their customers will benefit from in the fullness of that time. So, yes, we are happy to see those technical issues sorted out and resolved to the satisfaction of parties but staying with the current timetable that the government has adopted for this reform. Thank you.

CHAIR—I have just got a couple of questions that I want your comments on for the record. In respect of the Shipping Registration Act you put here that there is no guidance about how this will be dealt with. You say that the PPS Bill is still silent on this issue and it is unclear whether consequential changes to the Shipping Registration Act are being considered. Can you just expand on that for us in respect of the issue?

Mr Gilbert—The Shipping Registration Act provides within its own terms the registration of title in ships on a publicly accessible register and also mortgages over ships on that register as well. We would like to see one of two things happen: either all personal property security interests go onto the PPS register or, if not, then there is a systemic link between the PPS register and the Shipping Register so that the searching is reduced effectively to one inquiry without having to conduct multiple searches. It is a question of efficiency and in practice finding all the relevant information in the one place. That is what that is about.

CHAIR—That makes sense. I think that it is pretty clear about section 14 being removed—I think that you have outlined that pretty well. For clause 116, the Corporations Act, you are suggesting that either the definition of controller be amended in the Corporations Act or that the PPS Bill be amended to clarify that further.

Mr Gilbert—The bill currently provides in the case of receivers, receivers and managers, and controllers, that the provisions of the Corporations Act will apply. What needs to be clear from our position is that we see a great benefit in the PPS Bill provisions where, if you have mixed security interests—a security interest over land, to which the PPS Bill does not apply, but also over personal property of a company—the PPS Bill gives you the opportunity, if you have to take an enforcement step, to effectively take a hybrid approach to it without having to deal with the separate regimes in terms of that enforcement but perform them collectively,

holistically, under the one provision of the PPS legislation. We would like to make sure that that right is still available. The particular provision, clause 116, suggests that that may not be the case. If it can be clarified that it is the case that that facility is available, then that would be an ideal outcome.

It is particularly relevant to the controller. A controller includes a mortgagee, so a bank enforcing a charge in its own right rather than appointing a receiver or a receiver and manager is effectively a mortgagee in relation to land, enforcing an interest in relation to land, and in respect of personal property, enforcing a security interest under the PPS Bill. We would like to make sure that the two streams of activity can be combined into one, as the PPS Bill currently provides.

CHAIR—Okay. So, again, you suggest that section 226 of the Corporations Act should be amended to ensure that two registrations are avoided—that it is actually streamlined.

Mr Gilbert—Yes.

CHAIR—So that goes to that as well?

Mr Gilbert—It is slightly different. There is a requirement under the Corporations Act that, for a charge to be valid, it has to be registered with ASIC within 45 days of its having been made. We assume that that will be replaced, to the extent that personal property is included in the charge, that the 45-day time limit will apply under the PPS Bill and that the point of registration will be on the PPS register. It is not quite clear what would happen in relation to land, and that is something that may need to be looked at. But most of the points we have raised in our submission are really alerts, I suppose, as to things that we see would benefit from some fleshing out and some more clarity.

CHAIR—Can you just expand for me on your suggestion that section 47 should be a more objective test rather than a subjective test? That would change the focus and the emphasis then, no doubt?

Mr Gilbert—Yes. Establishing what someone's belief is subjectively at any particular point in time is not an easy thing to do. We propose that the test should be more objective—that is, that rather than what the person does or does not believe, you take a more objective approach and say, 'Would a person believe the value of this item to be less than $5,000 given the circumstances of this transaction?' We are keen to make sure that, through an objective test, you create an arm's length situation. Where there is not an arm's length transaction, it may be a transaction then that is going to basically trick the secured creditor. It is really just keeping things at arm's length, and objective tests achieve that quite adequately.

CHAIR—That would be a major change in the emphasis of this section?

Mr Gilbert—It is more to do with the test of belief. It is in a sense a technical issue that you either say, 'Well, it is someone's belief that has to be tested by evidence or whatever,' or you say, 'Well, what would a reasonable person reasonably believe in these circumstances?' so that the circumstances themselves dictate what a reasonable belief ought or ought not to be. That gives you that little bit of comfort that anything that is less than an arm's length transaction may not pass the test.

CHAIR—Thanks.

Senator BARNETT—Thank you, Mr Gilbert, for your submission. As I see your submission, you have suggestions for at least six amendments to the bill and possibly seven. Is that right?

Mr Gilbert—Either clarification or amendments, yes.

Senator BARNETT—You put this submission in recently—31 July is the date. Have you had any discussions with the department regarding your suggestions or recommendations for clarification or amendment?

Mr Gilbert—Not since the submission has been put in. The department would be aware of some of the matters that we have raised in this submission. In fact, in relation to the shareholder issue, you will see that I have mentioned in the submission that the Attorney-General's Department has agreed to look into the matter. We felt that it was important to at least have it on the record for this committee that there was a concern there but that the Attorney-General's Department is looking at the matter.

Senator BARNETT—It is good that you have noted that. I use an example, the Shipping Registration Act, which the chairman and you have discussed in the last few minutes. You mentioned there 'the importance of achieving as complete a national model as feasible' and that you will be following up with the Attorney-General's Department. Have you had any discussions with them up until now?

Mr Gilbert—I have not had a discussion about that in any detail with the department. Certainly that has been discussed in the course of consultation, and it is perhaps something that the department itself may be able to clarify in terms of its plans as to what it does intend to do. There was an intention. It is something we have not seen in the material to date, but there was an intention that that would be created in a much more seamless approach to the register searching.

Senator BARNETT—We have had the department as a witness this morning, for which we thank them, and they are coming back tomorrow morning. We have not specifically asked the department for a response to the submissions before us today and the recommendations in those submissions, but you would be hopeful that either you would have personal discussions with them or that any evidence given here or subsequently would clarify these matters or that they would agree to amending the relevant sections as per your submission?

Mr Gilbert—Yes. I should add—and it was a note that we put at the end of the submission—that the department have been very committed to consultation. The bill is technically difficult in some respects and requires time to understand it—

Senator BARNETT—Indeed it is.

Mr Gilbert—and they have been very good in responding to the sorts of concerns we have raised—

Senator BARNETT—They have undertaken a lot of work, for sure.

Mr Gilbert—and that will continue. We expect that that will continue.

Senator BARNETT—For sure. And you indicate with respect to the regulations, I think, that you look forward to those being drafted and to being consulted.

Mr Gilbert—Yes. One of the important things about any reform regime is that the real work, the hard work, starts when all the black ink is dry—and that means the principal legislation and the subordinate legislation.

Senator BARNETT—Yes, but in terms of 'black ink' your recommendation is that we get clarity or seven amendments to the bill. That is really something that we as a committee need to take on board, and we need to get your response and then the department's response to your recommendations. Did you raise any of those issues prior to the bill being introduced? Did you raise any of those issues during the consultation on the exposure draft? Were they relevant at the time, and did you raise them?

Mr Gilbert—It is a question, I suppose, of the flow of the consultation process, in that there have been many discussions by us with the department, as other stakeholders have had those discussions as well. The first notice we saw of clause 14(2) was in the bill itself. We were not aware that 14(2)(c) was there until we saw the bill. There had been prior discussions, as I mentioned earlier, about the Shipping Registration Act and getting a seamless searching approach into place. Section 116 was not raised before with the department.

Senator BARNETT—Can we just go through them in a minute—but I think you have answered the question. Let us go to proposed section 14(2)(c), the PMSI one, where you actually recommend the deletion of that section, because you are clearly worried about it. You say in your submission:

… it could mean less choice for the consumer in seeking finance or less ability to obtain consumer goods finance.

That is a pretty serious observation and recommendation you have made.

Mr Gilbert—It was an observation that, if 14(2)(c) stayed, would it mean that a consumer would have greater difficulty getting finance on the security of what I now have to say would be non-serial-numbered goods? It might be a rare instance, but it is nevertheless a possibility. Most consumer finance, as the committee will be aware, is principally in relation to either real estate or serial-numbered goods.

Senator BARNETT—You have touched on section 116 before, on the need for greater consistency, and section 266 of the Corporations Act. You call for the avoidance of doubt in respect of the registration of PPS interests. Is there anything else you want to add to that, and how important is it to you?

Mr Gilbert—Again, it is a point of clarification, and there are going to be, as I understand it, some consequential amendments made around the Corporations Act, because it is part of the legislative need to do that, and we would hope that that is picked up and addressed. It is a flag that it is something we would like to see be clear.

Senator BARNETT—The next one, about the proceeds being covered by security interest regarding shares, you have touched on already. Is there anything else you want to add to that recommendation?

Mr Gilbert—No. We are more than happy to pursue that with the Attorney-General's Department. Whether there may be an amendment to the Corporations Act or the bill as a result, we are not sure. There is a level of concern about it. It would be a big issue if it did materialise, and we just want to make sure that it does not arise.

Senator BARNETT—But one of those two things, an amendment to this bill or the Corporations Act, should really occur, in your view—is that right?

Mr Gilbert—Or a view that we are wrong and the government is right.

Senator BARNETT—And you would like to be proved wrong, officially?

Mr Gilbert—Well, it would be good to be proved wrong—it would be one out of the way!

Senator BARNETT—It needs to be sorted. On section 127, reimbursement of enforcement expenses, you say:

… the PPS Bill should add that those expenses should not only be "reasonable expenses", but that they should be "reasonably paid or incurred" by the enforcing party.

Mr Gilbert—Yes. It is a submission that is often made by us and others in relation to expenses—that they should be not only reasonable but incurred reasonably.

Senator BARNETT—I see.

Mr Gilbert—It is a minor technical point.

Senator BARNETT—It is a technical point, but it is one that is not uncommonly made.

Mr Gilbert—It is not uncommonly made by us, and often by others against us.

Senator BARNETT—How important is this section 47(1)—taking personal, domestic or household property free of security interest?

Mr Gilbert—It is, again, just about removing as much doubt as possible without detrimentally affecting consumers who are involved in arms-length transactions—that the asset should pass without being clogged with a security interest. Again, the point is one of just getting it clearer.

Senator BARNETT—To go to the big picture, do you represent the smaller financial organisations or just the major banks?

Mr Gilbert—We have 23 banks as members of the association but we represent only banks—that is, banks who are allowed to call themselves banks within the meaning of the act.

Senator BARNETT—We have had a lot of feedback during the Senate inquiry regarding consultation and concerns about the lack of consultation, particularly for small business and others. What about your members? Do you think they are across this legislation and its impact on the way they do business once it is promulgated and commences?

Mr Gilbert—That is a progression, and there has been a lot of work done by banks over the last 12 months as to each of the consultation papers and the exposure draft, and it is a learning curve. It is a completely new regime. It is, in places, difficult in terms of understanding the language and the nature of the reform. We would agree wholeheartedly with the approach that has been taken in the most recent bill. It is far simpler. The exposure draft bill was incredibly complex. We did not know why some of those provisions were even there. I think others may have had some responsibility for that. Even just the way the bill is set out on this occasion—there is a box at the front of each part which gives you a summation of what is in that part—is very helpful to our members and others who have to work with this legislation. In terms of understanding the bill, I am sure that no-one in our membership would put their hand on their heart and say, 'We understand it fully right now,' but certainly, into the new year, that is exactly where they will be, because they will be in the implementation phase.

Senator BARNETT—Are you foreshadowing the need for one of the most comprehensive education and information campaigns and processes with your members, small business and the community generally to make sure there is a proper understanding of how the bill operates, its impact and the need for change in terms of business operation?

Mr Gilbert—Absolutely. We support that. This type of reform depends very heavily on ensuring there is a proper public information campaign. If there are presentations and discussions, our members will go because it

is like attending conferences—it is a way of getting a better understanding and perspective on a whole lot of things.

Senator BARNETT—I suppose it depends on the conference.

Mr Gilbert—That is right.

Senator FISHER—Mr Gilbert, you may not be placed to answer this, but I presume you would be saying that you do not expect that your members' clients or customers understand how this bill will impact them. I presume you would be asking, from your perspective, how could they at this stage?

Mr Gilbert—I think that is a fair summation.

Senator FISHER—Taking it back one step, however, do you have anything upon which you can base an assessment as to whether or not their representative organisations, and particularly the business organisations, have been involved in or have any appreciation of the prospect of this bill and its impact on their members? Are you in a position to comment on that or make any observation?

Mr Gilbert—No, I am not. I can only speak for what I have in terms of personal knowledge within our membership.

Senator FISHER—To the extent that you do have personal knowledge within your membership, to your knowledge, have there been any discussions either between your organisation or any of your members with organisations who would represent your members' customer bases about this?

Mr Gilbert—No, our association has not had any particular dealings with other business associations other than those that may be involved in financing but not in bank financing. In terms of small business associations and those sorts of bodies, no, we have not.

Senator FISHER—Do you reckon they might want to know about it? Do you reckon they might have something to say?

Mr Gilbert—I am sure they will. If they are in the business of selling goods on reservation of title arrangements, then most certainly they will need to know about the need for registration. I understand that the government is going to be ensuring that that communication gets deeply into those areas.

Senator FISHER—And the input end might be better than the output.

Senator BARNETT—I will pursue that a little further. You may be aware that the department has responded to the Senate committee report and that is a public document. We thank them for that response. They have implemented and responded to the recommendations of the report on the majority side and they have responded to the minority or Liberal senators' report as well. They have responded to those recommendations but, with respect to one of them, only in part—and that related to the issue of the requirement for a business to act in a commercially reasonable manner. They have taken on board our concerns about the difficulty in defining what a commercially reasonable manner is. As I understand it, that is contained only in chapter 4 of the bill. I am interested to know your views on the revised bill and the concerns—if you have any—regarding the definition of a commercially reasonable manner.

Mr Gilbert—We thank the committee, actually, for the approach that it took to this particular section. Previously, as you are aware, the bill had this apply right across the entire relationship with the customer. We thought that was inappropriate. It created a whole range of uncertainties from go to whoa. By confining it just to chapter 4, which are the enforcement provisions, it is more consistent with certain duties that arise, under the Corporations Act, in terms of enforcing security interests. It is common in consumer finance legislation as well. It is more consistent in that dimension with that activity than across the full spectrum. We certainly do not have the level of concern with that provision as we did have because of its much broader application under the previous iteration of the legislation.

Senator BARNETT—You had a problem, I think, in your first submission to our committee because it talked about a 'commercially reasonable manner' and in an 'honest manner' and you had concerns with those definitions.

Mr Gilbert—Certainly not honesty—not from the ABA's perspective, though maybe for others! We did with the 'acting in a reasonable manner' though. If you look at the Corporations Act, there is an obligation on a controller, who would be a bank enforcing a mortgage for example, to effectively achieve a fair market price on the sale or realisation of the asset. We are not uncomfortable with those concepts because they exist in

virtually any other law that relates to enforcement. It is a different context to the context in which this was intended to operate originally.

Senator BARNETT—And you are really saying that this applies in other similar legislation. You are saying that you do not have an issue with it at all.

Mr Gilbert—We must comply with a provision that is not exactly the same but is similar in terms of intent under the Corporations Act if—

Senator BARNETT—What we need is some sort of precedent that gives us some comfort that these words are commonly understood, otherwise, let's face it, this is going to be litigated and they are going to end up in court. I have the section in front of me, section 111, 'Rights and duties to be exercised honestly and in a commercially reasonable manner.' It is subsection 1 and 2. So why will it not be litigated and end up in court?

Mr Gilbert—It may well be, but even under the Corporations Act provision a party enforcing a mortgage could find themselves in court on the basis of whether they acted fairly and whether they had obtained a proper market price in promoting the property—

Senator BARNETT—Sure, but our objective as legislators is to draft black letter law that ensures that the parties to any contract or negotiable instrument know exactly where they stand so that they do not end up in court or they can avoid litigation.

Mr Gilbert—Or the alternative is to delete the provision altogether and then there would be no uncertainty. We as bankers live with a lot of uncertainty in legislation, I'm afraid.

Senator BARNETT—Would you be unhappy if it was deleted, or would you not be concerned one way or the other?

Mr Gilbert—If it were deleted, it would remove any uncertainty that may be attending to that provision. We are not necessarily seeking that but if the committee was so disposed to recommend that it be removed, we would not object.

Senator BARNETT—Thank you.

Senator TROOD—I wanted to pick up on two matters with you, Mr Gilbert. The first relates to this point that you were discussing in relation to proceeds covered by a security interest. It may be that I have an impaired understanding of the nature of this problem but it seems to me that the issue you are referring to already exists in relation to the changes of ownership of shares and things of that kind which institutions deal with on a regular basis. During the course of a bank paying dividends, for example, it must happen on numerous occasions that it receives advice of a change of ownership of shares et cetera and that messes up entitlements with regard to dividends et cetera. Is this problem that you are alluding to any different to the normal difficulty that banks have in deciding who it is that dividends should be directed to?

Mr Gilbert—I suppose that the PPS legislation will bring a new dimension to it in terms of the registration aspects. That seems to be where the issue lies. Yes, theoretically, it is a problem now but, under arrangements that are generally conducted through the CHESS system particularly, there are contractual arrangements between shareholders, brokers and financiers whereby dealings in shares cannot occur unless the financier agrees. It is not really a security arrangement in the legal sense of security but it is a secure arrangement. These controls effectively mean that if the secured party wanted to get hold of the dividends, receive the rights issue or whatever it happens to be, they have a pre-signed transfer from the owner of the shares which they could lodge with the company. They then become the shareholder and are therefore entitled to all the rights that are attached to those shares. That is what is currently done. The question is that under the PPS law there are rights of seizure under, I think, it is section 123 and there is a registration system where there is a new dimension to this and the possibility has arisen, certainly in a number of our member's minds, that this could mean problems in administering dividends and rights issues.

Senator TROOD—So it is a different set of circumstances to one where an owner of shares or a claimant of ownership would direct the company through a transfer of shares or through some other negotiable instrument to dispose of the dividends in a particular way. What is it? Is it the fact that the company would not be on notice about the expectations with regard to the security or it that the notice that might be given does not have certainty?

Mr Gilbert—Possibly both. There is a timing issue as well. A bank that is about to issue a dividend will close its register, as it were, on a particular date. They call it the record date. Whoever is on the record as a shareholder as at that date will be in the distribution. Theoretically, a secured party could come to the bank

after the closure of that record and say, 'I am a secured party, I am entitled to the payment of that dividend.' The processes are already in train by then by the bank to distribute the dividends. It would be a major problem for the share secretariat to stop the process, alter its records in the record book and perhaps have to verify that the claim that the secured party is making is a valid claim and is not contested. It mitigates against a smooth administrative process.

Senator TROOD—Why should not a secured party take the consequences of its failure not to provide the institution with advice as to its interest?

Mr Gilbert—There is nothing in the law that says that they should suffer from that. They are entitled to enforce their security whenever the terms of the security entitle them to do so. The fact that they sat on their rights, the record date was set and the book closed, and then they acted afterwards I am not aware that there is anything in the bill that would affect them in that respect.

Senator TROOD—In any event you are discussing that with the department?

Mr Gilbert—Yes we are. It may be that this is more imagined than real, but we need to make sure that it is not real.

Senator TROOD—The thing which is not raised in your submission but is mentioned by a couple of other submissions relates to these ADI accounts. A couple of issues have arisen in relation to this. I do not know whether you are familiar with submissions from Allens Arthur Robinson et al and Professor Duggan's submission both of which raise questions about ADIs. The Allens Arthur Robinson et al submission raises the question about extending the provisions to ADI accounts to other financial institutions. I imagine that does not interest you very much, but what is the argument against their proposition that that should extend to other financial institutions?

Mr Gilbert—I have seen that in the firms' submission. I think what they are really saying is what is the difference—

Senator TROOD—It gives these institutions a specific interest, doesn't it—a particular entitlement?

Mr Gilbert—Yes. Of course, ADIs are effectively deposit takers who hold moneys. They are prudentially supervised entities within Australia. I am not sure that Allens were arguing that that should be opened up to anybody, because you simply cannot take deposits and hold accounts as ADI accounts. What they were saying, as I understood it, was why should the law not also extend to an ADI deposit held in another country in currency other than an Australian currency? If that is the case, we probably agree. That is one of the technical amendments that we thought should be looked at. I think a bank was named as an example in the submission. Why should it be any different simply because that account is held by a branch in another country? It is still the same bank and in a currency other than Australian currency. We would certainly have that one on our list of things that should be looked at.

Senator TROOD—The force of that observation—that is to say, extending that entitlement to foreign banks—struck me as logical. So I am glad you support that proposition.

Mr Gilbert—Or an Australian ADI in a foreign country. We would certainly support that. Looking a bit further to other banks not subject to Australia's prudential supervisory regime is something that we would need to look at a little more carefully.

Senator TROOD—This is about protecting the trade in securities, isn't it? It is not necessarily about people making decisions in relation to their bankers and things of that kind. Don't we need to draw a distinction here between the trade in these securities as distinct from the regulations that apply to the prudential management of the banks?

Mr Gilbert—Yes and no. These security interests are taken effectively over an account held in an ADI, for example, in Australia, to ensure that if they need to exercise their right of set-off—which banks must preserve; APRA requires banks not to dilute their rights of set-off—the money is there. It was unclear under old law, under common law, whether a bank could take a security interest over its depositor's account at all. This law makes it clear that a bank can do that and an ADI can do that—that is, a building society, credit union or a bank—and that that security interest will stand so that, if the bank has to assert a right of set-off, the money is there to do it. It is a very important measure.

Senator TROOD—It is an important measure in relation to the prudential supervision of banking.

Mr Gilbert—APRA's view is that the right of set-off must be preserved, as I understand the situation.

Senator TROOD—There is another point in relation to these which may reflect the same principle that you have just articulated. Professor Duggan makes the point that banks have a privileged position in relation to the control of security as distinct from the registration of security. He thinks that puts them in a uniquely advantaged set of circumstances, as distinct from any other security holder. How do you respond to that?

Mr Gilbert—I did read that. Unfortunately, I think perhaps unintentionally Professor Duggan has implied in that aspect of his submission that we are in some way being given a favour. This is not the case. Under the old law, as I mentioned, where you could not take a security interest over your own depositor's account, a bank would set up arrangements which would effectively create a flawed asset—that is, the customer would not be able to withdraw the money from the bank account because of a contractual arrangement and a system freeze on the account, which gave the same effect as a security interest but of course is not a security interest.

We have explained that that is how it happens under the old law. Under the new law it is probably the case that those arrangements will continue; that the type of arrangement would be by virtue of control, which is a reflection of the past practice, where you could not take a security interest. And that practice will probably continue even though a security interest is able to be taken. The control rather than registration would be the means of effecting it.

If I were another financier seeking to finance a customer who held an account with a bank—and this is taking the point that Professor Duggan went further on—one of the first things that I would be asking if I were looking to take a security interest over that account would be: does the bank hold a security interest of the account already? If it did, I would seek to enter into a priority agreement with the back; that you would agree with me that I have priority, in the event of default, to the money in that bank or a certain amount of the money in that bank. That is a very normal commercial practice. So the theory of the matter and the practice of the matter are quite different.

Senator TROOD—Or should it be that there is a presumption when anybody is seeking to provide security in relation to deposits that in all likelihood the bank has entitlement as a result of its control as distinct from registering it.

Mr Gilbert—Perhaps I could put it another way and say that you should not presume that the bank does not have a security interest. They are not that common but it puts you on notice that it may exist and of course a prudent financier is going to ask the questions.

Senator TROOD—Isn't that his point?

Mr Gilbert—It is safer to presume than not worry about it.

Senator TROOD—Yes, but in fact he is not saying that some potential financiers may be a little more dimwitted than others perhaps and therefore not make the presumption you are referring to. He is saying that lenders ought to be on the same footing. In other words, we are all better off if we understand that there is a registration process, rather than just assuming control as a foundation of your entitlement. That is what I understand him to be saying.

Mr Gilbert—In practice we do not see that as a problem and I would not imagine that financiers would. If a financier were looking to take security over an account they would want to make sure that the bank that holds that account for that customer has not got—

Senator TROOD—So a prudent financier would have explored that proposition rather—

Mr Gilbert—Prudence and diligence in these times is highly recommended.

Senator TROOD—I am sure we are all exercised about the need for greater need for prudence and diligence.

Mr Gilbert—Indeed.

CHAIR—Thank you for your evidence.

[11.33 am]

FLANNERY, Ms Angela Marie, Partner, Clayton Utz

CHAIR—Welcome. We have received a submission from Clayton Utz that we have recorded as submission No. 6. Do you have any amendments or changes to make to that submission?

Ms Flannery—No.

CHAIR—Would you like to make an opening statement?

Ms Flannery—We are still supportive of the legislation and the introduction of the new regime. What we tried to focus on in our comments were things that could be done to simplify and streamline the regime rather than radically change it. These are things like simplifying the enforcement regime, simplifying the conflicts of laws a bit and clarifying some things that we think slipped into this version of the bill inadvertently that were not in the previous version of the bill and that go against stakeholder comments et cetera. There is also the issue that the Attorney-General's Department tried to conform to other jurisdictions a little bit more when in some cases there is not really a compelling reason for that conformity. There are differences between the other jurisdictions and very sensible reasons why in the previous exposure draft there was some deviation from, for example, the Canadian position or the New Zealand position. That is the way that we have tried to structure the comments that we have provided. We focused on simplicity elements and trying to streamline the provisions.

CHAIR—I want to go the enforcement regime and the conflicts of law. You suggest that both of these areas either need to be simplified or further amended.

Ms Flannery—Yes. Certainly in relation to the enforcement regime. This was not something that we dealt with in our earlier submission, but we have started helping clients—financial institutions—prepare their standard form documents that they will use going forward under the new regime. As we pointed out in our submission, there are going to be quite a number of different alternative regimes that people will be governed by depending on whether they are governed by the Consumer Credit Code or not and depending on whether their security interest is over domestic, personal or household property, even if potentially your loan is for a business related purpose.

Also, this is a question that you cannot even determine the answer to at the beginning of the process where a company you grants security or where you get security from an individual. If you appoint a receiver, that tips you out of chapter 4 entirely in terms of enforcement. Even if you wanted to set up your documents to take advantage of chapter 4, you cannot always assume that you will be able to do so, because it might be that when the time came for enforcement—if it ever did—you would find that the best way to enforce would be by a receiver. There is also an issue to do with companies. Even if they enforce individually, because they would be a controller for the purposes of the Corporations Act as long as the property over which they were enforcing their security was owned by the company, they would be tipped out of chapter 4 entirely anyhow. It is not just a simple matter of saying, 'Yes, I'd like to use chapter 4.' Sometimes you can; sometimes you cannot.

There is also interaction with the Consumer Credit Code. Now that the federal government has control of that legislation as well, it is the perfect time to look at whether the consumer protection provisions in chapter 4 should really go into the Consumer Credit Code, given that we are in the process of considering that legislation as well.

CHAIR—I want to make some comments. You made some comments about how you feel that this second version of the bill has not been properly consulted. Did you expect the redraft of this bill to be out there longer for people to look at?

Ms Flannery—Yes. Or perhaps the Attorney-General's Department, as they did before the exposure draft that you considered, could have made a public draft available that people could comment on or meet with the Attorney-General's Department about et cetera. Before the Senate standing committee got the previous exposure draft, the Attorney-General's Department had already had significant input from a variety of sources—industry and legal.

CHAIR—This redraft was tabled in June. We are now going through this exercise. It has been out there for comment. If you look at the end stages of this, the government has agreed to extend the implementation date to May 2011. There are people out there saying, 'The sooner we can get this legislation through and we can get

ourselves organised, the better it will be.' I am not sure how much longer you thought this draft ought to have been out there. That timeline—

Ms Flannery—Even a month would have been beneficial. Obviously your recommendations from your initial consideration of the bill came down quite some time ago, and we cannot go back to the past, but even if there had been an interim draft before New South Wales had passed the legislation that would have been helpful. Even an additional month would still enable the legislation to be passed this year and might still allow some rats and mice amendments to be made that would at least clarify some things. For example, in relation to the priority time in section 55 a couple of words dropped out from that section which I think, from discussions with the Attorney-General's Department, might not have been intended to drop out. If we just had a bit more time to go through the legislation because it is so different, at least on the order of setting out and some drafting, that would be quite beneficial.

CHAIR—Have you had to chance to write to or meet with representatives from the department?

Ms Flannery—Yes. Again, as in the previous consultation process before the previous exposure draft came to the Senate standing committee, they were quite happy to meet with us and talk to us about various concerns. We understand that there are some things that potentially will be amended, but I still do not think we had enough time.

CHAIR—All right. Senator Fisher, do you have any questions?

Senator FISHER—Not at this stage.

CHAIR—Senator Trood?

Senator TROOD—I do have a couple of issues. Ms Flannery, as I recall, when you came before the committee previously and in relation to your earlier submission you were generally sympathetic to the legislation.

Ms Flannery—Yes.

Senator TROOD—I think you were noticeably more sympathetic than some of the other legal contributors to the debate. Do you now regard the legislation as being improved as a result of these considerable changes?

Ms Flannery—In some places yes and in some places no. The points where we think it has not improved are really drafting changes that we thought made things a little bit unclear, so in a sense they are minor points that hopefully might be able to be tidied up. It is still the case that we are supportive of the legislation because I think it does simplify what is a very difficult area of the law at the moment, with differences between the states et cetera. We are still overall supportive and really appreciate the fact that the conflicts of law provisions et cetera have gone in. Overall, there have been improvements but there are some minor things that we think should be fixed.

Senator TROOD—One of those minor things you make reference to is the problem of 'tangible property' and the change to 'goods'.

Ms Flannery—Yes.

Senator TROOD—Those of us on the committee thought 'goods' was a perfectly satisfactory word to use in these circumstances and the 'tangible property' was unnecessarily complicating the whole task of interpretation. You have made the point that there is a need to clarify that, but it is not a huge difficulty, is it, that cannot be rectified easily?

Ms Flannery—No. It is just confusing because 'goods' is a subset of 'tangible property' and every time you see 'goods' you have to remind yourself that it does not actually mean goods, it means tangible property.

Senator TROOD—It is not beyond the wit of Mr Patch and his colleagues, and certainly the parliamentary draughtsman, to sort that problem out, is it?

Ms Flannery—No.

Senator TROOD—In relation to a couple of your observations about the conflicts of laws provision, as you note there is now a substantial part with regard to that. You mention in your submission, at paragraph 2.4, that section 237 does not provide flexibility to parties with regard to non-Australian law. Is there a public policy reason, in your view, as to why that should not be the case?

Ms Flannery—The normal principle is that, unless there is a really good reason to adopt another position, parties to a contract should be free to choose the terms of that contract, including the governing law. So if I am

an Australian company—so I am the grantor of the security interest—and I want to grant a security interest over a bank account in New Zealand and the bank, which is taking the security interest, and the grantor agree that New Zealand law should apply I do not see why that should not be acknowledged in the legislation as a valid choice of law, because if that bank account were in Australia and we picked Australian law then that would be upheld.

Senator TROOD—As a matter of principle in relation to contract law that seems an eminently sensible position, but can you see a possible public policy reason why the restriction should exist? I assume that your interpretation is the correct one—in other words, that there is in fact a restriction here.

Ms Flannery—It is more that the legislation is just leaving it to a question of common law. If we are going to codify complex rules we might as well also make that clear. It may well be the case that, if someone took that New Zealand bank account security to court, the court would still uphold the New Zealand law as a valid choice of law. But, given we are specifically saying in these particular circumstances in section 237 the choice of law will be respected if it is Australian law, I think that equally we should say that the choice—

Senator TROOD—Essentially, the parties should be free to contract?

Ms Flannery—Yes.

Senator TROOD—The other issues that I have relate to priority time, which has been mentioned. To save time, I will move on.

Senator BARNETT—Thank you, Ms Flannery, for coming here again and thank you for your submission to the earlier committee inquiry. In fact, we appreciated your submission so much that we quoted you in our report—you would, by now, have noticed, I am sure—at page 49 in terms of the priority interests of lessors. I would like to ask on the record if you are entirely satisfied with the amendments.

Ms Flannery—It comes as no surprise that I am not. I assume you are talking about what happens on the insolvency of the grantor?

Senator BARNETT—Exactly. We quoted you, in your response to proposed sections 233 and 234, on page 49 of our report. You have expressed those concerns. I know you have already touched on it in answers to my colleagues but, if you want to outline it further, please do so.

Ms Flannery—The equivalent section is now section 267. In the previous exposure draft of the bill there were some limited exclusions from the operation of the rule that an unperfected security interest would be vested in the grantor on insolvency. So, instead of the list being extended to include the types of leases, bailments et cetera that we had suggested in our submission, it is actually being made shorter. We would certainly support putting back into the legislation the transfer of accounts where the transfer of the account or chattel paper is not made for the purposes of securing an obligation as an exception to that vesting in the grantor rule. We would support putting that back in the legislation. The position of the Attorney-General's Department in that regard is, quite sensibly, that because the definition of 'account' has been narrowed there is not so much need for that exception for accounts in section 267.

But the policy reason for excluding the transfer of accounts where they do not secure payment or performance of an obligation should really be to prevent unsecured creditors of the grantor from having a windfall. The way it will work now is that if you do not perfect your security interest in a transfer of accounts, and it is a normal transfer where the grantor has been paid for the accounts, where the grantor sells $100 worth of accounts for $90 the grantor will have $90. If the transfer of the account is not perfected, those accounts vest back in the grantor, so the grantor's creditors effectively have the $90 consideration paid for the accounts and the $100 worth of accounts. It just seems that that is an unnecessary benefit to the unsecured creditors. If we look at a comparison with other jurisdictions, it is my understanding that New Zealand, for example, does not have an equivalent to section 267. The same policy reason basically applies to leases. If you have the leased equipment, and you have not paid for the equipment, your unsecured creditors potentially get the benefit of that equipment.

Senator BARNETT—But I think the department's response—and I am being devil's advocate—is that if people get into the habit of registering their security and/or, in this case, their lease then that should cover the situation. I think that is their argument.

Ms Flannery—That is correct. That is their argument. I think part of that argument is that they want to encourage use of the system.

Senator BARNETT—So they would say that, during this education and information campaign that I presume will commence next year in advance of it all going live, everyone is going to have to be prepared—that there may be a few hiccups in the early stages following commencement where a few people will fall short, but once people get to know how the system works, everyone will be registering and, Bob's your uncle, you will have clarity and consistency. How do you respond to that?

Ms Flannery—Under the current law, the people with legal title to the assets do not lose their ownership simply because—

Senator BARNETT—I am aware of that.

Ms Flannery—So I do not see a compelling policy reason. Particularly when you compare this legislation with, for example, New Zealand, which does not have equivalent legislation, there is no compelling policy reason to treat the owners of the property so harshly when that is not required to make it consistent with other jurisdictions. There is still an enormous incentive in both cases for perfection to occur, because there is a risk that you will lose priority to other security interest holders, for example, which will motivate people to ensure that they are in compliance. But to just go that extra step and actually take from them property which our current law recognises they own is, I think, beyond the policy reasons.

Senator BARNETT—Being devil's advocate again, aren't you creating an exception to the rules in this case? And if we make an exception there, where else should we be making exceptions to the rule?

Ms Flannery—There remains an exception to the rule for particular types of PPS leases in any event. So it is already the case that there is recognition that there should be exceptions in particular circumstances, and it is just not a provision that is required for the efficient operation of the law.

Senator BARNETT—Is there a middle ground between your views and the department's views?

Ms Flannery—Not really. I am of the view that my view is the middle ground.

Senator BARNETT—That is a clever answer!

Ms Flannery—The extreme opposite of the view of the Attorney-General's Department is that you take out section 267 entirely.

Senator BARNETT—You should be in politics. That is a very clever answer. So as far as you are aware, these provisions are unique among international comparisons?

Ms Flannery—No. I think they may be in some Canadian jurisdictions, but they are not in New Zealand.

Senator BARNETT—Thank you for that. You are obviously frustrated about the lack of consultation and you would have preferred more consultation in advance of today?

Ms Flannery—Yes.

Senator BARNETT—You have made the point firmly in your submission and likewise in terms of the regulations and the need for them to be broadly and publicly made available as soon as possible.

Ms Flannery—Yes. Part of our concern is that, although there has been the consultation paper on the regulations some time ago, there are now really important things that will clearly be in the regulations. For example, I understand from discussions with the Attorney-General's Department that the regulations bring back mortgage-backed securities, so that they will actually be regulated by the legislation when it is passed. We are definitely supportive of that, but it will potentially be quite difficult to make it work because mortgage-backed securities will have to be treated in the same way as accounts, and I am not sure how that will actually work in the regulations. At least one of the other submissions made the point that, for example, the definition of 'motor vehicles' is going in the regulations rather than actually being in the legislation. I think people's responses to the bill and the things that they have said in their submissions and that they will say before you when they present may be different if they had those regulations available. It is a similar problem with amendments to other legislation. For example, I understand that the Shipping Registration Act will be amended, and the Corporations Act will obviously need some changes. Not having the other legislation available is difficult.

Senator BARNETT—I understand that. Do you have a clear view in your mind in terms of the other acts that will need to be amended? You mentioned the Shipping Registration Act and the Corporations Act. Do you have other acts or legislation in mind? If you wanted to take that on notice, we would be interested in your views, if you had those views.

Ms Flannery—I would like to take that on notice. The Corporations Act and the Shipping Registration Act were the ones I had in mind.

Senator BARNETT—If any others come to mind, we would obviously welcome your input. I will put the question to other witnesses likewise.

Just to finish up on that issue of consultation, to your knowledge and understanding, you have not had any official consultation with the department since this bill was released?

Ms Flannery—No, we asked the department to meet with us I think it was two weeks ago, which they did. That was very helpful.

Senator BARNETT—Sure, no problem, but to your knowledge—and we will confirm this with the department—there has been no formal or official consultation process since the bill was released in late June?

Ms Flannery—Not formal, but I understand from other people that the department spoke to them on various occasions.

Senator BARNETT—But there has not been like the previous exposure, where there was broad-ranging stakeholder interviews and consultation process. We will get clarity with the department on that, unless you wanted to add anything further?

Ms Flannery—No. I know there has been informal consultation.

Senator BARNETT—Can you expand on this overlap with the Consumer Credit Code? You say there is an unnecessary overlap?

Ms Flannery—Security interests over personal, domestic or household goods are treated differently to security interests over other personal property. It seems pretty clear that the reason for that is consumer protection. I can understand that at the time the original draft of the bill was being put together that there was probably no certainty that consumer credit law would become something for which the federal government was responsible. But it is now quite clearly the case that the federal government has responsibility for the Consumer Credit Code. So, ideally, all consumer protection provisions should go in there, because the Consumer Credit Code does deal with questions of enforcement.

If you look at any bank, when an individual gets a standard loan, typically the bank will just use their standard form documents. They will have different provisions apply if you are governed by the Consumer Credit Code and if you are not. Going forward, they will have to have provisions if you are governed by the Consumer Credit Code and the PPS enforcement regime and where you are governed by the regime but not the Consumer Credit Code et cetera. Chapter 4 has special provisions where it is the security interest granted over personal, domestic or household assets, and the Consumer Credit Code predominantly governs loans made for consumer type purposes and obviously investment property. That is real estate, which is outside the scope of the bill.

Senator BARNETT—So this is going to create some confusion and duplication, in your view?

Ms Flannery—Yes.

Senator BARNETT—This sounds quite problematic. How serious are these issues?

Ms Flannery—I think it is serious. If it is the government's legislative intent—and quite clearly it is—to provide consumer protection, it should be done in a consistent manner in one piece of legislation, which you have the ability to do now. It should not be split into two different pieces of legislation.

Senator BARNETT—I cannot remember where I read it, but there were rules applying differently to households and business security interests. It may have been in the ABA's submission. I just cannot put my finger on it at the moment. This is the type of issue you are talking about, where there is one set of rules for households and personal property and another set of rules for commercial property. Is that right?

Ms Flannery—Yes. Under section 109(5) of the bill, particular enforcement provisions do not relate to security granted over assets which are personal, domestic or household assets, and generally then you cannot contract out of the other provisions. So, if you grant a security interest, even if it is for a business loan, over collateral used predominantly for personal, domestic or household purposes, you have this particular regime and you may or may not be governed by the Consumer Credit Code provisions.

Senator BARNETT—I am with you. Maybe we can ask the department how they will respond to that. We will flag that with them and we will probably follow it up tomorrow.

Senator FISHER—Ms Flannery, does the Consumer Credit Code apply to real property?

Ms Flannery—Yes.

Senator FISHER—You are saying one instrument to govern the lot. If you had your druthers, you would take out of the Consumer Credit Code the stuff relating to personal property but leave in there stuff relating to real property?

Ms Flannery—No. What I think should happen is that all of the consumer protection provisions should come out of the Personal Property Securities Bill and go into the Consumer Credit Code.

Senator FISHER—Okay.

CHAIR—What would be the benefit of that? Wouldn't it undermine the PPS Bill?

Ms Flannery—It is currently the case that the Consumer Credit Code provisions will continue to apply, in any event. They provide protections in terms of when you can enforce et cetera, so it is important that those provisions continue to apply. I do not think it undermines the regime here.

CHAIR—But if we are talking about trying to streamline what is happening, why would you do that?

Ms Flannery—If you are going to streamline things it is better that they are in one piece of legislation. I think it is much easier to take the consumer protection enforcement provisions from this bill and put them in the Consumer Credit Code than to try to do the reverse, because the Consumer Credit Code covers personal property and real property.

Senator FISHER—Then again Senator Crossin's point on the policy and philosophy stands, which is that the whole point of this bill is to bring everything under the umbrella of this bill or this regime. Could you not contemplate leaving the consumer credit instruments with real property or is that inconceivable? If so, why?

Ms Flannery—I think it is too hard because the Consumer Credit Code deals with the whole process of taking the loan and taking security et cetera and I think it would be very hard to take one particular aspect relating to enforcement of security interests over personal property out of that legislation and putting it in here. But it is theoretically possible. I think it would be easier to go the other way. Even though this bill provides an overarching regime for security interests over personal property, it does recognise that there are other pieces of legislation that continue to apply, and the Consumer Credit Code is one of those.

Senator BARNETT—I have a final question. You might recall we had some discussions during the last hearings regarding the rights and duties to be exercised honestly and in a commercially reasonable manner. That is in the new section 111, which is in chapter 4, which we have just been talking about. I am interested in your views on that new provision which applies in chapter 4.

Ms Flannery—As it is drafted, it now only applies to rights, duties and obligations that arise under chapter 4, on the enforcement provisions. For example, I think that for companies, because generally chapter 4 will not apply on enforcement because you will have a receiver or you will be deemed to be a controller and you can contract out quite a bit of it as well, it limits the scope of the section quite dramatically.

Senator BARNETT—Who will it apply to?

Ms Flannery—It will apply to security interests over personal, domestic or household assets unless those types of provisions are taken into the Consumer Credit Code. It is fine to apply to that and it would apply in the case, to take another example, where you are an individual and granted a security interest and you had not contracted out—where you actually could contract out—over your business assets and you did not enforce by use of a receiver, so you relied on the provisions in chapter 4. I am actually fine with it applying where you use the special provisions in chapter 4 because some of them do give you rights that go well beyond what you currently have at general law.

Senator BARNETT—The ABA, in their evidence this morning, said that they would not be opposed to section 111 being removed altogether if it were removed altogether.

Ms Flannery—Yes. I would not be opposed to it, but I have listed the things I think should change and in our written submission we did not comment on section 111.

Senator BARNETT—But you are equivocal as to whether it remains or stays?

Ms Flannery—Correct. I do not object to it staying but equally I do not object to it being removed.

Senator BARNETT—And if that part of the Consumer Credit Code legislation were removed then that would obviate any concerns that you might have about it being removed as well?

Ms Flannery—Correct.

Senator TROOD—Ms Flannery, I refer to the point you make about section 55(5) with regard to priority time. I have just been looking at that section of the bill. It refers of course to taking possession of collateral and also temporarily effecting by force of the act. Your submission is that neither one of those circumstances meets the situation of control. Is that right?

Ms Flannery—Correct. And in the previous exposure draft that the committee considered in section (5)(b) after 'first takes possession' it used to say 'or control'.

Senator TROOD—Yes, that would seem to be a sensible and not particularly complicated amendment. I was trying to clarify whether or not either one of the possession or force of the act provisions might cover control, but it does not.

Ms Flannery—No, I do not think so.

CHAIR—Ms Flannery, thank you very much for your time today. We certainly appreciate the effort and the time that you have put into looking at these bills and providing us with your expertise and advice.

Proceedings suspended from 12.10 pm to 1.23 pm

WAPPETT, Mr Craig, Partner, Piper Alderman

Evidence was taken via teleconference—

CHAIR—Welcome. We have a submission from Piper Alderman which, for our purposes, we have numbered No. 2. Mr Wappett, before I ask you to make an opening statement, do you have any corrections or changes you want to make to that submission?

Mr Wappett—No, I do not.

CHAIR—I invite you to make an opening statement and then we will go questions.

Mr Wappett—I will be brief in light of previous submissions made to the committee in March and my comments made to the committee previously. I would like to endorse both my and the firm's support for the reform of personal property securities and this form of revised bill in particular. I believe that the department should be commended on the level of stakeholder engagement that they have undertaken in revising the bill since March. I think the revised product is a significant improvement on the previous version in terms of its digestibility in particular. At this stage, I do not have anything further to add.

CHAIR—Thank you. The one thing you raise in your brief submission is clause 14(2)(c). You are not the only one who has raised concerns about that. The Australian Bankers' Association were before the committee this morning and they also put to us that they thought this section should be removed. They argued that it would result in less choice for consumers in seeking finance and less ability for them to obtain consumer goods finance. What is your argument for why this section needs to be removed?

Mr Wappett—I agree with the ABA's submission in broad terms. I think most consumer finance is predicated on taking security over the particular goods that are being financed. It is very unusual in a consumer context—in fact, contrary to some legislation—to actually take security over all assets or a broader range of assets of the borrower than the actual goods being financed. In essence, the consumer financier is looking towards the goods that they are extending credit on to recoup their loss should they seek to enforce their security over those goods in the future.

The effect of not being able to take a purchase money security interest in the context of consumer finance means that it will be necessary for a consumer financier to search the register and ensure that there are no prior registrations that could cover the same collateral by virtue of an all-asset security that might have been granted previously by the same grantor. If there is a prior registered security interest that does cover the same type of collateral as described in the prior registration then it would be necessary either to get a release of that prior security interest in relation to the goods that are being financed by the consumer financier or, alternatively, to reach some other arrangement. All of that will add to the administration time and also to the cost of providing consumer finance.

If you took clause 14(2)(c) out of the bill then consumer finance would be treated in the same way as commercial finance. So, if a consumer financier were extending credit to enable a consumer to purchase particular property, they would get super-priority under the bill to the extent of that credit that they had lent to enable the purchase of that property. They would have a purchase money security interest, which would have the benefits of super-priority and they would not need to search or enter into subordination and priority or release arrangements with prior registrants because, by virtue of the operation of the legislation itself, they would get that super-priority without having to go to the added expense and time of searching and possibly having to enter into release or other commercial arrangements with other creditors.

That seems to me to be more desirable in a number of senses. One is that it should, in theory, keep the cost of providing consumer finance to a minimum because you do not have that extra time and expense factored into the exercise, and it also means that consumer finance and commercial finance are on the same footing, which I think means that the legislation is less complex. You are not distinguishing between consumer and commercial finance in what is essentially a similar scenario. I see some benefits in that.

CHAIR—What is your assessment of why it was not in the draft legislation but has appeared now?

Mr Wappett—I don't know specifically what led to it being included now. I have had some discussions with the Attorney-General's Department about why it was included, and I understand that the reasoning was to endeavour to add some strength to securities that may have been granted by an individual, particularly in their capacity as director of a company. If that guarantee was supported by an all-assets security out of that director's assets, whether they are business assets or personal assets, those assets under the all-assets security

would be available to support the guarantee, which would usually have been given in a business context. My understanding of the rationale is that it is to give some added focus to directors who are giving directors guarantees, because it might mean that their own personal assets are more at stake in supporting that guarantee.

My own view is I don't think that that is particularly likely to happen. Directors guarantees, particularly in the small business context, are a fact of life. I think many directors are reluctant to give directors guarantees, but if they do give directors guarantees they would be even more reluctant to grant a security that extends to their own personal assets. I think it is also questionable as to whether many financiers would see a lot to be gained by having security over the fridge, washer or dryer in somebody's home as security for a directors guarantee for their business. Fundamentally, creditors tend to look to the business assets as security and they will look to the directors guarantee to keep the directors focused on the job of maintaining the sustainability of their businesses. But certainly in my experience it would be unusual to go beyond that, to take security out of personal assets. So I think the rationale underpinning clause 14(2)(c) is a bit weak.

CHAIR—Can I secondly ask you about your additional letter to us, dated last week. It goes to clause 12(4) of the bill, which, as I read it in the original version, included in the definition of 'account' ADI accounts and chattel papers. You now put to us that that has been changed.

Mr Wappett—Yes.

CHAIR—You suggest it should be corrected. Do you want to outline to us why you are of that view now?

Mr Wappett—I don't have a particular problem with the reasoning behind narrowing the scope of the definition of 'account' generally in the bill, but I think in this particular context it has had an unintended consequence. If you look at other provisions in the bill, and I cannot recall the precise numbers at hand, the intention under the bill—and I think clearly the main reason for having clause 12(4) in the first place—was to remove doubt that exists under the general law about whether someone can take a security interest in an obligation which they themselves owe to somebody else. That in particular has arisen in the context of bank accounts, where banks have purported to take a charge or mortgage type security over a bank deposit with themselves. So that is a debt that they owe back to their customer, the depositor.

Certainly in Australia most people would say that the general law position is that you cannot do it. The position in England has changed in recent years and it appears now that common law there says you can. The main reason for including clause 12(4) was to clarify that it is possible to take security in an obligation that you owe to somebody else. That was particularly in the case of bank accounts. There are other sections that specifically contemplate taking security in a bank account where it is the depositor's bank that is taking that security. It seems to me that it is in an inadvertent error that crept into clause 12(4) as a result of the amendment to the definition of account.

Senator BARNETT—I want to clarify something with you to start with. In answer to a question on notice from me, the department set out, to 30 June 2009, their total expenditure on the PPS reforms in 2007-08 and 2008-09. They have listed a range of consultancies. I see that in 2007-08 Piper Alderman undertook a consultancy for the government. The description of the services is 'expert commercial legal advice on the PPS reform'. The term is from 22 October 2007 to 22 February 2008. The contract value is $10,000. Is that accurate?

Mr Wappett—I believe it is, yes.

Senator BARNETT—All right. I am a little surprised because, in the submission we have before us, there is no reference to the fact that you have been a consultant to the department. It may have been in your earlier submission, was it?

Mr Wappett—No, it was not.

Senator BARNETT—Do you find that strange or do you think it is not a problem? Some people might say you have a vested interest in the matter and that perhaps it should be disclosed.

Mr Wappett—I certainly have never tried to hide that fact. The work that was undertaken for the department was in relation to writing a comparison paper on the legislation that exists in Canada and New Zealand and comparing that legislation with the 'Bond bill' that was drafted after a workshop at Bond University in 2002. That paper has been available for some considerable time on the Attorney-General's website. It was work that was undertaken for the department very early on in the consultation process—I think around the time or just after the options paper was released in 2006. That work was undertaken by me;

Professor Tony Duggan, who has also made submissions on the reform; and by Laurie Mains, who is a solicitor in New Zealand.

Senator BARNETT—Okay. Thank you very much for being open about it. Obviously, not withstanding those comments, you have been able to be at least somewhat critical of the bill and have been making recommendations for reform. That is noted. Can you confirm, on record, whether you have any contracts pending or under negotiation or whether you are in communication with the department in regard to any of those matters?

Mr Wappett—Since that particular work, I have done a considerable amount of work as a member of the Attorney-General's consultative committee and have spent a great deal of time as a member of that committee both in committee meetings and also in providing feedback to members of the Attorney-General's Department on drafts of the bill and various consultation papers that they have prepared over the period of the last couple of years.

Senator BARNETT—Sure, but what I am referring to is has there been any on a paid basis?

Mr Wappett—No, none of that has been on a paid basis.

Senator BARNETT—And into the future?

Mr Wappett—I am certainly not aware of any paid consultancies pending at this stage. Certainly none have been mentioned to me.

Senator BARNETT—All right. We need to clarify some of those things for the record, so thanks for that. You have talked about clause 142C and I think you have rounded that out quite well. There was a view put before lunch by Ms Flannery from Clayton Utz regarding the merit of the consumer credit parts of the legislation being transferred to the consumer credit state and territory legislation so that it is perhaps easier and more free flowing. Do you have a view as to the merit or otherwise of that proposal?

Mr Wappett—I do not think there are too many provisions in here which are focused on the provision of consumer credit per se. To the extent that the bill deals with consumer finance and consumer property that might be subject to a security interest, it does it very much from the perspective of the security interest side of the equation and that is a different focus from the focus of the consumer credit legislation. I think that the main area of overlap is in the area of enforcement provisions. There is some overlap in that context and there may be some merit in the submission of Clayton Utz in relation to the enforcement provisions to the extent that they only relate to consumer property or could be contracted out of consumer property. But certainly—

Senator BARNETT—Just to confirm that, my understanding is that yes, that was their view—the latter points that you have made.

Mr Wappett—Yes, I think it would only be in that area of enforcement but the difficulty is that most of the provisions in chapter 4 of the bill are potentially applicable to both consumer and commercial security interests. From memory, whilst it is possible to contract out of a number of provisions in the commercial context but not the consumer context, on the face of it those provisions apply equally in both scenarios. So whilst it might make sense on one level to say that that could be transformed into the consumer credit legislation, it may actually give rise to some other issues of duplication.

Senator BARNETT—Just to go back to section 142C and be more specific, we have had a submission from the Australian Institute of Credit Management. I am not sure if you have seen it but it has a different view to your own, and also to that of the ABA which obviously supports the position of section 142C that you have expressed. AICM, on page 4 of its submission, notes:

> the wording of this section and believes its inclusion will be of considerable benefit when a credit provider obtains a guarantee (for example a directors guarantee) as this will preclude the erosion of the value of the guarantee.

How do you respond to that?

Mr Wappett—As I indicated previously, it is fairly unusual for a director giving a guarantee to grant an all assets security over their own assets which would include their personal assets. I am certainly not saying that it does not happen but in my experience it is unusual. So to the extent that that is being raised as an added incentive for directors to honour their guarantees, I think it may be illusory.

Another issue is that, if that is the intention of including this provision in the bill, even those directors who may have been inclined in the past to grant a security that would extend to their personal assets, you may well find that in the future they structure their affairs in such a way that it has no real teeth anyway. In fact, most

directors tend to arrange their affairs so that their own personal assets are not on the line if their personal guarantee is called upon.

Senator BARNETT—I might agree to disagree with you in terms of very small business, micro-business, farmers, shopkeepers and sole traders. I would have thought it were not uncommon, when they provide a personal guarantee, that the guarantee covers not only the business interests that they have but also their personal interests. Perhaps we will agree to disagree on that.

Mr Wappett—Yes. I am certainly not saying it does not happen, but I am not sure that it is as widespread as others might think.

Senator BARNETT—What would happen in that instance for those people? Aren't they prejudiced?

Mr Wappett—You are talking about the creditors who extend credit to them?

Senator BARNETT—Yes.

Mr Wappett—If clause 14(2)(c) were removed and the director who was in that situation then arranged consumer finance to buy a new fridge, for example, and the consumer financier got a purchased money security interest, it would mean that they would have a super priority in relation to the fridge that they had financed and would rank ahead of the assets financier who had taken a security interest from the director to support their directive guarantee. Yes, it would weaken that finance but, by the same token, you would find the consumer financier is probably unlikely to extend credit in that situation without getting release of the fridge anyway. So it just adds to the cost while they finance something, if they cannot take security in it.

Senator BARNETT—I can see your point. I am thinking. Thank you very much.

Senator FISHER—What is your main client base in terms of the actual work you do at Piper Alderman?

Mr Wappett—Most of the work that I do is in the field of banking and finance. I act for banks and finance companies and also do work in the field of insolvency. I act for a number of insolvency practitioners. I do a mixture of other corporate work as well.

Senator FISHER—I am just trying to get a feel for—

Mr Wappett—I do not tend to act for consumers.

Senator FISHER—That is part of my question. I gather from what you have suggested, and the wonderful firm of which you are a part, that you are not acting for a lot of small business in securing finance?

Mr Wappett—No. It tends to be the medium to large businesses, generally. I do quite a lot of work for borrowers as well as financiers.

Senator FISHER—Thank you very much.

CHAIR—As we do not seem to have any other questions for you, I thank you very much for your submission and your time this afternoon.

Mr Wappett—Thank you for the opportunity to speak with you.

[1.52 pm]

BILLS, Mr John Maxwell, Executive Officer, Institute for Factors and Discounters

EDWARDS, Mr Stephen Mark, Legal and Market Consultant, Australian Finance Conference

CHAIR—Mr Bills and Mr Edwards, good afternoon. I now formally welcome representatives from the Institute for Factors and Discounters and the Australian Finance Conference. We do have your submission which, I understand, has been lodged together with us. We have numbered it No. 4 for our purposes. Before I ask you both to make an opening statement, do you need to amend that or change that submission at all?

Mr Bills—No, we do not.

CHAIR—So if you want to make an opening statement, please do so, and then we will go to questions. Do you each have an opening statement?

Mr Bills—Do you want to handle both IFD and AFC together, or one at a time?

CHAIR—We will leave that to you, Mr Bills.

Mr Bills—I will do it for IFD, as I am more closely involved with them. I have a very short opening statement. We have been very closely involved with the Attorney-General's Department in the development of this legislation. We think that the process has been a very rigorous and rational one and we are very pleased with the outcome. We did appear before this inquiry earlier this year and I think that the substantive issues that we raised are reflected in the final piece of legislation. So I guess we are here to say that it is very good, and from a commercial point of view it is very realistic and very logical.

Mr Edwards—The Australian Finance Conference, which in essence reflects the views of finance companies, banks and other equipment financiers along with the kindred associations it services, such as the Australian Equipment Lessors Association et cetera, remains very supportive of the reform and endorses overall the thoroughness of the process and consultation that has gone on.

CHAIR—I should thank you very much for your submission and we should finish there I think before we ask any questions and it goes a bit off the rails!

Mr Bills—I think from the point of view of the Institute for Factors and Discounters, the receivables financiers, we really have nothing more to say.

CHAIR—I certainly do not have any questions. Senator Barnett, I believe you do.

Senator BARNETT—Thank you very much for being here and for your feedback. We have only just received the AFC submission today so, Mr Edwards, do you want to walk us through that. There are two key points that you make, and you might just alert us to the importance of those two points in your submission.

Mr Edwards—Thank you. Apologies for the late submission. Some key people involved in the preparation of it were suffering from the flu over recent times. It was emailed through to Canberra yesterday but I was not sure whether you had received it hence I have taken the opportunity to provide you with copies of it today.

Senator BARNETT—Yes, thank you, we have got those. Your first point talks about section 14(2)(c). We have just been talking about that with another witness so could you walk us through your views on that?

Mr Edwards—I have read Mr Wappett's letter and he and I have had some discussions about it. We, I suspect like others, have also read the submissions from Clayton Utz and from the Australian Bankers Association—all of whom have a similar concern. The concern fundamentally is that in effect a consumer finance transaction cannot take the benefit of a PMSI, or purchase money security interest priority. The reason is that, for the first time, in the drafting of the legislation it appears that there is an express exclusion from the concept of PMSI for consumer transactions. We are not clear about the rationale for that and see it potentially acting to the detriment of not only consumers in some kinds of transactions but also consumers maybe in the investment market. If they are looking to have finance available to them to acquire investments, including along the lines of antiques and so forth, they have a facility available to them where the financier wishes to take security over what is acquired. Under this regime the financier would not be able to claim a PMSI. There are some provisions in the Consumer Credit Code which prohibit, for instance—

Senator BARNETT—Sorry to interrupt, but is that only the case if that particular person who owns the antiques has a guarantee over all of their business and personal assets? If not, can you please describe in more detail your example?

Mr Edwards—Okay, perhaps I will backtrack for a moment. If we have lender A who provides a line of credit to the customer to acquire antiques then they would take security over that. That arrangement is an investment arrangement. It is a personal or domestic purpose. But that arrangement is not regulated by consumer credit laws. It is expressly excluded. So it would be permissible to have a general security equivalent to, say, a company or floating charge to cover future acquisitions.

A particular customer may wish to acquire something else of an antique nature and may choose to go to another financier for that purpose. Alternatively, it might be that the provider of the antique would wish to, in effect, do a conditional sale so that the customer has the benefit of the antique but the seller retains a security interest in it. My reading of that provision is that it would prohibit that kind of arrangement.

Senator BARNETT—Prohibit or—

Mr Edwards—Sorry, not prohibit; you are right. It would restrict it because the priority rules would not allow that second financier to assume a PMSI priority over the general financier who provided the initial line of credit.

Senator BARNETT—The second financier being the financier that provided specific finance for a specific product?

Mr Edwards—Correct. Or, as I say, it could have been the seller of the antique.

Senator BARNETT—So you are saying they would not have security?

Mr Edwards—They would have security but they would not have a PMSI, and therefore they could not achieve a PMSI priority which would give them priority over the existing security arrangement that is in place.

Senator BARNETT—We had a submission from the Australian Institute of Credit Management. I do not know if you have read their submission.

Mr Edwards—No, I have not had an opportunity.

Senator BARNETT—Did you hear the evidence when I spoke to the last witness about what they said? They said that they support its inclusion remaining, and they say:

AICM notes the wording of this section and believes its inclusion will be of considerable benefit when a credit provider obtains a guarantee … as this will preclude the erosion of the value of the guarantee.

They have used an example of the director's guarantee. How would you respond to that?

Mr Edwards—I have no clear view to express on that at the moment that would be helpful to the committee.

Senator BARNETT—If you are happy to take that on notice and have a look at that submission and perhaps respond to us about that—

Mr Edwards—Okay.

Senator BARNETT—Have you had some liaisons with the department? They have put it in there for a reason, obviously. You want it removed.

Mr Edwards—Yes, we have had some exchanges.

Senator BARNETT—Let us be a devil's advocate. What have they said to you?

Mr Edwards—As I recall, it was largely premised on the prohibition that is in the Consumer Credit Code that prohibits a consumer giving and a lender taking a general security from a—

Senator BARNETT—Prohibits or—

Mr Edwards—It prohibits a lender taking a general security from a consumer so that the security applies to all goods, or whatever it might be, acquired by the consumer. It seeks to require that financiers take security over identified or described property, not a general, all-embracing security over all property.

Senator BARNETT—And you are saying they would not have a legitimate PMSI in that case, over that particular property?

Mr Edwards—What I am saying is that, as I understand the Attorney-General's Department approach, because that prohibition appears there is no need for a PMSI in the consumer credit area because a priority dispute would not arise, because every transaction would be a particular transaction referable to particular property that is secured. Whereas, if you look in the commercial space, for instance, a company will give a general security over all its assets, and the role of acquiring particular property which is financed and which

security is taken over will give rise to a PMSI. If it is registered in accordance with the proposed Personal Property Securities Act, that PMSI will have priority over the interests of the holder of the prior general security.

Senator BARNETT—We have to try and get our head around all this and it is a challenge, quite frankly. Can you give us another example? You have given us the antique example. Is there another example that you could give to us to help us follow your argument? You are saying that it should be removed.

Mr Edwards—Yes. I am not 100 per cent confident as to where this law in this particular draft came from. It certainly was not in earlier drafts that I am aware of, and I am not aware of it being in other personal property security laws in other jurisdictions, such as New Zealand and Canada.

Senator BARNETT—Are there any other examples you can give us as to why it should be removed apart from your antique example?

Mr Edwards—No, but I can take that one on notice, if I may. The antique was one that I particularly worked through, given that the Attorney-General's Department had explained to me that their position was based on excluding consumer transactions from being a PMSI.

Senator BARNETT—The previous witness argued, in support of the same objective that you have, that the small business operator in terms of providing a personal guarantee can arrange their affairs such that they can protect their personal assets and therefore it is not an issue. They have their business assets separate to their personal assets. But I still cannot quite follow that, because under your antique dealer scenario the PMSI still would not apply to that specific antique as opposed to across the business as a whole.

Mr Edwards—That is right.

Senator BARNETT—If you have any examples on notice, please help us and we will have a look at them. Last time you were here, we talked about the commercially reasonable manner and clause 111. I am interested in your views on that in the new bill as it applies to chapter 4 only—the enforcement provisions. What is your view? We have had some witnesses this morning who have expressed the view that they are a little ambivalent as to whether it should stay or go. What are your views? Perhaps both of you could answer that question.

Mr Edwards—My view at this point is that it is broadly speaking consistent with obligations that are imposed through the general law and in some instances some statute law on mortgagees when they are exercising mortgagee rights of sale. There are broad brush requirements around the bona fides of the process that is undertaken. In broad terms, there is an obligation, shall we say, to act in good faith as a mortgagee. That is a duty that is owed by the mortgagee to the mortgagor. Confining it to enforcement in the way it has been does not cause the concerns that the broader approach in the earlier draft posed. As I said, it is probably broadly consistent and—

Senator BARNETT—Do you have any examples of other consumer finance or other finance legislation which you can point to as a precedent to demonstrate that it is broadly consistent? I have asked that question and I have not had a very comprehensive response as yet. But I am happy for you to take it on notice, or you can answer it now if you like.

Mr Edwards—In the Consumer Credit Code as it currently exists at state level you have obligations in section 98, I think, or 97. The obligations of the mortgagor are to sell for the best price reasonably obtainable. That is a statutory obligation. The mortgagee, when conducting those sales in a consumer transaction, will also be subject to the general law that applies about duties of mortgagees. Each of, as I recall, the land title laws also impose similar obligations on mortgagees of land should they need to undertake a mortgagee sale. But I can come back to you with more particular references.

Senator BARNETT—Mr Bills, do you want to respond?

Mr Bills—No, I have nothing further to add.

Senator BARNETT—Would you agree or disagree with your colleague?

Mr Bills—I think I would agree with him.

Senator BARNETT—Dangerous not to.

Mr Edwards—Perhaps if I could add that for areas like—no, I will withdraw that, I am looking at a different part. My brain went to chapter 7 of the Personal Property Securities Act where the enforcement provisions do not apply to leases and to assignment of accounts, but of course this obligation is placed elsewhere, so I will withdraw my comment.

Senator BARNETT—With respect to leases, now that you have mentioned it, Ms Flannery from Clayton Utz—you probably read her submission—has the same view this time as she had last time with respect to lessors' entitlement to their assets and protecting that asset under the proposed bill. She thinks there needs to be an amendment to provide better protection when an asset is leased and a financier provides finance for that purpose. Do you have a view on the Clayton Utz position?

Mr Edwards—I have not read that particular aspect of her submission in detail, but I will come back to you on that.

Senator BARNETT—More generally, can we just get a feel for your membership base? We have the list of members of the institute. They seem to be sizeable entities, corporate entities.

Mr Edwards—Yes.

Senator BARNETT—Is that right?

Mr Edwards—Yes, that is right

Mr Bills—The membership of AFC and AELA, the leasing association, is even broader. The leasing association has about 100 members which represent all of the major equipment financiers in Australia. It includes all of the major banks, all of the regional banks, the international banks, independent financiers, manufacturer finances, rental companies, the whole range of equipment financiers who do leasing, hire purchase, chattel mortgage and rental business.

Senator BARNETT—Excuse my ignorance. It is the leasing association is it? I have the Institute for Factors and Discounters and the Australian Finance Conference. What is the other association you are referring to?

Mr Bills—That is another association that is related to the Australian Finance Conference. I think there was a list of members of the Australian Finance Conference attached to our submission and you will see that it is a very broadly based association as well.

Senator BARNETT—What is the name of this leasing association?

Mr Bills—It is the Australian Equipment Lessors Association.

Senator BARNETT—Are you saying that they concur with your submission?

Mr Bills—Yes, they do.

Senator BARNETT—Do they have the issue on that leasing matter that I raised with Mr Edwards as expressly put down by Clayton Utz as a serious concern?

Mr Bills—We would have to go and have a look at that Clayton Utz submission again on that issue.

Senator BARNETT—Most of them are medium to larger financial institutions and banks.

Mr Bills—We have some small ones as well, quite small rental companies and finance companies. For example, we have some regionally based finance companies, leasing companies.

Senator BARNETT—Is there a separate association that represents the smaller financiers?

Mr Bills—I think there is a separate association that represents very small individually owned entities—one-man companies. They are not members of ours. I guess the smallest of our members would be about $20 million or $30 million in size going right through the finance section.

Senator BARNETT—To what extent do your members know and understand the bill and its consequences?

Mr Bills—They are very clear.

Senator FISHER—Can they tell us then? Sorry, that was in jest—and probably inappropriate.

Mr Bills—This is a major reform, from their point of view. The major products that we get involved in are leasing, hire purchase and chattel mortgage. Chattel mortgage presents all sorts of problems in terms of costs and extra risks. This bill is going to in effect do away with the current distinctions between the costs and the risk profiles of those products and make it pretty even for all of those. So our members are very supportive. They have also had a lot of experience with the REVS registers around the country and they know—it is very simple—that to protect your security interest you stick it on REVS. And they know now that it is not just cars that they will be sticking on REVS but all personal property securities.

I think it took them a while to come to grips with this concept of personal property securities. They thought it was watches, rings and things, but now I think we have managed to get the view across that it is all non real estate assets. These are the things that they finance. This presents a major piece of economic reform for them and they will be very much involved in getting all their security interests on the register.

Mr Edwards—A number of them have operations in New Zealand and are very impressed with the New Zealand law generally and the changes that that has bought about to the confidence in taking security or doing leases, and also the business efficiency that has arisen from that.

Senator BARNETT—All right. One of the areas of serious concern that we have relates to consultation and the need for education and information for the relevant stakeholders in advance of the bill coming into force and, specifically, the register becoming live. Do you have a view about how that is handled and managed and how comprehensive it must be? I have a view that it is probably got to be the mother of all education and information campaigns, but what is your view?

Mr Bills—Certainly our members—and we have 100 or more—are all aware of this issue. I think they are the people who you want in terms of education. It is not going to worry the customers too much, except that in some cases their costs will go down. The people who need to be aware are those who are taking security, and most of those are aware of it now. In terms of a public relations program, I guess we need to ensure that the word is very widely spread, and I think we are a long way down that track already.

Mr Edwards—During consultations with the department, one of AFC's contributions to date has been a willingness to participate in education and certainly to suggest education because it will reflect on everybody, basically, should things go wrong and there are surprises. It is probable that there will be a surprise or two for some people but, nonetheless, education is very important to get through to business. We would be supportive of whatever works best.

Senator BARNETT—On the topic of privacy, do you think the new bill has got the balance about right? There have been a loss of changes in the area of privacy. There have been recommendations even today that we have been looking at. I am wondering if you have a view as to whether the balance is about right or there should be any further reforms.

Mr Edwards—The Australian Finance Conference has been quite mindful of privacy issues right from the beginning of the development of this significant reform. John has mentioned the REVS operations. There is no personal data involved in that, and that is supported by industry for two reasons. One is that the primary interest, for instance, has been the security, the vehicle, the boat—whatever—itself. The second is that the more data you have on these registers, unless it is really necessary, the more expensive it is to manage and to retain that data and the greater the risk of getting it wrong. In terms of the balance of where grantor personal details are needed as opposed to where they are not, when you are dealing with serial numbered goods et cetera, I think overall the balance is pretty much consistent with what AFC has put into its recommendations for the last two to three years with this process. I have read the government's response to the privacy impact assessment and, to my mind, it all seems well set. We will have an opportunity three years after the law becomes operational to assess whether it is right.

Senator BARNETT—On the privacy issue, have you seen the Australian Privacy Foundation's submission? They have expressed a range of concerns. One of them relates to protecting individuals from identity theft, identity crimes. Do you think those concerns are legitimate?

Mr Edwards—I guess there is always a measure of some risk that identity information can be misused. We can only hope that with the approach that is being undertaken and with the enforcement provisions that are there about inappropriate access and use of data that that will be quarantined. I doubt that there will ever be any way that we could be absolutely 100 per cent confident that any sort of identity data, whether it is on this register or anything else, could ever be used as it is not intended.

Senator BARNETT—You mentioned a review within three years under the act, but the Victorian Privacy Commissioner has recommended a review within two years. Do you prefer two years or three years?

Mr Edwards—In one sense, I am probably ambivalent as to whether it is two or three years. I guess three years puts everybody well beyond the implementation phase and the register operating as business as normal. All transitional phases, obligations and processes would have faded away. That third year would just allow the register to be assessed as a normal operating part of commercial life in this country, whereas if you do it too early it will still be going through a settling-in, transitional phase.

Senator BARNETT—Thank you for your feedback today.

Mr Bills—There is one other issue that we would like to raise, and this is the question of giving notice to the register within 10 days of taking of the grant or taking possession of the goods. That is probably a pretty big issue for us. I think, of everything that is left, it is the one that is concerning us the most. At the moment, we will not know when the grantor takes possession of the goods, yet we have to provide details to the register on the basis that we should know. So we do have a suggestion for an improvement in that regard.

Senator BARNETT—And that specifically is?

Mr Bills—Basically, the 10 days should work from the time that we provide the finance rather than when the person gets the goods. We will not know when they take possession of the goods. We will certainly know when we provide the finance.

Senator BARNETT—Are you happy with the 10 days from that date?

Mr Bills—Yes, we are.

Mr Edwards—From our perspective, 10 business days works efficiently. Ten business days, as a number, is consistent with New Zealand.

Senator BARNETT—What is the New Zealand model? Do they have it from the date of the provision of finance or the date of the collection of the goods?

Mr Edwards—It is from the date of the collection of the goods. Feedback over recent months—in fact, since we last appeared before this committee—has demonstrated to us that it is perhaps in this area that the New Zealand Personal Property Securities Act is not delivering some of the commercial efficiencies it could be. Operational feedback is that financiers who want to claim a PMSI in a range of circumstances now rather than just registering within 10 days of the customer getting the goods because, as John said, they do not know when the customer gets the goods. What they do now is go to the existing security holder, the general security holder, and negotiate a subordination agreement. So, to our mind, that undermines a key benefit. If you are providing finance to acquire a particular asset or good and you follow the rules through, you will end up with a super-priority over a general security already registered. If the parties cannot rely on that because they do not know a key bit of data—and, that is, when the goods were handed over—then you have all this negotiation going on about subordination agreements. Our solution to that is to bring it back to a simple rule of 10 business days for when the loan funds or finance funds are advanced. That is consistent, I think, with an overall policy of the law because that is when the security attaches.

Senator MARSHALL—Mr Edwards, are you saying that you could not make the registration under the existing proposal until the goods are received?

Mr Edwards—You can do it beforehand and certainly—

Senator MARSHALL—The point I then ask is: what is the difference? You are actually getting a little bit of extra time. You can do it when you provide the finance, or you should do it then. If they do not receive the goods for five days, technically you would have 10 days up your sleeve, anyway, wouldn't you? Have I misunderstood that?

Mr Bills—The problem is that sometimes they get the goods before you provide the finance and you do not know that has happened.

Mr Edwards—And that is the issue.

Senator MARSHALL—Your proposal does not fix that.

Mr Bills—It does because our proposal is that we have 10 days from the date that we give them the finance and we know for sure what that date is. We do not know when they have actually taken delivery of the goods.

Senator MARSHALL—You are trying to cover-off that aspect of when they get the goods before the finance.

Mr Bills—Yes.

Senator MARSHALL—How do you get the goods before the finance?

Mr Bills—There are some very incentivised people out there who find ways of doing things.

Senator MARSHALL—Let me know. Hand me a list. I have a harbour bridge out there that I want to sell!

Mr Edwards—We are advised that it happens more than often enough for there to be a concern. The asset is already out there.

Senator MARSHALL—That is a downside to what you are suggesting, because it sounds absolutely illogical—

Mr Bills—There is no downside.

Senator MARSHALL—Not from your point of view, but there may be.

Mr Edwards—I suspect that there may be a concern, for instance, if somebody buys the particular item that has been financed and it is not yet appearing on the register but the consumer or customer has been able to on-sell it and another person buys, your priority rules do not apply then. It is simply a case that your extinguishment rules will apply and the person who buys it without it being on the register, provided the buyer complies with the requirements of the personal property securities act, they will actually get it free of the security interest, and the financier's interest is gone or it was never there. So they cannot rely on it. That is a potential downside that might have been there, but I think the extinguishment rules deal with that adequately so that there is not a loss that flows through to the innocent buyer.

What we are after is a priority issue about what we know, and what we know is when we advance the funds and then we can register. When we register, there is a new provision, as I recall, in this draft of the bill which says that if you are going to claim a PMSI security or priority security, you need to state that fact when you register. If you do not know because it links off when the customer got the goods, that becomes quite difficult to get correct.

Senator MARSHALL—Why 10 days? Why shouldn't registration take place on the day that finance is provided? Doesn't that then protect others better so that the property cannot be disposed of in that window?

Mr Edwards—If it is disposed of, that is where the extinguishment rules apply in finance.

Senator MARSHALL—But why do we need 10 days? If you are saying that the better link is back to the provision of finance, why should it not be at the time of finance that the registration is made so we do not need a 10-day period?

Mr Edwards—Nowhere else that has this law requires it as immediate, and 10 days has been picked because 10 days is already suggested in the statute. One of our initial proposals in one of the earlier drafts of this bill proposed a five-day period for registration to get PMSI priority. Again, that five days dated from when the customer got the goods, but the membership at that point would have been happy to explore having five business days from when the funds were advanced. So the concern is to get that period as tight as possible. Bear in mind though that not every financier or provider of PMSIs or goods on conditional sale will have direct business to government links so that, as they settle the transaction, a press of a button will inform the register. The bigger lenders will be well equipped to so that. But I would imagine that a lot of small- to medium-sized businesses that are looking to protect their financial interest, having provided a PMSI either by way of equipment finance or a conditional sale, will need a few days to finish off the processing and get it to the register. So if there is a concern that 10 business days is too long, what I would say is that the members of the Australian finance conferences also considered a shorter period—but certainly not an instantaneous one.

Senator MARSHALL—I do not know if there is a concern. I am just wondering where the 10-day period came from.

Mr Bills—There is a great incentive for somebody to put their interest on the register. I do not think you need to have any penalties to encourage them to do that because if they do not get it on the register then they are not protected. This goes back to the question of a public relations program. Once people understand that, they will all see it as a fantastic incentive to get it on the register properly and as soon as possible.

Senator BARNETT—Can you advise us of the section that you are referring to? Do you have a form of words to amend it?

Mr Edwards—Yes, maybe we can come back to the committee secretary on that.

Senator BARNETT—What is the section?

Mr Edwards—It is section 62(3)(b)(i).

Senator BARNETT—Thank you very much. If you want to take that on notice, that would be potentially useful.

Mr Bills—That is probably the most important issue that we would like to raise.

Senator BARNETT—That is the most important point?

Mr Bills—Yes.

Senator TROOD—I want to ask your view of the conflict of laws provisions which were not included in the original bill but have now been included in part 7. Are you comfortable with the regime that is settled in there? Do you have any particular observations? In their submission Clayton Utz made some very specific references to parts of those conflicts of laws views. Do you have any support for their views, dissent from them or any other wider views?

Mr Edwards—No. I must admit that conflict of laws is not one of my areas of expertise, and the focus of our membership is internal and hopefully avoiding conflict of laws across the Tasman or in other ways. So the conflict of laws area I have left to the specialists. They would understand that far better than I could ever hope to.

Mr Bills—We have a few conflicts there now which are a bit unresolved with the current arrangements. I know with the REVS registers and also the company charges register a lot of these issues have not really been determined finally as to which takes priority in the event of there being an inconsistency. So we see that this legislation will do away with those sorts of potential conflicts which are really unresolved.

Senator TROOD—I see. So the concerns that you have are, you think, going to be met?

Mr Bills—Yes, very practical, day-to-day concerns that we have, yes.

Senator TROOD—There has been one point that has been raised, which is the opportunity for the parties to choose the law that might apply in the context of there being a difference. Do you have a view as to the entitlement of the contracting parties to settle on the jurisdiction that might apply with regard to any dispute?

Mr Edwards—Fundamentally, I do not see any reason why. The area where this would arise you would expect to be significant parties contracting with each other—not normal retail or consumer type transactions. I would expect that, if the parties want to agree that the law of a particular jurisdiction applies, that is a matter for the parties.

Senator TROOD—Thank you.

Senator FISHER—I have one question, or two, I guess—one for each gentleman. You have spoken to Senator Barnett about your membership, and clearly you are representative of the membership base of your respective organisations. Do you have any figures on those who would be eligible to be members of your organisation but are not? What percentage of those people who are eligible are in fact members, leaving aside affiliate members and associate members? Perhaps you first, Mr Bills.

Mr Bills—I think across-the-board our membership would probably make up 90 per cent of the market by volume.

Senator FISHER—Volume of business or numbers of—

Mr Bills—By dollars.

Senator FISHER—What about by numbers?

Mr Bills—There could be quite a number of smaller operations out there. They would be fairly small if they were not our members. Some of our members are quite small—they get down to $20 million in size, even smaller. There are probably some independent operators out there that need to be aware of this, yes.

Senator FISHER—Yes, that is what I am getting at. Clearly, you are not able to say that you represent their interests.

Mr Bills—I think we probably represent their interests, but whether we can get the message across to them, as we can with our own members, is a different question.

Senator FISHER—If they are not members of yours you may not be able to represent their interests. You may well have views about the issues they may face, which is not necessarily, the same.

Mr Bills—Yes, not necessarily.

Senator FISHER—Mr Edwards, what about the Institute for Factors and Discounters—the same question in terms of your main membership. You have listed here about a dozen, I suppose. If we leave out associate members and affiliate members, what percentage are your members?

Mr Edwards—I might defer.

Mr Bills—Again, it would be easily 90 per cent of the market, but there are quite a few smaller factoring operations around, which are really one-man bands.

Senator FISHER—Yes, they are the ones you referred to before. Okay.

Mr Bills—Yes. In that market there, people who use their superannuation to provide factoring facilities to panel beaters and all those sort of people. They are very small—individuals who are semi-retired.

Senator FISHER—Thank you.

CHAIR—Thank you both. That is all the questions we have today for you. We appreciate your time and your availability this afternoon.

Mr Bills—Thank you again for the opportunity.

Mr Edwards—Thank you.

Proceedings suspended from 2.39 pm to 3.00 pm

RICH, Ms Nicole, Director, Policy and Campaigns, Consumer Action Law Centre

CHAIR—I now formally welcome representatives from the Consumer Action Law Centre. Ms Rich, good afternoon and welcome to our hearing. We have a submission from the Consumer Action Law Centre. We have numbered that submission No. 5 for our purposes. Before I ask you to make an opening statement, do you want to amend it or change it at all?

Ms Rich—No, that is fine.

CHAIR—If you provide us with an opening statement, then we will go to questions.

Ms Rich—Sure. Obviously I assume that senators have read the submission, so rather than go through it all I thought I would briefly mention what our top two priorities are, and then you can ask me any questions that you are interested in. I should start by saying that I gave evidence to this committee before in relation to the exposure draft of the bill. I think it is a very complex bill, and the committee did a really good job of getting across a lot of the important issues in a quick time frame and in fact made some worthwhile recommendations. A lot of those, I saw, were adopted by the government and addressed, so I really commend the committee for that and also the government for taking on board a lot of those important recommendations and for making some really important changes to the bill that is now in parliament and is the subject of this inquiry. We certainly have noted that, in particular, a civil penalty regime has now been implemented in the bill, which is a really important improvement. There have also been some important improvements to protect individual privacy.

Really there are a few issues remaining with the bill that we have chosen to highlight in our submission. In terms of the bill itself, the No. 1 issue for our centre is the issue that we loosely call 'data mining'. We still think it is a significant issue that one of the authorised purposes for searching the register by individual name is broadly to assess credit. We think that is too broad and that it is not in fact in line with the purpose of the bill and the creation of a register that will hold a lot of personal information about individuals.

Probably the second big issue is that broader policy setting. We understand that the government wants to have a comprehensive register of all personal property security interests; however, we do not actually think that that value trumps what we still see as the risks with allowing individual names and dates of birth to be kept on the register for really low-value consumer property that we think there is limited value in having included in the register. The other issues are specific issues to do with provisions of the bill, and they are set out in our submission.

CHAIR—Thanks, Ms Rich. Let me go, then, to those two areas of concern. You are concerned about the searches of the PPS register, and you are suggesting that items 7 to 10 under proposed section 172 be amended. What would be the effect of those amendments then?

Ms Rich—We suggest that it is a legitimate purpose, obviously, for a lender to search the register before making a decision about whether to lend based on taking security in an item of personal property, for example. That is absolutely within the purview of this bill and the rationale for creating the register. However, the way that this provision in the bill is expressed allows a lender to access the register any time they are considering any extension of credit to an individual or considering any kind of investment with or through an individual.

CHAIR—So it is too broad?

Ms Rich—It is too broad. It needs to be limited to the purposes that it should be for and that correspond with the underlying rationale of the bill and the creation of the register. We believe that is a perfectly tenable position but, even if you did not accept that and thought that it should be allowed for general credit assessment purposes—which we do not agree with—it is not clear that the provision would exclude searching the register for credit marketing purposes, including prescreening, which we said in our submission has been an issue in the general credit reporting area. In fact, the Australian Law Reform Commission made recommendations to make it clear that credit reporting information should not be accessible for that purpose. We do not understand why you would not just pick up that recommendation and make that clear here as well.

CHAIR—With regard to individual privacy, currently in the bill, if it is not registerable by serial number there is reference to individuals' names and dates of birth. You are saying that that is a concern for you?

Ms Rich—Yes. This is a fundamental policy setting that we have argued all along, and the government clearly does not agree with us, because it has not been changed. We understand the reasons for that: the government says that they want this register to be able to contain all personal property security interests,

regardless of the type of personal property, on the grounds that they should all be able to be included on the register. We can see that argument. We can understand the value of that. We just do not think that comprehensiveness in and of itself necessarily trumps concerns and risks of including individuals on the register. That said, for individuals the primary purpose for granting a security interest in personal property would be a vehicle, which is capable of being referenced by serial number. The large majority of consumer interaction with the register will be about cars and boats, so that is not a problem. What we are really talking about is lower-value consumer goods that are not capable of being referenced by serial number. It could be electrical goods, white goods, household furniture—all those sorts of things.

In comparison with the quite significant risk of having individual names and dates of birth available on the register, we do not see a huge value to our community in allowing the security interests in those sorts of pieces of property to be kept on the register. Some of the main types of security interests we see taken in that sort of property are not necessarily desirable from a broader public policy point of view in any case, so we see that undermining the value in allowing those sorts of security interests to be included in the register. Ultimately, the privacy impact assessment concluded that it could be an issue but we should wait for three years and then assess whether it is a problem. That was the solution to a lot of potential privacy risks in the privacy impact assessment, and we did have a concern that perhaps the answer being 'let's wait three years on all of these problems' is not necessarily the best way to go. Maybe it is on some, but this is a fairly clear one. Yes, we can review it in three years. That is certainly better than nothing. But we also know that another potential solution is simply not to allow consumer goods—not commercial property that sole traders want to grant security interest in but in those cases where it is genuinely consumer property that just should not be included in the register if you cannot put it on by serial number.

CHAIR—I see.

Senator BARNETT—Thank you very much for your submission; it is most appreciated, as it was last time. Thank you for your comments regarding the Senate committee report and the amendments flowing from it. On that last point—the prohibition on registered property with a value of less than $5,000—do you think there should be an expressed prohibition?

Ms Rich—We would support that because of the reasons that I have outlined. I know that, for example, the Australian Privacy Foundation pointed that out. Clearly, it creates less of an incentive to bother registering—why would you bother going to the trouble of paying to register a security interest when it does not actually give you particular priority over somebody else anyway? We think that is true but, if that is the case and that is the general policy intention of putting that provision in, the reason we would support saying not to allow registrations of that sort at all is because it is the reputable and scrupulous lenders who will be incentivised by that not to put registrations on there. They do not have any interest in registering property that they are not going to gain any particular commercial benefit from. It is the unscrupulous and fringe lenders who take security in those sorts of goods for other reasons who are going to have an incentive to register those sorts of security interests on the register even though it does not actually create any technical legal benefit for them.

At the moment, unless the National Consumer Credit Protection Bill goes through, as a lender you can take security interests in consumers' household goods, goods that would be protected in bankruptcy from being seized by creditors and goods that in some states the sheriff cannot seize even if you owe a judgment debt. The public policy behind that is that there are some essential goods that people should not lose, because there is a certain level of living that we accept people should not fall below. But you can essentially circumvent that public policy by taking the security interest directly in that property, and that is what is sometimes called 'blackmail securities'. Most of those lenders do not have any genuine interest in repossessing those sorts of goods to repay a debt; they do it because those goods are worth much more to the consumer than to them, and they use it as it is termed—as blackmail—to prioritise repayments of those debts over other, essential household expenditure, particularly when people are on a very low income and it is actually quite difficult for them to make repayments towards the debt. That is what those sorts of securities tend to be used for at the moment, and we are quite concerned that, because it is the unscrupulous lenders who would make use of it, this provides them with another tool. They can show a very official—

Senator BARNETT—But it is not just the unscrupulous. The honest lenders may also register, may they not?

Ms Rich—They may. But, again, there is a provision in the bill which, I think rightly, says that if you are buying goods worth less than $5,000 that are basically consumer goods you should not have to check the register before taking clear title; therefore, there is a provision that says you basically do take clear title—or at

least you take first priority in the interest in those goods. There is not really an incentive for most mainstream lenders to bother registering, so who is going to use the register for those sorts of goods? I suggest that it is going to be people who use those registration statements for other purposes.

Senator BARNETT—What about the concerns about the process of seeking an amendment to the entry on the register? Do you have a view that the process might be too complex or too slow? Do you have any concerns about those matters? They may have been raised by the Privacy Foundation, but I might have that wrong as well.

Ms Rich—We did not raise it in this submission, did we? I know that earlier on in the process—I guess we are going back a year or two—we talked about that. It is absolutely important that there be some kind of amendment demand or change demand process that the grantor, as well as the security holder, can access. It is not necessarily something that is very easy to get right but, having voiced those concerns, we think that the bill has made a reasonable attempt to provide for some kind of a process by which granters can of their own motion seek changes. We could make comments about specific issues, but overall there is a process there that we think will work okay.

Senator BARNETT—Let us talk about that for a minute. Do we need to look at an option for utilising an external dispute resolution mechanism similar to the credit bill which you touched on earlier, which are in case the registrar is overwhelmed with requests for amendments or changes to the register?

Ms Rich—It is a very good suggestion. I think it was my colleagues at Legal Aid Queensland who might have made that suggestion.

Senator BARNETT—Yes, it was their submission on pages 2 and 3.

Ms Rich—I think they make the point that a lot of the businesses that would be security holders and would be registering interests would probably be obliged to join an external dispute resolution scheme anyway because of the national credit laws going through parliament. That is a good thing. I think that they are right. It is possible that there is room for a small amendment in this bill to ensure that those disputes to do with personal property securities registrations are able to be dealt with by those external dispute resolution schemes. I think it is a really good suggestion and it was good that they picked it up, because I think you are right: the registrar is primarily an administrative type of role. If we only get one or two requests every couple of months then it is not going to be a problem. But if they do get a significant number of requests for changes or amendments then you are right: they probably are not going to have a simple function.

Senator BARNETT—Are you familiar with the timing processes—how quickly they have to amend the register? I must say I have not read the act that definitively.

Ms Rich—I cannot remember off the top of my head, sorry. I thought I would save the forest by not printing the bill out and bringing it with me. I usually look at it on the screen. I remember looking at it and thinking it is not the fastest process in the world—that is correct. By the same token, I do not think it is too slow and I note that sometimes the external dispute resolution schemes can take a while to resolve these sorts of matters as well. But I certainly do not think it is too slow.

Senator BARNETT—But do you agree we should have some sort of appeal mechanism, or alternative dispute resolution mechanism?

Ms Rich—Yes, there is merit in the fact that maybe we need a party other than the registrar to deal with some of these functions. I know some others have raised the issue—even the privacy impact assessment, I think—that we might need to look at another body being able to deal with very urgent requests for suppression of details on the register, which is a related issue.

Senator BARNETT—I was going to ask about that and your views on the suppression of that information, and if you think that is adequate.

Ms Rich—The problem is that the process will be contained in the regulations and we have not seen the final form of the regulations, which I do think is a concern. Generally, you expect that the regulations get made later, but with this bill there are quite a lot of substantive details that go in the regulations. We have had one consultation on draft regulations but the bill has changed quite a lot since that time. I do think it is a bit of a concern that we have not seen the proposed regulations under the new form of the bill.

That said, if it is anything like the previous regulations it could be problematic because the registrar, again, is not necessarily going to have the ability as an administrative type of body to deal with substantive requests to suppress details on the register, which I must say is probably the single most serious issue for consumers.

Most of the bill does not really deal with consumers, but that issue, while it will not occur very often, when it does occur it is very important that it be dealt with appropriately and quickly.

Senator BARNETT—Sure. What about the issue that has been raised before about identity theft—do you have any issues? Do you think the bill covers those concerns with adequate penalties and sanctions?

Ms Rich—We certainly think it is a positive step that address details for individuals will not be able to be included in the register. It is very important, because identity theft generally needs three pieces of information to be viable, and the register was going to contain that, basically.

Senator BARNETT—Which three?

Ms Rich—The address, name and date of birth of an individual.

Senator BARNETT—Those three are the three, are they?

Ms Rich—The fact that addresses are not going to be on the register is very important. That said, with a name and a date of birth you can do a bit of damage. Again, a really simple solution would just be to not allow those sorts of registrations on the register. That is the sort of risk that I was alluding to earlier. We see limited value in including them, and we see potential for great risk in including them in the register.

Senator BARNETT—But are you satisfied with the way the bill is written? It was raised as a pretty big issue last time, prior to our last report—identity theft, identity crime, fraud and so on. You are satisfied as it is written?

Ms Rich—We think it is positive that address details have been clarified—that they cannot be included on the register. It just comes down to us having a fundamental policy disagreement with the government about including those sorts of registrations on the register. To the extent that we have accepted that the government does not agree with us and the bill is proceeding along the lines that individual name and date of birth will be allowed on the register, there is not much more we can say. But we think that issue could be solved.

Senator BARNETT—That is helpful. The Victorian Privacy Commissioner recommended the review of the privacy arrangements within two years rather than three years. Under the bill, as you know, it is three years. Do you have a view one way or the other?

Ms Rich—I agree with the Victorian Privacy Commissioner's submission on a number of substantive issues. I think we are actually in furious agreement on some of the issues. I think the reason they are concerned to have the privacy review conducted earlier is that some of those risks, while they could be very minor, are potentially quite substantial problems. So I think they were concerned to have that review earlier rather than later, because if those problems do emerge then they are pretty serious and we need to deal with them quickly. So to that extent, yes, it is possible that we should have the review earlier than three years. But that said, I actually see some pretty simple solutions to some of those problems that we could just fix in the bill now rather than waiting to see what occurs.

Senator BARNETT—Finally, we have evidence today from Clayton Utz's Ms Flannery regarding the view that the consumer credit aspects of, I think, chapter 4 of the bill, the enforcement provisions, should be moved to consumer credit legislation, which I think you referred to earlier—state and territory consumer credit legislation. Do you have a view about that or are you familiar with that view?

Ms Rich—I am not sure what her argument is; I probably need to know about what she is arguing.

Senator BARNETT—She said that there was an overlapping of the provisions where, under this bill, it would apply to businesses and commercial operators in the same way that it applies to consumers and households, and that the consumer credit legislation—and as a stand-alone, they deal with consumer credit—should apply with respect to personal property securities.

Ms Rich—I think that she is right that a lot of consumer protection policy objectives can be dealt with in the consumer credit legislation. It is currently state and territory laws but they have agreed to transfer responsibility to the Commonwealth and so we have the bills going through parliament at the moment to transfer them to national laws.

Senator BARNETT—Can I get clarity on that? I am not up to date on that. Where is that at the moment?

Ms Rich—It is actually with your colleagues in the Senate Economics Committee. There are four bills. The main one is the National Consumer Credit Protection Bill and there are some related smaller bills, and they have gone to the Senate Economics Committee for a hearing. Essentially, those bills pick up the state and territory Uniform Consumer Credit Code and apply it as a national code and they create a licensing and

responsible lending conduct regime not dissimilar from the financial services licensing regime that we currently have for other financial services providers. To the extent that there were any provisions in the Personal Property Securities Bill that were substantive provisions around consumer protection that should be in the consumer credit legislation, that would be correct, but I think that the government actually does understand that distinction and has got that broadly right.

The provisions in this bill that impose substantive obligations on security holders are to do with registrations and issues around registering personal property security interests on the register, so it is different. It is not the sort of thing that is picked up in the consumer credit bills, and we always argued for some kind of a compliance enforcement regime in this bill because there are substantive obligations in this bill. For instance, you should not search the register for an unauthorised purpose. You must give a grantor a copy of the statement saying that you are registering the name and the personal property and so on on the register. Those are specific obligations to this bill and do you need some kind of incentive for people to comply with those obligations.

Senator BARNETT—And in terms of costs in accessing the register and reflecting the view of consumers, are you happy with the way the framework is at the moment?

Ms Rich—Again, the regulations will probably set out fees so it is hard to know—

Senator BARNETT—So you have got no idea at the moment.

Ms Rich—It is hard to know anything that is going to be in the regulations. Obviously you want it to be affordable. The large majority of users of this register are going to be business users. That said, all of those costs will ultimately flow through to consumers. We are here representing consumers and of course we want it to be a reasonable price.

Senator BARNETT—We have not been to the department with these types of questions as yet, because that sort of detail is for later, when the bill is up. Clearly it is going to be an issue down the track. It has got to be viable and I am not sure whether it will be full cost recovery and we will need to get to the bottom of that. But in terms of the consumer and those that use it, we know that it will be online and digital, as it were, and you can access it quickly and register things instantaneously et cetera. So that will be an issue. Do you think it will be an issue, or don't you have a problem with it?

Ms Rich—I think this is where a public education campaign will be really important. Businesses that regularly deal with security interests will obviously know how to use the register and that will not be a problem for them. There are some really big benefits for consumers in this bill. The greatest single benefit is the fact that before you buy a motor vehicle you will have one place that you can check to see whether there is a security interest in that vehicle. We have had lots of really heartbreaking complaints over many years of consumers that have innocently bought a car from another person only to find six or 12 months down the track that a lender knocks on the door saying they have a security interest in that vehicle, which the consumer did not know about, and they repossess the vehicle. That can be really devastating for people; a motor vehicle is a very large purchase.

Senator BARNETT—Is that a not uncommon practice?

Ms Rich—It is not uncommon because consumers do not know to check for a security interest before buying a car from another individual. Even if they do know they will often ring up the state—and in Victoria it is VicRoads—and ask about it. They do not know that even if they are told over the phone that there is no security interest, unless they get the written certificate telling them that then there is no legal force against the lender and so on. So it will be really important to get the public education campaign right for individuals, particularly individuals buying boats and motor vehicles.

In terms of relating it to your question about fees, I know that very early on we had a concern that consumers were going to be charged more to do the double search of this register and the register that tells you whether there have been any problems with theft of the vehicle or whether it was an insurance write-off and so on. I am not 100 per cent sure where that got to, but obviously the only parties affected by having to pay more to do the double search are individuals.

Senator BARNETT—What is the cost at the moment? If I want to check whether the vehicle I am about to purchase is clear of any security interest, I go to the Register of Encumbered Vehicles or the state equivalent of the REVS.

Ms Rich—That is right. It depends on which state or territory you are in, but essentially it is whoever is responsible for registering vehicles. It is not a large fee, from memory. The big issue is that people just do not know about it and how important it is.

Senator BARNETT—Can you do it online?

Ms Rich—No, you cannot. That is one of the other problems. It is not that accessible.

Senator BARNETT—That is another issue, because that takes time.

Ms Rich—You have to get a written certificate sent out you. Of course, people are trying to make these decisions quickly because they are buying it via the *Trading Post* or whatever it might be. So there will be some really big benefits to individuals from having this register created as long as the fee is not too high and it is practical for individuals, not businesses, to use.

Senator BARNETT—We will certainly follow up on that. I have just got the latest figures today and I have been advised—but I stand to be corrected—this whole regime is going to do away with 68 federal acts and 37 state and territory acts that establish 30 separate registers. That is my understanding, and we can have that confirmed. So there will be a transition into this one register. I do not know what the fees are for these 30-odd different registers. Maybe we can set up a matrix and work out what the costs are and how much of a saving we are going to have for our consumers in the future. These are all issues we can work through in the weeks and months ahead. Thank you.

Senator FISHER—Ms Rich, the scenario you painted was about this being of assistance to individual consumers buying, for example, a boat or a car. What is your understanding of how it will work? Say a consumer decides to buy a boat, does a search and finds no registration of security over said boat. As I understand it, the registration is voluntary. Say that financier does in fact have some sort of security over said boat but has failed to register it. Essentially, the legislation says, 'If you want priority, register your security.' Obviously the financier would not have priority over somebody else for that security, but what then is your understanding of the effect for a consumer who would be proposing to purchase the boat when there may still be someone—a financier in the ether—who has a form of security, albeit non-registered?

Ms Rich—My understanding is that if you do not register that sort of interest once the register is created, it will not perfect the interest. It will not be prioritised over the next purchaser if they have searched that register. So I think consumers will be much better off in that situation than currently because if they purchase the vehicle or the boat and the interest was not registered on the register at the time that they purchased it they will basically take it free of that interest, in practical terms, in the sense that the lender will not be able to repossess the vehicle and sell it and then give the consumer the non-existent leftovers of funds if they recover their debt.

Senator FISHER—That is your understanding.

Ms Rich—That is my understanding of how it will work. It will obviously mean that lenders of finance for the purchase of cars, boats and so on will register their interest, because they will have an interest in doing that. That is a better situation than at the moment where consumers are not aware of how to find out and they can still have their vehicle repossessed down the track because there was a prior existing security interest in the vehicle, and so on. Having them registered up front and having consumers able to search for that will be beneficial. The practical issue is going to be whether consumers, ordinary people on the street, know to search the register before buying a car. Again, that comes back to why it is really important to get the public education campaign right, otherwise you will not fix the problem.

Senator BARNETT—The public education campaign has been brought up pretty regularly by other witnesses—how extensive and comprehensive it has to be. Frankly, there is a view that most people do not have a clue as to what is going on in terms of the impact and consequences of this bill.

Ms Rich—That is probably right. Most of the bill deals with business-to-business transactions and so on and most of the other witnesses would be expert in those sorts of issues. So, when they talk about a public education campaign, they are probably talking about something quite different to me. In some ways I am really talking about a quite simple message: do not buy a car or a boat from an individual unless you have checked the register first. It is a pretty simple message. I do not necessarily anticipate that it has to be that expensive but it does need to be effective and out there. I am not an expert in this area, but there should be ads in places where consumers commonly shop for vehicles, such as online sites, the *Trading Post* and so on. That is pretty sensible to me and it is probably not that expensive. I could imagine the government communications experts coming up with a reasonably good campaign.

Senator BARNETT—Thank you.

CHAIR—Thank you very much. We do not have any other questions for you today. Thank you for your consideration of the issues and for making yourself available to our committee this afternoon.

Ms Rich—Thanks very much.

[3.35 pm]

LOWDEN, Mr Patrick Michael, Partner, Freehills

LOXTON, Mr Diccon John Robertson, Partner, Allens Arthur Robinson

STUMBLES, Mr John Gregory Heath, Consultant, Mallesons Stephen Jaques

CHAIR—Welcome. We have received your submission, which we have numbered 17. Do you have any changes or amendments that you need to make?

Mr Loxton—Yes, we do. I will give you both a clean copy and a marked up copy.

CHAIR—I now invite you to make an opening statement and then we will go to questions.

Mr Loxton—We have done what we can in the short period of time available to us to look through the bill, and we have done the best we can to keep our comments short. But we are worried that there are features of the bill, some of which we have seen and some of which we will not see, that will make life difficult for those of us who need to operate the bill and advise on it in the future. Some of the difficulty is shown by the fact that, in their response to what we have said, the Attorney-General's Department have in some cases come to a view of the bill that is radically different from our view. On a couple of occasions they have pointed out things we have missed, and we have corrected our submission to take account of that. But at the end of the day, their view is very important in the sense that they are the ones who now have the opportunity to clarify the legislation by putting changes through parliament. Indeed, you the Senate have that opportunity to clarify it. But we do not.

After the bill receives royal assent there are two groups of people who will be very important in terms of how this is run and how it is interpreted. The first group is people like us, who have to make the decisions and advise our clients as to how the security works and which risks they run. Clients in the banking and financial sector are traditionally very conservative. They do not want to know that something is 80 per cent effective, they want to know it is 100 per cent effective. So it is important from our perspective to be able to say that this works and that it works in a particular way. If we cannot, we will throw at it everything we possibly can and go through whatever costly exercises we can to try and make it work. So the views of people like us and others are, I think, important in terms of understanding the way in which it will be seen in the marketplace.

There is another group of people who are also important and whose views we may not find out for a generation, and they are the courts. We have just had an example of a judge in Queensland coming to a radically different view on the way in which the registration requirements of the Corporations Act work, in a way that is completely against everybody else's views for the last 20 years. That has meant a significant degree of consternation in the financial market and a lot of costs in trying to fix up what has gone on.

An example, I think, in the way in which people can look at the act and the view you can take is the response of the Attorney-General's Department to our suggestion that the bill, while it requires registration of security of arrangements that do not secure money, then forbids people from lodging them. The Attorney-General's Department has said that an interpretation of those provisions would be that it only applies to those people who have to register because it secures money. That may be the way a judge would strain to find it. But we now have the opportunity to say that if that is the correct view it can be fixed by just, in my calculation, five words in addition to the section. That is just one example that we give in ways in which, we think unintentionally, the bill introduces uncertainty or contradictory requirements. We have noted from a number of the other submissions that other people have found many things that we have not found ourselves.

I will now take you through some of the issues that we have found. The bill does not deal with investment entitlements. We understood, as we read through, the hesitation in engaging in legislation in advance of treaties being introduced, but that leaves us with a gap in which we have to deal with these things, and they are a very important part of commerce. In many respects they are dealt with differently from the way in which investment instruments—debentures and the like—are dealt with. We would recommend that they should be dealt with within the aged care—that it should make clear that the act applies at least to take up the Attorney-General's Department's suggestions and general law and that as far as possible they are in a way treated in the same way as investment interests so that you can get control of them by having them registered in their name. And there are—and you will see it from our amended submission—still some issues in relation to 51 that we think need to be fixed.

In relation to commingled goods, again, if we get this right we have actually advanced things on where we were in the old days under the old law. But there are two problems, and I do not agree with the response of the Attorney-General's Department on this. You should not think about a pile of wheat but a pile of gold bars. Section 84 says that if you contribute a gold bar to the pile the amount that you can take out is limited according to the value of the gold bar when you put it in. That may have been some years before and the gold bar may have fluctuated. It still is the case, as we see it, that the amount that you can take out and participate with other people at the same level depends on the amount secured. This is a wonderful opportunity to get this fixed and to be able to say that those people who have equal-ranking security interests in the gold bars can participate on a rated basis according to the amount of gold they put in. I commend that to you.

We have also said that there is a weakening of what is one of the main ways in which corporate finance is provided in this country and that is the all-assets charge. Again, there are some issues as to whether we got the schedule right and we have fixed that up. But in broad terms in New Zealand in many circumstances if you have actual notice of a charge you cannot take priority over it. In this country, even if you have notice of it under our bill, you can still take priority. The effect of that is a) to weaken the security but b) to put people who want these charges in to a lot of extra expense. What they have to do is then take all the steps to protect themselves against someone who may take security by taking control over ones that are registered by number. At the moment, if you have security over project financing or over a company you just take one piece of paper, you register that, and that in broad terms gives you pretty good protection over everything. Now, in order to get the same degree of protection you will need to go through a lot more expensive steps. I think that is probably enough from me. I will ask John to speak.

Mr Stumbles—I want to make three comments of a drafting nature which are significant in practice. The first one is a matter dealing with flawed assets. A flawed asset is an arrangement whereby party A deposits money with party B on condition that B is not obliged to pay A the money back unless and until certain events occur. So it is inherent in the actual property right. It is not a security in that sense. The property is flawed, if you like, with the entitlement to make a demand only if and when certain circumstances occur. This is a common arrangement with financiers, and indeed is often associated with the right of set off. You have the floor and then in certain circumstances the set off accompanies the floor. We are disappointed that that is still not expressly excluded from the act given that set off is. The response is, 'Oh, if your analysis is correct then it is not security.' My response to that is that section 12 says 'in substance'. The words 'in substance' are what create uncertainty from our perspective. Imagine a client coming in and saying, 'I've got this flawed asset arrangement. Do we have to register it to ensure it is effective against a liquidator, for example.' You would say, 'Well, on one view you do and on the other view you do not.' We just want to avoid the need to go through that exercise given that the current arrangement is that flawed asset arrangements are not registrable.

Senator BARNETT—What subsection of section 12 are you talking about?

Mr Stumbles—I am talking about section 12(1). The second drafting point is in relation to repose and securities lending. These are rather arcane arrangements but the simple notion is that party A agrees to transfer its ownership of property to party B, normally securities, in return for party B entering into a reciprocal arrangement to sell similar but not identical securities back to party A at some time in the future. That is the first limb and the second limb. If you think about, when party A transfers under the first limb party A gets money. Then when the second limb is performed party A buys the securities back and pays the money over. You can see that that sounds like a borrowing of money—putting property up and getting it back. In legal form we do not think it is. But again the words 'in substance' create a question mark, and we indeed would like clarified. I note that the Attorney-General's Department has been very receptive to comments, and we have made a series of comments overtime to the department. Indeed in an earlier set of comments we provided drafting to address these points, and somehow or other this disappeared. So we would again press for the reinstatement of those exclusions.

My third drafting point comes in relation to the definition of accounts. An account essentially is a debt obligation or a book debt, if you like. One of the exclusions from the definition of account is, and this is complicated, I am afraid, an ADI account. If you look at the definition of ADI account, you see it is a protected account with a bank. That definition of protected account essentially tracks those accounts which are currently covered by the so-called Commonwealth government guarantee of bank deposits. I am not quite certain but I suspect that has had some background effect to the way this definition has been drafted. The effect of the definition is that, so long as one has this exclusion from the definition of an ADI account, it means that if a bank, say, NAB, has a depositor with it, it lends money to the depositor and it wants to take a security over the deposit account with it then under the current drafting they are unable to do that.

If you look at the Banking Act, it seems that that may disappear after 2011 possibly. That being the case, at that point in time it may well be that that possibility may occur. The drafting point is that by that point in time the definition in the act does not work because by definition there is then no protected account covered. So, as I say, I think the issue should be addressed by clarification—namely, that a bank may be able to take a charge over its own account in the future, subject, if a policy decision is made to that effect, to express exceptions for protected accounts during the period of the Commonwealth guarantee. I think I will finish with those points and pass it over to Mr Lowden.

Mr Lowden—I will to speak to a few of the examples that we have raised in our submission that we think warrant some particular attention. The first of those is the requirement for descriptions of collateral. Clause 20 of the proposed act requires a description in relation to collateral, and the concern we have about that is the formality that it introduces into the legislation in order to create a valid security interest and the uncertainty as to what description will suffice. There is certainly language in the act which suggests that a quite particular description needs to be included and a requirement that the description be sufficient to identify the property by item or class.

Again, we have some concerns around what is meant by class, particularly when you read that in the context of some other provisions which say that certain descriptions, such as a description by reference to the term 'equipment' or other types of property, are not adequate unless there is a further description that identifies the class. That does beg the question as to what a class is for the purpose of the bill. We note the response the department have provided as to their views as to the operation of those terms. We do not dismiss by any means that what the department is saying is correct. It is certainly open in the legislation. The concern is that it is just not clear from the section what it means, and the stakes are very high—whether you have a valid security agreement or not.

The next point is on clause 79 of the bill. I think the current clause represents a clarification of the position included under the previous draft of the bill. Unfortunately, it has been clarified in a matter against what we had suggested.

Senator Trood interjecting—

Mr Lowden—That would be understandable, although the response from the department does seem to suggest that the department is considering narrowing it in the manner we suggested. So far as we can gather from the bill, the explanatory memorandum and papers and discussions we have seen on this, the purpose of this section appears to be to make sure the provisions in a security agreement do not stop a transfer and passing of title actually occurring, and that sits with the extinguishment provisions which provide for people to take title free of a security interest.

That seems to us the sensible intent of the bill, but by not limiting it to security agreements you end up in a situation where whether property is subject to a security interest at all has quite radical effects on completely unrelated agreements. One example would be that, if you had a joint venture agreement under which the joint venturers' interests were not transferable, all one of the joint venture parties would need to do to overcome that restriction would be to create a security interest over their interest, and this provision would then say that they could transfer it.

Another way of highlighting that concern is to contrast the provisions in clause 79 with those in clause 80. Clause 80 recognises that allowing somebody to transfer property despite a restriction can have quite drastic implications for the position of the other party and has quite detailed provisions which are intended to serve to mitigate that. You look at clause 79 and all of those provisions are absent, so if the right being assigned is not an account or chattel paper then you do not have any of the protections under clause 79 that are included in clause 80.

Next I come to a provision which I think really reflects a policy decision rather than a drafting one. We would urge the committee to reconsider the policy merits of this clause in light of some particular difficulties which we would like you to consider. It is clause 143, which confers a right of reinstatement on grantors of security interests. I understand this is included in the Consumer Credit Code, which is possibly the genesis of this. I think in a commercial lending transaction this sort of one-off right to undo a default at any time prior to the sale of a property has real practical difficulties. I suppose one question is from a policy perspective: why is this felt necessary as it does not seem to be something that has been subject to any level of debate in public? Secondly, as a practical matter, there are a number of scenarios in which we see this raising real difficulties. There are all sorts of transactions, such as derivative transactions, that would be closed out or where the value of the underlying obligation that is secured would be terminated. The contracting party, the bank who provided

the derivative, would in the meantime be out taking offsetting positions in the market to manage their market risk in respect of the transaction. This clause then comes along and at some point after the default but prior to the sale of the collateral suddenly we need to undo all of that. That is something that we can see creating some real practical difficulties.

Another point as to clause 143 is that the policy reflected in chapter 4 seems to be to facilitate contracting out, but a number of these such provisions—and this is one of them—extend to the benefit not only of the grantor but of anybody else who may be interested. It is not going to be practical to have all of those parties enter into a contract and the lender is not going to have any way of ensuring that everybody in the world has entered into a contract with it so as to protect the efficacy of their contracting out.

One final point is with respect to implementation. The experience—this is from speaking to our New Zealand colleagues—of New Zealand where they had a 30-month period to implement the legislation once it was passed is that it was still a real stretch and people had a lot of problems meeting that timetable. By contrast, we have a much bigger economy, we have far more banks and we have much more complex legislation. Speaking about colleagues, I think it is ambitious to say the least that we implement the bill in the timetable proposed and we would urge the committee to revert to what I think was your original recommendation, to ensure that there is an adequate implementation phase. We do not think that the current proposed implementation phase is adequate.

CHAIR—Thank you for that. Gentlemen, I will ask a simple basic question at the outset if that is possible. What is your general view of this bill compared to the exposure draft?

Mr Loxton—In many ways it is easier to read and there are a lot of things that are being fixed. There are, however, some things that have gone backwards, from our perspective, in some significant areas. I think it illustrates the difficulty of getting what is a very complex piece of legislation right. There are significant changes which we have struggled with, because we, like everyone else in law firms, have other things to do. There is a significant improvement. There are things that have gone backwards. We think it should have further work in order to get it to what could be a very valuable piece of legislation in terms of getting it certain.

CHAIR—Are you able to very briefly dot point for us where you think it has gone backwards as opposed to those areas for which you sought changes and those changes have not been forthcoming?

Mr Loxton—Yes. We have mentioned some of them. The flawed assets in the previous bill were not included as examples. They are now included.

CHAIR—And you think that is a negative thing?

Mr Loxton—Yes. Repossessions were expressly excluded from the previous legislation and now they are arguably included or arguably not included. It has been suggested that this will be clarified by regulation.

CHAIR—Yes.

Mr Loxton—In the previous draft, assignments which did not secure obligations were excluded from the vesting provisions on insolvency, now they are included. There are other drafting points some of which we address in our paper and some of which we have let pass.

CHAIR—One of the areas that was raised with us today by people was clause 14(2)(c). A number of submissions have argued that it should be removed. They argue that it will result in less choice for consumers in seeking finance and less ability to obtain consumer goods finance. It is not an area that I noticed in your submission. I find it interesting that a number of people have referred to clause 14(2)(c) but I cannot find it in your submission to us. Do you think 14(2)(c) should stay?

Mr Lowden—I think 14(2)(c) is a consumer related provision which is not the focus of our submission. We practice more in the commercial area. It reflects something that is not on our radar so much as a view that it is correct to exclude it.

CHAIR—Have you looked at the bill from one angle, one point of view, not in a holistic way?

Mr Loxton—We have looked at it in a holistic way, but we have concentrated on various things and various topics that are of particular interest to us. We did not think that in this exercise we would concentrate on everything.

CHAIR—You have not looked as to whether there are deficiencies or positives from a consumer's point of view?

Mr Loxton—We have looked through the bill in the terms of trying to make sure there is certainty and in that respect there is in some areas more certainty, but we have not particularly looked at it from that point of view.

CHAIR—The other issue is that you might remember during our committee hearings for the exposure draft there were many, many submissions that recommended that the implementation date be put off to May 2011. We made that recommendation and the government has picked that up. Quite a number of people today have welcomed that. Are you suggesting that May 2011 is too short and that should be further extended?

Mr Lowden—Yes.

CHAIR—On what basis do you make that suggestion? I am not sure that is the position you put to us when we had the draft bill. I thought you were amongst the group of people who were urging for a 12-month delay which is what you now have. Are you asking for a further delay now?

Mr Lowden—I do not think we previously proposed a particular date. We indicated that we thought more time was needed. Another feature is that this bill is a very substantial rewrite of the previous bill as well. There is a lot of relearning to do on the new bill.

Mr Loxton—I think if truth be told, we were each of us at conference where a New Zealand lawyer presented. I think but for his views we may have not raised this particular issue, but we are passing on to the committee the views which were mentioned to us by a number of New Zealand lawyers at the conference. They all thought that the period that we in Australia have given ourselves was too short. What they said was that the major financial institutions in New Zealand were able to deal with the time frame, but a lot of the others, particularly they described leasing companies and others, really took a lot longer to cope with it. It may be that in Australia we are able to take advantage of the New Zealand experience and certainly the banks will be informed by the New Zealand experience, but we pass on to the committee the views that were expressed to us.

CHAIR—Which is that you need more than 18 months, is that what you are saying?

Mr Loxton—Yes. They said you need to have education, change policies, change the documents, change the systems and change your credit approaches to take account of the new security and the way in which priority can work. They said that took up a lot of time. We have started to talk to clients and we have started to scope out the exercises. I think it is early days yet, but it is certainly a massive task that lies ahead of us.

It lies ahead at the same stage that they need to rewrite documents in terms of national consumer credit legislation, contracts review legislation and anything else that is on the horizon. I do not think we are strongly putting the view, but what we are doing is passing on the benefit of the intelligence that we were given by the New Zealanders. In a sense, it is us who benefit by having a short time period because that means people desperately strike for lawyers, but I think we are passing it on.

Mr Lowden—Although I think one issue we are mindful of is more the time frame to actually get the legislation right. We think there is still quite a lot of work that needs to go into the bill before it is going to be in a position to pass, and then that needs to be thought of in the context of the time that follows for implementation.

CHAIR—I understand that that is your position, and your submission to us is comprehensive. Similarly though, we have been provided with a response to the issues that have been raised with you. You would have seen probably the first section of that response and maybe not the second section which we have been provided with today. We do not have time in the next 25 minutes to go through each section looking at 'I say', 'they say' and discussing the differences. We can clearly read that. But in relation to the first response from the Attorney-General's Department, if there was one particular area where you felt that perhaps they are significantly in error, what would that be? What would you point us to, given that there are quite a number of areas and we do not have three hours with you ahead of us? What is the one area you would alert us to for reconsideration?

Mr Stumbles—There are three issues which I think you should have high on your radar: timing—

CHAIR—That is a May 2011 introduction?

Mr Stumbles—Yes.

CHAIR—All right, we have got that message.

Mr Stumbles—The second one is the issue about description. This is where problems are going to occur.

CHAIR—This is clause 20?

Mr Stumbles—Yes. People are going to mess up the description in filing their documents for registration. That is another source of great problem. The third—and this is a registration problem—is section 267. In our submission we said that section 267 did not deal with perfection under foreign law. What we were talking about there was a situation where an Australian company gave assets say in Hong Kong. So if a property is situated there you would think Hong Kong law should govern. Yes, I understand that, and the response we got from the Attorney was, 'Yes, that's correct. Part 7.2 deems that perfection of property is governed by the foreign law and we perfect under that jurisdiction.'

I understand that reasoning and three things flow from that. The first is that if that is correct, that would mean that an Australian company granting security over its assets in Hong Kong would not have to register under Australian law to have a perfected security interest. If you are searching another Australian company here, you would say, 'Gosh, what if its assets are secured?' You would not know what foreign assets are secured. Compare that with the current position where the general rule we all follow is that if an Australian company gives a security over all its assets wherever situated, you always register in the home jurisdiction. So that has prompted our comment about there being no recognition of foreign perfection methodology. That was that comment. Now, I understand the Attorney's view, and it is a view available—

CHAIR—Can I just interrupt you there before you go on to the next train of thought?

Mr Stumbles—Yes.

CHAIR—They actually do make a suggestion in their response that in relation to clause 267 they suggest to us—the committee—that we may wish to consider whether clause 268 should be extended to the interest of a transferee of 'a transfer of an account or chattel paper that does not secure payment or performance of an obligation.'

Mr Stumbles—Yes, we would support that.

CHAIR—As proposed by Clayton Utz.

Mr Stumbles—Yes, we would support that.

Senator TROOD—Does that address the problem?

Mr Stumbles—Not quite. No, it does not. It is a different point.

CHAIR—Yes, it is, but I thought you were moving off clause 267.

Mr Stumbles—No, I have not finished 267 yet. In terms of drafting, it is not an easy thing to address that question. That is the first point. The second point is this. Say, under current law, I execute a charge in January 2009 of present and future property and register it with ASIC. The company then goes into liquidation, say in the following year. But then further assets come into the company after it is in liquidation. You would have thought: 'I'm a secured creditor. My security should extend to that future property.' You can see what I am getting at. That is how the current law works.

There is a technical problem here because, under the concepts of attachment, attachment only arises when the company has an interest in the subject property to be given by way of security. So imagine my scenario where the company only gets the interest in the property after the liquidation commences. Then you would say, 'Oh, well. I've got my interest. I have given the value. Therefore, my security should be valid it against that property.' The problem is that there is another section of the Corporations Act, section 458—and this is not expressly mentioned in the submission—which says that dispositions of property after the commencement of winding up are void. So if attachment involves an interest in the vesting of the security you can see that there is a risk that the after-acquired property, purportedly the subject of our security, will not come within the umbrella of that security.

Mr Loxton—In a nutshell, it says that if you have something that has not perfected at the time that a company goes into liquidation or a person goes into bankruptcy then the security interest vests in the trustee in bankruptcy or the liquidator. The difficulty is that something does not perfect until it attaches and it does not attach until it is acquired. If it is acquired after the start of the winding up, that means that it will not have perfected at the start of the winding up and so will go over to the liquidator. I do not think that is intentional.

Mr Stumbles—No, it is not intentional. It is highly technical. I do apologise for that.

Senator TROOD—The argument you want to press is that the existing arrangements are the ones that ought to apply when this bill is passed.

Mr Stumbles—In terms of after-acquired property I think we should continue the current legal position.

Senator TROOD—The current legal regime ought to apply, rather than creating what is an anomalous situation.

Mr Stumbles—Correct.

Senator TROOD—It is inconsistent, anyway, with the existing arrangements.

Mr Loxton—Yes, in the sense that if you have something that has already been advertised by registration before the appropriate time then it should protect things that are acquired afterwards. Otherwise, what you have done is destroyed the value of what you have, which is an ability to get things in ahead of time. Another issue there is that we say it is too sudden death. If I am a secured creditor and I get something and fail to perfect it by registration and then in the next moment a voluntary administrator is appointed, I have lost. We say that is too draconian because we may not have had enough time to react or even to sort out what the registration is. The Attorney's view on that is that you do it ahead of time. I think, from practical experience, even understanding the way that the electronic register works and all the convenience that it will bestow and the fact that you can register ahead of time, it simply will not happen in many cases. There will be many people overseas who will need to react to it.

The other issue is that it will not be clear as to what the position is if I get my security interest in the morning and perfect it in the morning and the liquidator is appointed later that morning, which is what is called the 0R rule. There is in relation to some registration systems an ability to get extensions of time. We do not see why, as a matter of policy, it should be absolutely sudden death, the way it is. There could be some latitude in it, some possibility of extension.

CHAIR—What section is that, Mr Loxton?

Mr Loxton—That is still section 267.

CHAIR—I need to finish my questioning there, unless you wanted to add something. We need to finish at 4.30, so I am going to pass to Senator Barnett and the others for the rest of the time until then.

Senator BARNETT—We have touched on some key issues and you have answered some of those questions. You have summarised your three key concerns with the bill: timing, clause 20 and clause 267. They are the top three, are they?

Mr Lowden—They are three key concerns, in no particular order.

Mr Loxton—They are not 'the' key concerns—we have not ranked them. It would be difficult—

Senator BARNETT—Well, it is quite a good question in terms of ranking. If you wanted to take on notice or think about ranking, let us know. We have your views on those three and we have your submission, and we will consider them all on their merits of course, but if you have a view on ranking, if you think that three are totally outrageous that we need to fix, let us know.

Mr Loxton—Virtually everything we have mentioned we think should be fixed.

Senator BARNETT—The reason I ask this is that we respect your views and your input. At the previous hearing that we had you had a tremendously comprehensive submission, and some of those things have been taken up and some of them have not. Now here we are again and, frankly, it is another comprehensive submission. We are at death's door; this is it—this is the bill. So I would like to get a feel from you and your colleagues as to where we are going with the bill. That is taken on board. In terms of the implementation phase, you have talked about the bill and its passage. The New South Wales bill has already passed and it is based on this bill. You are aware of that.

Mr Lowden—Yes, we.

Senator BARNETT—We therefore have to consider how we handle this. Do we amend this bill, which would mean New South Wales would have to go back to the drawing board and bring in another bill, or do we bring in consequential amendments? I am interested in your views as to which way we should go. I think we as a committee have to consider that strategic position and make a recommendation. Do you have a view on that?

Mr Loxton—I would hesitate to interfere in federal-state relations, but in terms of practicality we think there are a number of issues in this bill that just have to be fixed in order for it to work well.

Senator BARNETT—Do you understand the process?

Mr Loxton—I understand the issue. We would have said, 'Revise it further,' but if the decision is made to try to get it implemented as soon as possible but also to accept some revisions, and you want to preserve the New South Wales legislation—which I have not studied in detail, but assuming it does not allow amendments to the actual bill but allows amendments in subsequent legislation—then you need to have consequential amendments, would be my guess. But, again, I hesitate to—

Senator BARNETT—My understanding is that the New South Wales bill mirrors the bill before us. If we wish to make any amendments to this, they have to basically start again. If we do not, we put up consequential amendments to this bill. We have to pass the primary bill and then, in a cognate way or linking it somehow, pass the other one.

Mr Loxton—If that does not cause a riot in New South Wales that sounds to be a better way of doing it.

Senator BARNETT—We were advised this morning by the department that the other states and territories are planning to introduce the same bill, that mirrors the one before us, prior to the end of the year. That is the plan. I want to try to tie you down in terms of the timing and the implementation phase. We recommended a one-year delay. We have now got that; the government has agreed. What are you recommending in terms of timing? Do you think there needs to be a further one-year delay or a six-month delay? If so, what are the reasons and what needs to happen in the interim in terms of consultation with key stakeholders et cetera?

Mr Loxton—The New Zealanders had a period of 30 months once the legislation was passed. That is the only benchmark we have. In the end, this is for the people that need to implement it. We are simply commenting that in New Zealand they had extraordinary difficulty in implementing it in that time. As Mr Lowden said, we are more focused on getting the bill right and getting it right early. Anything in terms of consequential amendments that allow us to go through the process of fixing up those things which we think ought to be fixed we would commend.

Mr Stumbles—I think you can legitimately say many of them are consequential drafting clarifications. Most of the policy decisions have largely been made about this legislation. There are one or two things that have come up in those submissions. There are some policy issues in some of the things, but a lot of them come down to the drafting, I would say. You can characterise a lot of them as consequential in terms of clarification, it seems to me.

Senator TROOD—Mr Stumbles, that seems to me a rather important point because you came to the committee originally with some principled objections to the whole legislation, as I recall. You did not like one bit of it. That is probably overstating it, but you did not like the whole approach that was being taken. As I remember, you wanted to divide the bill and return us to essentially where we are. You seem to have made a lot of progress in terms of accepting the changes that have taken place—and accepted that there are some innovations here that can be accommodated at least by your clients.

The point you make about in principle decision is an accurate one—whether or not you have accommodated yourself to those principles and to saying, 'Well, we cannot do anything about it and we are going to go with it,' or whether or not you have persuaded yourselves that some of these changes are in fact worthwhile changes. I think you are right that we have reached the point where there are some matters which remain which reflect poor drafting but, nevertheless, could potentially have quite serious consequences if they are not rectified. I am not saying all of those points that you raised with us are of that character but many seem to be of that nature. There are a couple of substantive things I would like to raise with you, if the chair would permit me, but it seems to me rather important that you engage with the Attorney-General's Department and deal with these issues that can be rectified not because they are matters of principle but because they are bad drafting.

Mr Stumbles—I think it is possibly an overstatement to say we are violently opposed to the approach. Philosophically we started from the position that we were wedded to the beauty of security by way of charge, and you probably picked that up last time. Speaking for myself, I recognise that, as I said before, decisions are being made. I am sure my other colleagues would agree with me that it is really about trying to get a workable document that will not create a high degree of uncertainty. We can move through fairly effortlessly, which is a bit of a challenge, but we want to reduce the doubts. We do not want to say this or that when clients come and see us. This is really what we are trying to do here. My own view, as Mr Loxton said, is that this is a vast improvement on the last draft. I would also like to acknowledge that the Attorney-General has consulted very largely among stakeholders in this bill.

Senator BARNETT—In this bill?

Mr Stumbles—I mean the previous consultation.

Senator BARNETT—That is quite different. Have you been consulted on this bill?

Mr Stumbles—Not yet, Senators, no. As far as I am aware, we have not initially given precise drafting comments.

Mr Loxton—I think to be fair to the Attorney-General's Department, they have had little time since the last hearing to produce this bill. In order to be able to do it, they really did not have time to consult with stakeholders.

Senator BARNETT—Have you expressed any of your concerns or views to the department since the bill became public when it was introduced—as in the bill, not the exposure draft—and if so have you had some discussions and liaison with them?

Mr Loxton—Only very briefly at this stage. To take up the point made earlier, we do have a different philosophical approach, but for the last 12 months or so we have been engaged with the Attorney-General's Department with the point of view that if we go down this route we have to go down it right. We have spent literally dozens of hours in meetings and discussions, putting forward points of view which, while occasionally address the philosophy, on large numbers of occasions look at the drafting and the approach even within the broad parameters. I am sorry if our approach was misunderstood last time. While we would prefer a different philosophy, what we were trying to say last time was that, within the time frame, you could still achieve exactly what you wanted to achieve but without having some of the things that are in there. We accept that has happened. Our attitude is always that, whatever the political decision in terms of having this legislation, it is something that we have to live with and work with and it is something that we want to see work well if it works. The drafting should live up to the policy objectives, and that is that it gives certainty, clarity and ease of operation to the economy. We will always have a philosophical discussion, but we have always worked on the basis of trying to get this legislation right, and we will continue to do so.

Senator TROOD—Please do not misunderstand me. I acknowledge and welcome the very constructive role that you have all played in relation to this matter. I think it has been constructive. Your earlier submission was complex and detailed. It ought to have been of value to the Attorney's department. I am certainly one of the committee who regards the contribution you have made as very constructive indeed. What I am urging you to do, if I can, is to continue in that state of mind and indeed encourage the Attorney to proceed in that way so that these issues can be sorted out where they are not matters of principle about which the government has a settled, determined and unmovable view.

Senator BARNETT—I would just like to make a point. There is the issue of flawed assets and repossessions. That has changed from the previous exposure draft. That is how I read it. All I am saying is that that is noted. The department is back here tomorrow morning, so we can flesh that out with them and get further and better particulars regarding the reasons why.

Senator TROOD—That was one of my questions.

Senator BARNETT—There are two important issues.

Senator TROOD—I would like you to tell us what the public policy argument is for inclusion and returning to where we were. What do you believe the argument to be?

Mr Loxton—Do you mean the argument for excluding, including flawed assets?

Senator TROOD—Yes.

Mr Loxton—I can tell you the argument for excluding. I think the argument for it is to take a very broad-brush attitude to the legislation and say: this covers anything of any nature that could possibly secure anything in any way. The argument against that is that—

Senator BARNETT—But it excludes rights of set-off—

Mr Loxton—That is right.

Senator BARNETT—You made the point earlier, Mr Stumbles. That is inconsistent. What is the argument there?

Mr Loxton—Sorry, Senator—we are violently, zealously and eagerly pushing the line that flawed assets should not be regarded as security interests.

Senator TROOD—I misunderstood. What I would like you to tell us—and the Attorney is presumably going to argue why it is—is: what is your case for the fact that it should not be?

Mr Loxton—There are a number of things.

Senator TROOD—Apart from contingency, which I appreciate—or is that it?

Mr Loxton—One is that it is just the same as a set-off. Another is that it is something that occurs in many transactions which do not really constitute security interests. So you would be registering a whole lot of transactions which are not really security interests, in the narrower sense of the term—transactions that are just normal commerce between parties—and that it is a way in which the financial markets operate and protect themselves against systemic risk, that it is something that is just intrinsic to an asset. So, if you try and say that a flawed asset is a security interest, you do not get very far. You cannot really talk in terms of priority, you cannot really talk in terms of perfection or attachment, you cannot really talk in terms of vesting and you cannot really talk in terms of policy. If you look at the overall objectives of the act of setting priority et cetera, it does not really work with flawed assets any more than it would work with a set-off. It is just a term of a contract.

Senator TROOD—Is there a class of flawed assets, which in some way might be distinguishable, which reasonably ought to be included?

Mr Loxton—If they were, and we cannot think of any, then they would be caught up with the general language under clause 12(1).

Mr Lowden—If you read section 12(2), you see that it does not actually add anything to the general definition because it is prefaced by the words 'the following if they in substance secure an obligation'. On our reading, including in that list examples of things that, in fact, none of us can think where they would be in substance a security just confuses what is meant by the general definition.

Mr Loxton—The difficulty is that a judge seeing those words would try and strain the act in order to try and say, 'Well, there must be a security interest in some way.'

Mr Lowden—And potentially it means not only straining to pick up those interests but also straining it in a way that it then picks up a whole lot of other things as well.

Senator TROOD—Is a consequence of that that we have a whole lot of things registered or involved which clog up the system in a way and create rights that should not be created?

Mr Loxton——You may see liquidators try and unravel contracts, saying that this really this vests in me—

Mr Stumbles—It is a flawed asset with a contingent agreement to pay or something. That is the argument. This bill could perhaps be renamed the transactions registration bill or something like that.

Mr Loxton—A moment ago we were talking about an issue and I have seen it mentioned in the Clayton Utz submission—and, by the way, we agree with most of their points. This issue deals with vesting in section 267 and following provisions. It goes to the area of what happens if you have somebody who owns something and its ownership is deemed a security interest. In many circumstances we would say that should not vest, but if it does then what we would say is, in general terms, if I have title then I have ownership of it. If it secures $10,000 but it is worth $100,000 then, for whatever reason, because of the uncertainty of the way that it works, it is vested in the liquidator. What has happened is that I have lost $90,000 of my value and not just the $10,000. So in a sense the liquidator and the other creditors have got a free serve. It really depends on what the policy is but, at the very least, someone who loses value in that way, whether or not they are within the limited scope of section 269, should get compensation for the fact that they have lost title which may exceed the amount that is secured to them. At the moment we do not read section 269 as working that way, and that is a consequence of the way in which the vesting drafting works.

I must confess that something that is quite obvious in the explanatory memorandum and which each of us failed to notice until today is the suggestion that the Corporations Act provisions on registration of charges would remain. We just do not understand that and the beauty of this, if it has a beauty, is to have one-stop registration. There should be just one regime for registration of charges—one regime that applies on insolvency and not two regimes and two statutes that may have overlapping roles in the Corporations Act and this act. So I suggest very strongly to the committee that it recommend that those relevant provisions of the Corporations Act that also deal with registration of charges should be removed and removed in their entirety.

Senator TROOD—Thank you. I want to raise this question about investment entitlements. Clayton's have made a point about that with regard to the Hague convention. They say that there is a need to adopt some rules about them. I am not clear precisely what they are saying. I would be grateful for your view, because you have raised a similar point about investment entitlement.

Mr Loxton—I think that is one of the many areas where we agree with them.

Senator TROOD—There has been a happy comity of interest, Mr Loxton, from where you were on the last occasion. Can I just clarify in relation to your position, is the case you are making for the essential regime that exists within the Hague convention or the existing rules, because it is not clear from Clayton's submission what we should be doing here? They are dissatisfied with the arrangements. They want something different.

Mr Loxton—There is a brave new international world coming, which is the Hague convention, which will sort out all sorts of difficulties one day. It is apparent in the drafting of this legislation that the decision has been made that these things will be governed by the Hague convention so nothing should be done in terms of applying the act internationally or even within Australia—which may contradict the Hague convention, because we do not know exactly how it will apply or when it will apply. The decision has been made not to say very much about it at all. We say it should say something. We need to put our own house in order now. If we have legislation which is comprehensive in terms of the way in which it works with personal property securities, then it should work with respect to these. There are a number of provisions, and we go through them, dealing comprehensively with what happens if you have debentures and shares and the like. But what it does not do is deal equally comprehensively with what happens if you have shares which are held in a depository and just a right to those—and those are growing and growing and growing in financial significance. So we say that the act should have a regime about it; it should not wait for the Hague convention; it should be able to be displaced by the Hague convention when it comes; and also it should make provision now so that these things—in a sense they are just one step removed from a share and a debenture—are dealt with in exactly the same way. We agree with them. That is their point, I hope.

Senator TROOD—I think their point is that the convention may be years away and we ought not to be waiting around for that, because serious confusion, perhaps even unjust consequences, would follow were we to proceed on the expectation that this might be implemented in the near future.

Mr Loxton—Yes. This has got to work now. To give you one example, if I am a secured party and I register a share in my name, then I have control over that and that beats everybody under the scheme. If I have a depository receipt, being a right in a share in my name, it does not beat everybody, because it is not considered as having control. No-one can do anything about it, but so far the act does not say it is control.

Senator TROOD—Thank you.

Senator FISHER—Mr Loxton, you very eloquently referred to I think section 80 something in respect of crops. You talked about wheat and then gold bars. It was so clever it lost me. Were you actually referring to the substantive provisions and, if so, being critical and, if so, how, because I cannot see that issue addressed in your submission? If it is, that is fine, I will read it.

Mr Loxton—My submission was so intelligent that I think I quoted the wrong number in the course of it! What I was addressing was what we had said about the commingling provisions. I will know all the sections off by heart within a year, but I do not yet.

Senator FISHER—That is fine; that is sufficient. So your point was not about the substance of proposed section 84.

Mr Loxton—No, I am sorry.

Senator FISHER—That is fine; thank you. What, if anything, will be the effect of this bill on situations in which there might today be an argument about retention of title and Romalpa clause-type issues—for example, delivery of hay to an exporter by a farmer or delivery of grain? Do you have a view?

Mr Loxton—Yes, the view is that, if the farmer is delivering the hay in advance of payment and has a contract with the buyer that the farmer will retain title to the hay until he or she is paid, that is security interest as defined and something the farmer will need to register in order to be protected.

Senator FISHER—So that would be consistent with the existing legal position in substance, would it—except that a farmer will now have to register to achieve—

Mr Loxton—No, the—

Mr Lowden—There is also a difference in something else. Firstly, I think, there has been some debate over that in an overseas jurisdiction.

Senator FISHER—Yes.

Mr Lowden—It has not been settled, and in fact I can still see scope, because of the uncertainty of what 'in substance' means, for argument—and I think we will probably have quite a bit of litigation before it actually gets settled one way or another. Assuming that it is treated as a security interest at the end of the day, one consequence of the formality requirements in clause 20 is that it will not be enough for the farmer or some other supplier to deliver under an invoice and just rely on the fact that the purchaser took delivery; they actually need to get it signed. So there is an additional hurdle that suppliers will need to jump even if they go off and register. So they have put the world on notice as to the existence of a security interest. The requirement for signing can mean that they lose their title to the goods. On the other hand, the rules on commingling, as Mr Loxton referred to earlier, are potentially of benefit because they mean that, if they validly establish an interest, they do not necessarily lose their interest simply because they cannot identify which was their bit of wheat.

Mr Loxton—The farmer has advantages and disadvantages. I think the point about writing may have been fixed in the last drafting in terms of acts to adopt it. But, from a farmer's perspective, Mr Lowden is quite right. In fact, there have been cases in New Zealand where someone in the position of a farmer was delivering something, there was a delay beyond the times of payment which was not expected and the farmer's ability to retain title was held not to be a security interest. The position with the current law is that that security interest in the broad sense of the term, retention of title, would not be registered against the buyer, so someone who is dealing with a buyer would not know that it was subject to a security interest.

Senator FISHER—In the current law?

Mr Loxton—In the current law. From the position of the farmer, if, once the hay had gone into a huge van or whatever—

Senator FISHER—Sorry, Mr Loxton; back up if you will. If the bill is passed then that interest can be registered as a security, can it not?

Mr Loxton—That is right, but the farmer would need to know that that is what he or she has to do.

Senator FISHER—Exactly. Continue with your scenario.

Mr Loxton—My colleagues can leap in when I am wrong. The farmer delivers the hay and it goes into a big container full of hay—or wheat is probably an easier thing to talk about.

Senator FISHER—A silo.

Mr Loxton—A silo, yes.

Senator FISHER—Not the ones that might exist in certain large companies!

CHAIR—Political parties or bureaucracies!

Mr Loxton—The wheat goes into a silo. Under the current law, the farmer would effectively lose his rights to that wheat because it would just disappear into a mass. One of the things that this law does is that it says the farmer can follow the wheat into the silo.

Senator FISHER—Yes, trace it.

Mr Loxton—We would argue with the way in which he can follow, which may not matter too much to one farmer with a piece but may matter a lot to people with gold bars or with large parcels. We think that the opportunity is there to fix that up and it should be taken.

Senator FISHER—So I guess, in summary, provided that farmers know about and then do register their interest, the bill does stand to benefit them, but that may be a reasonably significant proviso.

Mr Loxton—Yes, that is a huge proviso. There is another proviso, too, and that is that they need to describe what they are selling with sufficient accuracy so that people can follow through the wheat or whatever, and—

Mr Stumbles—That is the description point.

Mr Loxton—that is the description point,

Mr Stumbles—That is why it is so fundamental.

Senator FISHER—Of course, this retention-of-title issue goes beyond the farming community, but it is very key to the farming community. I would have thought, too, that implicit in what you are saying is that the bill in its current terms actually has the potential to make the current situation, albeit unclear, worse from a farmer's perspective, doesn't it?

Mr Lowden—Yes. From a farmer's or any supplier's perspective, there are—

Senator FISHER—Or any supplier's perspective, yes.

Mr Loxton—Yes. But it is not unqualified, because there are the issues of being able to follow it into the silo and all the rest, so there are wins and losses—

CHAIR—We are going to have wind up here.

Mr Loxton—but I think the general observation is that this bill, while it weakens what we think is one of the standard forms of charge, tips the scales in favour of those people who are sophisticated financiers who protect their interest against those who are not aware of the need to protect their interest and to go through all the various steps.

Mr Stumbles—So the point to respond to is that, for small business and farmers, the educational piece for both of those sets of interest groups is going to be quite significant. I think the difficulty of that, say, is that it is going to be better or worse for a farmer. If they register, in some respects it is going to be better for them, so you would actually—

Senator FISHER—Provided that they are clear within the terms of the legislation about that which they are registering their interest in.

Mr Stumbles—Yes.

Mr Loxton—That is right, and provided—the way the current bill works—that they get the wheat there before the company goes bust.

Senator FISHER—Yes.

Mr Loxton—And they have remembered to register before that.

Senator FISHER—Thank you.

CHAIR—We need to finish there. We have another witness we need to deal with this afternoon. I thank the three of you once again for your time and for making yourselves available for the committee this afternoon. We appreciate it, thank you.

[4.49 pm]

TURNER, Mr David C, Barrister, Victoria

Evidence was taken via teleconference—

CHAIR—Mr Turner, I formally welcome you to this public hearing of our committee. To begin the proceedings, do you have anything to say about the capacity in which you appear today?

Mr Turner—I am making a submission, and my contribution, in a private capacity. Even though the Victorian bar wants to make its own views known, it is going to do that separately.

CHAIR—We have a submission, which we have received from you today, with us. Did you want to make any changes or amendments to that before I invite you to make some opening comments?

Mr Turner—On page 3 I inadvertently referred to section 34(9) instead of section 34(10) in the fourth paragraph.

CHAIR—So that needs to be changed to section 34(10)?

Mr Turner—Yes.

CHAIR—No other changes?

Mr Turner—No, not really. There is a lot more that one could put into it.

CHAIR—I invite you then to make some opening comments and then we will go to questions.

Mr Turner—What I have done in this submission is deal with the purchase money security and how it is treated under the bill. I have made a few observations about the commercial reasonableness test and mentioned a couple of things about remedies. I think the purchase money security matters have been fixed up quite a bit but then muddled a little bit by some unfortunate drafting or perhaps misunderstanding of how the concept works and *(inaudible)* works in the scheme of *(inaudible)* security. I set out in there the two types of things that it deals with: the seller and the financier.

CHAIR—Mr Turner, can you hear me?

Mr Turner—I can hear you.

CHAIR—You keep dropping in and out so we might try to fix that. Are you on speaker phone?

Mr Turner—I am.

CHAIR—It might be better if you go to a handpiece.

Mr Turner—All right.

CHAIR—That is better. Please continue.

Mr Turner—It sounds better but there is still an echo.

CHAIR—There is a bit, but at least we are getting every word you say rather than every second word.

Mr Turner—That is obviously censorship! I was trying to say that I have not looked at the total revision of the bill. I have looked at some of the definitions and I have looked at some other matters because I recently gave a paper on some aspects of it. What I have tried to highlight in here were some of the things that I observed. One thing that still troubles me is the taxonomy and the strange use of terminology. They still retain things like 'predominantly for personal, domestic or household purposes'. They do not deal with consumer property or consumer goods, which is readily understood. If we use this language it will translates easier into the Consumer Credit Code issues.

In section 14(2)(c) I think there has been a fundamental error by excluding consumer collateral, which I have mentioned there and the reasons why. They have picked up the mixed security provisions in subsections (3) and (4) but unfortunately when they have tried to put these together—and I do not know whether you have the bill in front of you—subsections (3) and (4) are just gobbledygook now. I have included in the submission the article 9 provisions from which they were taken. You can see the clarity of expression compared to what is in the bill.

Senator BARNETT—What section?

Mr Turner—Sections 14(3) and 14(4).

CHAIR—Mr Turner, I think you are speaking to the last two paragraphs on page 2 of your paper to us.

Mr Turner—That is correct.

CHAIR—Keep going, Mr Turner.

Mr Turner—What I have tried to demonstrate here is that the article 9 rule that deals with the points that are in subsections (3), (4) and (5) have been dealt with in the article 9 thing in quite simple, easily understood language. When you go to subsections (3) and (4), that simplicity and ease of understanding is lost. This is one of the characteristics of the drafting style throughout this bill. When you read subsections (3) and (4) you do not know whether they mean the same thing as what article 9 103(f)(1) and (2) say. Certainly, if you look at the introductory words in (3), they have been nicely blended into subsection (5). But these are drafting issues, and issues that make this bill very hard to understand. You get this problem all the way through when things are broken out.

One of the things which are immediately obvious when you look at Canadian versions of purchase loan security concept, if you are financing entry you have to give notice to prior general security holders. The reason is so that they know when they make an advance, one, they do not have to search for it, it just means security interest and, two, they know that when they make a further advance they are not making it against assets which they think have been bought with sale proceeds, but they know they are making an advance against stock that has been financed by someone else. So the notice provision serves those purposes. That is not in this legislation and in my solution it should be. It is a big mistake.

I do not know what has happened in section 64, which deals with priorities, but this rule is different to what exists in Canada under article 9. It gives the accounts financier a priority over the purchase money security interest security holders' proceeds. I assume that the factoring people have got to the department and said, 'Look, we are more important than the economy because we finance receivables. We are more important than the inventory financier,' and that is the reason for reversal. In my view that is a wrong policy choice. The explanatory memorandum does not tell you about policy choices. It does not tell you why they have preferred one approach to another and the transparency issues. It would have been useful to know why it is this procedure, where you have to give notice and other complicated things. It is far more complicated than the Saskatchewan approach, which you will find in section 34(6) and 34(8) of the Saskatchewan legislation.

I do not really want to say anything more about purchase loan security interest. I would like to talk about the remedies provision, which is on page 4 of the submission. In the response to your last report, the government said that they would allow people to contract out of remedies. It seems to be the case that they are allowing a corporation where a receiver is appointed to contract out, and no one else. This seems to be illogical to me. If you are going to have a remedies section, it should be one—it should be a level playing field so that everyone knows the remedies are the same and you do not have remedies in here for one group of people and remedies for another group of people in another piece of legislation—such as the Corporations Act. This is another policy issue—there is no transparency about it and we do not know where we are with it.

If I can take you to the issue of commercial reasonableness, I have set out what the New Zealand act provides. You can see that the rights, duties and obligations which arise in the security agreement or the act have to be exercised in good faith and in accordance with commercial practice. In Saskatchewan they go a step further and say 'any applicable law' so that, if you have mixed security over the land and in personal property, the duty applies to both the land security and the other security because you have security over both. And also because they say 'under this act'—we do not say that; we say only 'under this chapter', which is the remedies chapter—subsection (2) is rendered otiose because it relates to priorities and other issues. This is another example of the way the department has gone about drafting this bill. It is still in a stage where it is embryonic. It is not ready to go forward as a piece of legislation, for a couple of the reasons I have mentioned.

I have set out the way these things are interpreted, the way the US approaches what the general law position is. The reality is that, if you limit commercial reasonableness to remedies and not other things, it means you can only apply that in relation to exercising your power to get your best price. Under the credit code, it is the best price reasonably obtainable, and it is probably the same at general law. If that is the case, why do you need commercial reasonableness and why do you limit it to only the remedies? In my view, it either has to apply under the act as well, because then it affects the priorities, or it has to come out and we should go back to the general law position of good faith, not commercial reasonableness.

CHAIR—Mr Turner, are you nearly finished? We have some questions for you.

Mr Turner—I have set out some stuff to do with the 'buyer in due course' point. I will not go through that; you can read it yourself. You will see how they have changed things from overseas to the way they want it

here. Again, because of the transparency thing, we do not know why there is a difference here and what policy choice led them to this view.

CHAIR—In relation to which section?

Mr Turner—This is the stuff to do with part 2.5. They set out a number of things. The cut-off or extinguishment provisions, as they are known—buyer in due course, serial number goods and all that sort of stuff—are confusing. They are different from the US and Canada and New Zealand, and there is no logical reason why they should separate them out and try and treat them in different ways and create all sorts of exceptions. It is totally confusing. That is really all I want to say about that.

The only other thing is the control point in relation to ADIs. Because you are a set by control, it gives what you might call a situational monopoly to anyone else who takes security interests in an account, because they have to register. The banks have combination and set-off, which are outside. But if you take a security over an account, anyone but the bank has to register that; it is different to set-off. The point about the forward assets thing is that, if you are going to say that that is akin to a security interest, it should be specifically brought in. The other point about a forward asset arrangement is that it is really a condition of your right to repayment of the moneys which are held. It is not a security interest as such, despite the fact that the right to have your money back as a lender to the bank is a property right, and therefore you should be able to make a charge over it. It is really a forward asset. The condition of repayment is not really a security interest.

So what I am saying is that we should try and get these provisions right all the way through. What I have mentioned today and in the submission are symptomatic of the problems with the bill and they should be sorted out. We cannot have one set of rules over here and a different set over the Tasman when you have got one company that trades on both sides and you have got different rights and remedies that apply over here or over there.

CHAIR—Can I take you to an issue that has been raised already today with us. It is on page 6 of your submission. In the act, the issue of what is considered reasonable is, as I see it, currently objective rather than subjective. You have made a suggestion that it should be changed. Other submitters today have also made the suggestion that it should be reversed. Could you explain to us why that would make it easier or would improve it?

Mr Turner—Could you summarise what the other people have said, if that is possible?

CHAIR—Yes, I can find that for you. It is in section 47(1) about taking household property free of security interest. There is a suggestion that section 47(1) remains a subjective test and that it should include a more objective test.

Mr Turner—Sorry, you are not dealing with the point there, I don't think.

CHAIR—No, it is a different issue.

Mr Turner—This is to do with the cut-off, or extinguishment, provision.

CHAIR—Are you suggesting as well that there should be a reversal of the emphasis in that area?

Mr Turner—I think there should be, yes. When you look at the classifications of inventory, equipment and consumer goods you are looking to the use or the purpose for which that property is used, and this does not really differentiate between those things. It says if you intend to use that wrongly, it is really a question of whether it is consumer goods not what you intend to use it for. And when you look it, the New Zealand legislation and Saskatchewan do not talk about new value and they limit it to goods—that is consumer goods—not to personal property generally.

CHAIR—I see.

Mr Turner—So it should be a sale of consumer goods for value where the person who buys consumer goods takes free if the value is not greater than $5,000—a sort of de minimus thing. The whole idea is because they are low value. That is the first point. The second point is if you go in and buy a $3½ thousand television, obviously it is going to be as consumer goods and you are going to use that. You should get title. You should not have to search. It does not matter about anything else as long as you do not know that the seller is not able to sell it.

CHAIR—Do you believe that the rewrite of this legislation is an overall improvement?

Mr Turner—Overall, it is an improvement.

CHAIR—And you would put to us that these half a dozen matters that you have outlined need to be clarified and further refined?

Mr Turner—I think that the department has to look at the policy choice and at what the other legislation is doing and fit themselves into those categories in the same way using the same language where possible. If they think for some policy reason that we need to make a change, then they should do it, but they should not be adding. New value means that when you buy something there is no antecedent debt, and that is not a requirement in the other jurisdictions necessarily. It is the same with the missing serial number—it does not matter.

Senator BARNETT—Thank you, Mr Turner, for your submission and for being on the line in Victoria. My question relates to section 111 on page 6 of your submission. I want to tie you down to a recommendation to the committee. We have heard what you have said about section 111 but specifically what are you recommending to us as a committee? Would you like to see that section removed? Would you like to see it amended—or what?

Mr Turner—I will just take you to one of the later sections, and it is one which they have taken from New Zealand basically—and why New Zealand is a mystery to me. It talks about commercial reasonableness. Article 9 in the Canadian paper seems to say true price or market price and, if you look at that against this other section, it also talks about what the market price or the best price is. I am saying that that has the effect of reading down 'duty' in section 111.

Senator BARNETT—Are you talking about section 131?

Mr Turner—Yes, sorry, it is section 131. I think that that should be what section 111 should be saying. That is your duty. It generally reflects what the current position is.

Senator BARNETT—So they have a duty to all reasonable care?

Mr Turner—Good faith, yes, that is right. They should exercise reasonable care to obtain the market value, which is the US standard, or the best price reasonably obtainable. That is in the Credit Code that used to be under the Hire-Purchase Act. I think that should be what the duty is rather than 'commercially reasonable manner'. If the duty to act in a commercially reasonable manner related to under the act generally, then there is a basis for having section 131, otherwise there is not.

There have been a couple of Canadian cases where people have been negotiating with someone else and they know that there is a mistake in the serial number in the filing statement and they have been negotiating about a settlement or a payout. Then they go and register and get priority over that mucked-up serial number. The courts over there have said that that is behaving in a commercially unreasonable manner. That relates to priorities under the act. It does not relate to remedies. I do not know whether I am making it clear enough.

Senator BARNETT—Section 111 is in part 4 relating to the enforcement provisions—chapter 4. You said that section 111 should reflect what is in section 131, which is showing good faith and reasonableness and it should use words along those lines. That is what I am hearing from you. Is that correct?

Mr Turner—That is correct, yes. That is what I am saying.

Senator BARNETT—If you can see it from our point of view, we have to come up with a report with recommendations so I am taking from what you have said that that is your recommendation.

Mr Turner—Yes. I do not think that commercial reasonableness itself adds anything to it where you have got this duty mentioned in section 131. The reason is that section 111, commercial reasonableness, is limited to remedies. So you have got a duplication or a reading down.

Senator BARNETT—Let me put to you what was said this morning. We had some witnesses during the day—the Australian Bankers Association and Clayton Utz—

Mr Turner—I do not know what they have said and I have not seen their submission.

Senator BARNETT—I am just about to summarise. They were equivocal as to whether it remained in the bill or remained out of the bill altogether. That is the way I summarise it and I hope I am not misrepresenting their position. Do you have a view, if it was removed altogether? Would that be a problem for you?

Mr Turner—If section 111 came out it would not be a problem at all, because I think it does not add anything when you have got section 131.

Senator BARNETT—So do you prefer it to be out altogether?

Mr Turner—I would prefer it without that section. If they are going to keep it in, then they have to make it applicable to the rest of the act not just the remedies.

Senator BARNETT—But if they do not keep it in, you would say that a recommendation would be to remove it altogether?

Mr Turner—Remove it and add 'good faith' to section 131.

Senator BARNETT—Okay. Thank you very much, Mr Turner.

CHAIR—Mr Turner, I thank you very much for your submission. It is actually quite helpful for us and we will follow up some your issues tomorrow when we have the Attorney-General's Department back before us in the morning. Thank you once again for your time this afternoon, and I thank all witnesses who have been here today.

Committee adjourned at 5.16 pm